No. 14-2153

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MISO TRANSMISSION OWNERS,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

MAX MINZNER
General Counsel

ROBERT H. SOLOMON
Solicitor

BETH G. PACELLA
Deputy Solicitor

LONA T. PERRY
Deputy Solicitor

For Respondent
Federal Energy Regulatory Commission
Washington, D.C. 20426
(202) 502-6048

October 2, 2015

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

TABLE OF AUTHORITIES

CASES (continued): **PAGE**

TABLE OF AUTHORITIES

CASES (continued): **PAGE**

TABLE OF AUTHORITIES

CASES (continued): PAGE

TABLE OF AUTHORITIES

CASES (continued): PAGE

TABLE OF AUTHORITIES

CASES (continued): **PAGE**

TABLE OF AUTHORITIES

CASES (continued): **PAGE**

STATUTES:

TABLE OF AUTHORITIES

REGULATION: **PAGE**

OTHER:

GLOSSARY

2008 Order	*Midwest Indep. Transm. Sys. Operator, Inc.*, 122 FERC ¶ 61,090 (2008)
Agreement	Agreement of Transmission Facilities Owners to Organize the Midwest Transmission System Operator, Inc.
Commission	Federal Energy Regulatory Commission
FERC	Federal Energy Regulatory Commission
Initial Order	*Midwest Indep. Transm. Sys. Operator, Inc. and MISO Transm. Owners*, 142 FERC ¶ 61,215 (March 22, 2013)
MISO	Midcontinent Independent System Operator, Inc.
Order Establishing MISO	*Midwest Indep. Transm. Sys. Operator, Inc.*, 84 FERC ¶ 61,231 (1998)
Order Granting RTO Status	*Midwest Indep. Transm. Sys. Operator, Inc.*, 97 FERC ¶ 61,326 (2001)
Rehearing Order	*Midwest Indep. Transm. Sys. Operator, Inc. and MISO Transm. Owners*, 147 FERC ¶ 61,127 (May 15, 2014)
System Operator	Midcontinent Independent System Operator, Inc.

Transmission Owners	Petitioners MISO Transmission Owners
Transmission Owners Agreement	Agreement of Transmission Facilities Owners to Organize the Midwest Transmission System Operator, Inc.

JURISDICTIONAL STATEMENT

The jurisdictional statement of Petitioners MISO Transmission Owners ("Transmission Owners") is complete and correct. *See* Cir. R. 28(b).

STATEMENT OF ISSUE

This appeal involves a filing submitted by the Midcontinent Independent System Operator, Inc. ("System Operator" or "MISO"), formerly called the Midwest Independent Transmission System Operator, Inc., and its Transmission Owners to comply with the regional transmission planning and cost allocation requirements established in the Commission's recent Order No. 1000 rulemaking.[1] The issue presented for review is:

Whether the Commission reasonably determined that a provision in an agreement among the Transmission Owners, granting themselves a right of first refusal to construct transmission projects within their own retail distribution territories, lacked certain characteristics necessary to justify application of a presumption that the provision is just and reasonable?

---

[1] *Transm. & Cost Allocation by Transm. Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011) ("Order No. 1000"), *order on reh'g and clarification*, 139 FERC ¶ 61,132 ("Order No. 1000-A"), *order on reh'g and clarification*, 141 FERC ¶ 61,044 (2012) ("Order No. 1000-B"), *aff'd sub nom.*, *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) ("*South Carolina*").

STATEMENT OF THE CASE

The instant petition challenges two Federal Energy Regulatory Commission ("Commission" or "FERC") orders, *Midwest Indep. Transm. Sys. Operator, Inc. and MISO Transm. Owners*, 142 FERC ¶ 61,215 (March 22, 2013) ("Initial Order"), JA 82, *on reh'g*, 147 FERC ¶ 61,127 (May 15, 2014) ("Rehearing Order"), JA 447.[2] These orders are also pending review before this Court on different issues in related Case Nos. 14-2533 and 15-1316.

I. Statement of Facts

A. Statutory and Regulatory Background

1. Federal Power Act

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

---

[2] A second rehearing order issued in the same FERC proceedings, which also addressed the System Operator's Order No. 1000 compliance filing (*Midwest Indep. Transm. Sys. Operator, Inc. and MISO Transm. Owners*, 150 FERC ¶ 61,037 (2015)), is not challenged in this appeal.

"[T]he Federal Power Act requires regulated utilities to file compilations of their rate schedules, or 'tariffs,' with the Commission, and to provide service to electricity purchasers on the terms and prices there set forth." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 531 (2008) (citing Federal Power Act section 205(c), 16 U.S.C. §§ 824d(c)). A "tariff is the mechanism through which a regulated utility sets its rates unilaterally." *South Carolina*, 762 F.3d at 71 n.5.

The Federal Power Act "also permits utilities to set rates with individual electricity purchasers through bilateral contracts." *Morgan Stanley*, 554 U.S. at 531 (citing Federal Power Act sections 205(c) and (d), 16 U.S.C. §§ 824d(c) and (d)). *See also id.* (Federal Power Act "'departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting.'") (quoting *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 479 (2002)); *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 367 (D.C. Cir. 2013) ("Along with the unilateral filing of tariffs, the FPA also allows suppliers to set rates with individual purchasers via bilateral contract").

The pertinent statutory provisions are reproduced in Addendum A to this brief.

2. The *Mobile-Sierra* Doctrine

The *Mobile-Sierra* doctrine derives from two Supreme Court cases: *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956); and *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344-45 (1956). Those cases held that a contract rate cannot be superseded simply by filing a new tariff. *See Morgan Stanley*, 554 U.S. at 533. In addition, *Sierra* addressed the question of how the Commission may evaluate whether a contract rate is just and reasonable. *See id.* The Court found that, while the Commission normally could not impose a rate that would not produce a fair return, a public utility itself might agree to a contract rate affording less than a fair return and, if it does so, it is generally not entitled to be relieved of its improvident bargain. *See id.* Thus, contract rates are presumed to be just and reasonable, and can be altered only when required in the public interest. *See id.* at 533, 545-46.

As the Supreme Court has explained, "*Sierra* was grounded in the commonsense notion that '[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them.'" *Morgan Stanley*, 554 U.S. at 545 (quoting *Verizon*, 535 U.S. at 479) (alteration by the Court). "[T]he premise on which the *Mobile-Sierra* presumption rests [is] that the

contract rates are the product of fair, arms-length negotiations." *Id.* at 554. *See also NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 176 (2010) (remanding the question whether the rate at issue qualified as a "contract rate"); *New England Power Generators*, 707 F.3d at 368 (explaining that *Morgan Stanley* "noted uncertainty as to whether the prices set [under the mechanism established in the settlement agreement at issue there] were in fact contract rates and remanded the case" to address that question).

The Supreme Court also has made clear that "there is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff -- the just and reasonable standard." *Morgan Stanley*, 554 U.S. at 545. The "'public interest standard'" is simply a "differing *application* of that just and reasonable standard to contract rates." *Id.* at 535; *see also id.* at 546 (explaining that *Sierra* "provided a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context -- a definition that applies regardless of when the contract is reviewed"). Moreover, the *Mobile-Sierra* presumption applies to non-contracting parties' challenges to contract rates. *NRG*, 558 U.S. at 174-75, 176.

3. The Commission's Open Access and Regional Planning Rulemakings

The Commission's efforts to foster wholesale electricity competition over broader geographic areas in recent decades has led to the creation of

independent system operators and regional transmission organizations. *See Morgan Stanley*, 554 U.S. at 536-37. These independent regional entities operate the transmission grid on behalf of transmission-owning member utilities. *See NRG*, 558 U.S. at 169 & n.1 (explaining regional system operators' responsibilities). The System Operator involved here operates the transmission facilities of utilities in fifteen states and one Canadian province. *See Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1059 (D.C. Cir. 2008) (describing System Operator's region).

The D.C. Circuit's recent opinion affirming the Commission's Order No. 1000 rulemaking provided a concise overview of the history of the Commission's electric industry reforms. *See South Carolina*, 762 F.3d at 49-54. In particular, the court traced the industry changes and the legislative and regulatory developments leading to the Commission's recent efforts to reform regional transmission planning and cost allocation. *See id.* at 51-54.

In 1996, the Commission issued Order No. 888, a landmark rulemaking which directed public utilities to adopt open access non-discriminatory

transmission tariffs.[3] Then, in 2007, the Commission issued its Order No. 890 rulemaking,[4] which set out certain measures to require transmission providers to establish open, transparent, and coordinated transmission planning processes. *See South Carolina*, 762 F.3d at 51.

After assessing the effectiveness of those measures, the Commission determined that additional reforms were necessary to ensure, as the Federal Power Act requires, that rates for FERC-jurisdictional services would be just and reasonable and not unduly discriminatory or preferential. *See id.* at 52. Accordingly, in 2011, the Commission issued Order No. 1000. That rulemaking required transmission providers to participate in regional planning processes that, among other things, would evaluate more efficient or cost-effective solutions to transmission needs. *See id.* at 52-53 (summarizing Order No. 1000 requirements). The rulemaking also required regional

---

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

[4] *Preventing Undue Discrimination and Preference in Transm. Serv.*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007).

planning processes to include methods to regionally allocate the costs of new transmission facilities that are selected in the regional plan for purposes of cost allocation. *See id.* at 53.

Moreover, as relevant here, Order No. 1000 directed transmission providers "to remove provisions from Commission-jurisdictional tariffs and agreements that grant incumbent transmission providers [(i.e., utilities that develop transmission projects within their own retail distribution territories)] a federal right of first refusal to construct transmission facilities selected in a regional transmission plan for purposes of cost allocation." Order No. 1000 at P 253; *South Carolina*, 762 F.3d at 72 & n.6; *see also id.* at 73 (noting that the Commission required removal of rights of first refusal only for facilities whose costs would be allocated according to the principles established in the regional transmission plan). Rights of first refusal give an incumbent utility the option to build any new transmission in its service area, even if the proposal for a project comes from a third party. *Id.* at 72; *see also id.* at n.6 (explaining that a "non-incumbent" may be either a developer that does not have its own retail distribution territory or a provider that proposes a project outside its own territory).

As Order No. 1000 and *South Carolina* found, such rights of first refusal discourage non-incumbents from proposing transmission facilities because, once the benefits of a proposed project are demonstrated, an

incumbent is likely to exercise its right of first refusal to construct that project. *South Carolina*, 762 F.3d at 72 (citing Order No. 1000 at PP 256-57). Thus, non-incumbents would not only be unlikely to recoup the full benefits of their project proposals, but also would be unable to recoup the costs of identifying the need and making the proposals in the first place. *Id.*

The Commission was concerned, therefore, that rights of first refusal would undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs and result in unjust and unreasonable rates for Commission-jurisdictional services. Order No. 1000 at P 7; *see also South Carolina*, 762 F.3d at 72, 74, 77 (same); Order No. 1000 at P 320 (removing federal rights of first refusal would address "disincentives that may be impeding participation by nonincumbent developers in the regional transmission planning process"); Order No. 1000-A at P 70 (relying upon the well-established general principle that "competition will normally lead to lower prices") (internal quotation omitted). As *South Carolina* explained, "the Commission rested its right of first refusal ban on competition theory, determining that rights of first refusal posed a barrier to entry that made the transmission market inefficient, that transmission facilities would therefore be developed at higher-than-necessary cost, and that those amplified costs would be passed on to transmission customers." 762 F.3d at 77.

Some parties argued during the Order No. 1000 rulemaking proceeding that their right of first refusal provisions were protected by the *Mobile-Sierra* doctrine and, therefore, that the Commission could not require changes to those provisions without first finding that they harmed the public interest. The Commission determined that it would address assertions that individual jurisdictional tariffs and agreements contain a federal right of first refusal protected by *Mobile-Sierra* when it reviews the transmission providers' compliance filings, rather than in the generic rulemaking proceeding. Order No. 1000-A at PP 388-89; Order No. 1000 at P 292; Order No. 1000-B at P 40.

On appeal, the D.C. Circuit fully affirmed Order No. 1000, including its requirement that transmission providers remove rights of first refusal to construct transmission facilities selected in a regional transmission plan for purposes of cost allocation. *South Carolina*, 762 F.3d at 48-49, 72-81. The court found the *Mobile-Sierra* arguments premature, since the Commission deferred consideration of that issue to the compliance proceedings. *Id.* at 81.

4. The Transmission Owners Agreement

In 1998, a group of nine Midwestern transmission owners sought Commission approval of their agreement (Agreement of Transmission Facilities Owners to Organize the Midwest Transmission System Operator, Inc. ("Transmission Owners Agreement" or "Agreement")) to establish an independent system operator. *See Wis. Pub. Power, Inc. v. FERC*, 493 F.3d

239, 248 (D.C. Cir. 2007); *Midwest Indep. Transm. Sys. Operator, Inc.*, 84 FERC ¶ 61,231 at 62,138 (1998) ("Order Establishing MISO").

Under the Transmission Owners Agreement, the transmission owners transferred functional control over their transmission facilities to MISO, but retained ownership and physical control, subject to MISO's direction. *Wis. Pub. Power*, 493 F.3d at 248. MISO would provide open access transmission service over the transmission system, and would receive and distribute transmission revenues. *Id.* The Commission reviewed the Agreement under the just and reasonable standard of section 205 of the Federal Power Act. Order Establishing MISO at 62,141, 62,145.

The applicants stated that MISO would have authority to change virtually all provisions of the Transmission Owners Agreement with limited exceptions involving pricing and revenue distribution. *Id.* at 62,150. Specifically, during a six-year transition period, unanimous transmission owner approval would be required for changes to the pricing provisions and revenue methodology set forth in Appendix C of the Transmission Owners Agreement. *Id.* at 62,149-50. The Commission approved this provision because "cost shifting and cost recovery are of paramount concern to the Transmission Owners." *Id.* at 62,151.

After the Transmission Owners Agreement was filed with the Commission, additional transmission owners indicated their intent to join

MISO. Order Establishing MISO at 62,139, 62,141. As each transmission owner executed the Agreement's signature page, MISO filed it with the Commission. *Id.*

In 2001, MISO submitted a proposal to become a Regional Transmission Organization. *See Midwest Indep. Transm. Sys. Operator, Inc.*, 97 FERC ¶ 61,326 (2001) ("Order Granting RTO Status"). As relevant here, the Commission found that, since MISO's Board[5] had independent authority to file to change its tariffs and market rules, MISO's existing governance structure largely satisfied the Commission's requirement that a Regional Transmission Organization be independent of any market participant. *Id.* at 62,505.

The Commission found, however, that, because unanimous transmission owner approval was required during the six-year transition period for filings to change matters affecting pricing or revenue distribution, MISO did not have independent authority to file to make such changes. *Id.* at 62,504 n.30; *see also id.* ("All other [MISO] Tariff rates, terms and conditions are subject to independent, unilateral revision by [MISO]."). The Commission required the Agreement to be modified to remove the transmission owners'

[5] The MISO Board of Directors is elected by the MISO membership. Order Establishing MISO, 84 FERC at 62,139. Membership in MISO is open to any eligible transmission customer and, therefore, members include not only the transmission owning utilities but also transmission customers such as generators and power marketers. *Id.* at 62,139, 62,147.

veto privileges regarding revisions to pricing, but permitted the transmission owners to maintain control over the revenue distribution methodology. *Id.*

The Commission also determined that MISO met the requirement that a Regional Transmission Organization be responsible for planning and directing necessary construction. *Id.* at 62,520. Finding that its long term competitive goals were better served by expansion plans that allow for third party participation, however, the Commission required Transmission Owners Agreement Appendix B, which allowed only transmission owners to construct and own new transmission facilities, to be revised to also permit third parties to construct and own new transmission facilities. *Id.*

The Commission accepted MISO's compliance filing making these changes, but stated that the transmission owners could make a filing explaining how their originally-proposed filing rights complied with the Commission's independence requirements and Federal Power Act section 205, 16 U.S.C. § 824d. *See Midwest Indep. Transm. Sys. Operator Inc.*, 103 FERC ¶ 61,169 at PP 4, 32, 45 (2003). In 2005, the Commission accepted a settlement regarding MISO's and the transmission owners' filing rights. *Midwest Indep. Transm. Sys. Operator, Inc.*, 110 FERC ¶ 61,380 (2005). The settlement divided the right to make filings affecting rates between MISO and the transmission owners and continued MISO's exclusive authority to

make filings with respect to all other tariff provisions and related documents. *Id.* at P 7.

5. The Order No. 1000 Compliance Filing

On October 25, 2012, MISO and the Transmission Owners submitted proposed revisions to the System Operator's Tariff and the Transmission Owners Agreement to comply with Order No. 1000. R. 17, 18; *see also* Initial Order at P 1, JA 85. As pertinent here, the compliance filing asserted that MISO's right of first refusal provision, set forth in the Transmission Owners Agreement, is subject to a *Mobile-Sierra* presumption of justness and reasonableness and, therefore, that the Commission could require that it be changed only if it found that change required in the public interest. R. 17, Transmittal Letter at 29-33, JA 22-26.

A number of parties protested this portion of the compliance filing, arguing, among other things, that the Transmission Owners Agreement's right of first refusal provision is not subject to a *Mobile-Sierra* presumption because it lacks certain characteristics on which that presumption is based. *See* Initial Order at PP 146-56, JA 147-52. MISO filed an Answer disagreeing with those arguments. *See id.* at PP 166-73, JA 158-60.

B. The Challenged Orders

On two separate bases, the Commission found that the Transmission Owners Agreement's right of first refusal provision lacked certain

characteristics that justify application of a *Mobile-Sierra* presumption. Initial Order at PP 175-92, JA 160-67; Rehearing Order at PP 108-22, JA 498-506.

First, the *Mobile-Sierra* presumption did not apply because the right of first refusal provision was a rule of general applicability and, therefore, properly considered as more akin to a tariff rate, term or condition, rather than a contract (individualized-negotiated) rate, term or condition. Initial Order at PP 177, 180-81, 185, 187, JA 161-65; Rehearing Order at PP 116-20, JA 502-05.

Alternatively, the Commission found, the *Mobile-Sierra* presumption did not apply because the right of first refusal provision was not the result of arm's-length bargaining and, therefore, "lacked the premise on which the *Mobile-Sierra* presumption rests." Initial Order at P 182, JA 163 (quoting *Morgan Stanley*, 554 U.S. at 554); *see also id.* at PP 183-84, JA 163; Rehearing Order at PP 110-15, 119, JA 499-502, 503-04.

The Commission further found its *Mobile-Sierra* determination here was consistent with its precedent. Initial Order at PP 186, 188-91, JA 164, 165-67; Rehearing Order at PP 121-22, JA 505-06.

SUMMARY OF ARGUMENT

The Commission reasonably found, on two alternative bases, that the Transmission Owners Agreement's right of first refusal provision lacked

certain characteristics that underlie default application of a *Mobile-Sierra* presumption.

I. Rule Of General Applicability

First, the Transmission Owners Agreement had the characteristics of a rule of general applicability rather than an individually-negotiated contract rate, term or condition. As the Commission explained, while the original MISO transmission owners had an opportunity to freely negotiate the Transmission Owners Agreement, new transmission-owning members must accept that Agreement as-is, with limited room for negotiation.

Transmission Owners and MISO claim that the Commission had no basis in law for this distinction. Supreme Court precedent establishes, however, that utilities may set rates either through generally-applicable tariffs or individually-negotiated contracts, and that the Commission must apply the *Mobile-Sierra* presumption only to contract rates.

The record here amply supports the Commission's conclusion as well. The Transmission Owners Agreement was filed in 1998 by the nine original transmission owners. New transmission owners seeking to join MISO are required to execute the Agreement, and those that joined MISO after the original nine (there are currently 51 transmission-owning members of MISO) simply executed new signature pages in doing so. The Transmission Owners and MISO have not pointed to any circumstance in which a transmission

owner successfully negotiated an individual variation on the Transmission Owners Agreement.

Transmission Owners and MISO argue that, because the Commission approved the Agreement in 1998 under the ordinary just and reasonable standard, the Commission must review it now under the public interest standard. But the Supreme Court rejected this argument in *Morgan Stanley*. *Mobile-Sierra* applies in the same fashion regardless of when a contract is challenged. Here, the Commission found, based on the characteristics of the Transmission Owners Agreement, that the *Mobile-Sierra* presumption of justness and reasonableness does not apply.

Moreover, as the Commission explained, the prior Commission orders Transmission Owners and MISO cite are irrelevant here. Those orders involved the issue whether the Commission would exercise its discretion to apply the public interest standard in any future challenges to certain provisions in the agreements presented there. As the D.C. Circuit has affirmed, the Commission can exercise such discretion when it is not required to apply the *Mobile-Sierra* standard. Here, by contrast, the issue is whether the Commission was required to apply the *Mobile-Sierra* presumption to the Transmission Owners Agreement's right of first refusal provision.

II. Lack Of Arm's-Length Bargaining

Alternatively, the Commission reasonably found that the *Mobile-Sierra* presumption did not apply because the Transmission Owners Agreement's right of first refusal provision was not the result of arm's-length bargaining. Instead, the transmission owners had a common interest in that provision, as it protects them from competition in transmission development. As a result, the right of first refusal provision lacked the assurance of justness and reasonableness on which the *Mobile-Sierra* presumption is premised.

The Transmission Owners' and MISO's own filings refute their claim that no one contemplated competition in transmission development when the Transmission Owners Agreement was negotiated. Likewise, their filings refute the claim that the record here contained no evidence that the right of first refusal was intended to protect the Transmission Owners' common interest in preventing competition in transmission development.

The Commission also reasonably explained, on two alternative bases, why its statement regarding *Mobile-Sierra* in a 2008 Order was inapposite here. First, that footnote statement was dictum. And, second, that statement was directed only to the portion of the Transmission Owners Agreement at issue in that proceeding, the revenue distribution provisions of Appendix C, not to the entire Agreement.

ARGUMENT

I. Standard Of Review

Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), the Court reviews agency orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See*, *e.g.*, *Michael v. FDIC*, 687 F.3d 337, 348 (7th Cir. 2012). "Under this standard, the court's review is narrow; a court may not set aside an agency decision that articulates grounds indicating a rational connection between the facts and the agency's action." *Schneider Nat'l, Inc. v. ICC*, 948 F.2d 338, 343 (7th Cir. 1991) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *accord N. Ind. Pub. Serv. Co. v. FERC*, 782 F.2d 730, 739 (7th Cir. 1986) ("[O]ur review of the Commission's orders 'is essentially narrow and circumscribed.'") (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 766 (1968)). The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b); *see also N. Ind. Pub. Serv. Co.*, 782 F.2d at 739-40 (same).

II. The Commission Reasonably Determined That The *Mobile-Sierra* Presumption Does Not Apply Because The Transmission Owners Agreement Has The Characteristics Of A Generally-Applicable Tariff

In the challenged orders, the Commission reasonably determined that the Transmission Owners Agreement had the characteristics of a prescription of general applicability, or tariff, rather than an individualized, negotiated

contract, and, as a result, did not merit a *Mobile-Sierra* presumption of justness and reasonableness. *E.g.*, Initial Order at PP 180-81, JA 162-63; Rehearing Order at PP 108, 116, JA 498, 502. Transmission Owners and MISO contend that the Commission had no basis in law for making such a distinction, and that the Commission otherwise erred in its finding. Neither contention has merit.

A. Supreme Court Precedent Compels Distinguishing Between Generally-Applicable Tariffs And Individually-Negotiated Contracts For *Mobile-Sierra* Purposes

Transmission Owners and MISO claim that the Commission had no basis in law for distinguishing between tariff rules of general applicability and contract rates in determining whether *Mobile-Sierra* applies. TO Br. at 36; MISO Br. at 19-20. To the contrary, as the Commission found, Supreme Court precedent on *Mobile-Sierra* plainly differentiates between "prescriptions of general applicability," like tariffs, and "contractually negotiated rates." Initial Order at P 180, JA 162 (quoting *NRG*, 130 S. Ct. at 701). Thus, in determining whether *Mobile-Sierra* applies, the Commission must determine whether the provision at issue is more akin to individualized contract rates, terms and conditions or to generally-applicable tariff rates, terms and conditions. Initial Order at PP 177-78, JA 161; Rehearing Order at P 117, JA 502-03.

Section 205(c) of the Federal Power Act, 16 U.S.C. § 824d(c), requires that utilities file with the Commission "schedules showing all rates and charges" for any jurisdictional transmission or sale, "together with all contracts which in any manner affect or relate to" such rates or charges. Under the statute, therefore, utilities may set rates by filing "compilations of their rate schedules, or 'tariffs,' with the Commission," or they may set rates "with individual electricity purchasers through bilateral contracts." *Morgan Stanley*, 554 U.S. at 531 (citing Federal Power Act § 205(c)). *See also, e.g., NRG*, 130 S. Ct. at 698 (Federal Power Act "allows regulated utilities to set rates unilaterally by tariff; alternatively, sellers and buyers may agree on rates by contract"); *Mobile*, 350 U.S. at 339 (analogous provisions of the Natural Gas Act permit rates to be set either by uniform tariffs or by "individualized arrangements" between the utility and its customers).

The *Mobile-Sierra* presumption of reasonableness applies only to "the authority of the Commission to modify rates set bilaterally by contract rather than unilaterally by tariff." *Morgan Stanley*, 554 U.S. at 532. For example, *United Gas Pipeline Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 115 & n.8 (1958), held that *Mobile-Sierra* did not apply to so-called "tariff and service" contracts that did not contain an individually-negotiated rate, but rather "refer[red] to rate schedules of general applicability on file with the Commission." *See also, e.g.*, *Verizon*, 535 U.S. at 478-79 (tariff schedules are

reviewed under the ordinary just and reasonable standard, whereas negotiated contracts are subject to *Mobile-Sierra*).

Accordingly, in determining whether *Mobile-Sierra* applies, the Commission must, in the first instance, differentiate between "rate schedules or 'tariffs'" and "contracts" under the Federal Power Act. *See Morgan Stanley*, 554 U.S. at 531. These terms are undefined in the statute and, therefore, the Commission has discretion to interpret them. *See, e.g., Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 677-78 (7th Cir. 2008) (recognizing EPA discretion to interpret a term left undefined in the Clean Air Act). Where the statute is either ambiguous or silent on an issue, the Court defers to an agency's reasonable interpretation of the statute it administers. *United Transp. Union-Ill. Legislative Bd. v. STB*, 169 F.3d 474, 476 (7th Cir. 1999) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). In *United Transportation*, this Court reviewed the determination of the Surface Transportation Board "regarding the proper characterization of [railroad] tracks as rail line or spur under the high level of deference accorded to an agency's reasonable interpretation of the statutes which the agency administers." 169 F.3d at 476. Similarly, here, the Court should defer to the Commission's reasonable characterization of the Transmission Owners Agreement as a generally applicable "schedule," or tariff, rather than a negotiated "contract."

Contrary to Transmission Owners' and MISO's assertions (TO Br. at 36-38; MISO Br. at 19-21), the Supreme Court in *NRG* and the D.C. Circuit in *New England Power Generators* plainly recognized this distinction. *See NRG*, 558 U.S. at 172 (*Mobile* and *Sierra* "concerned rates set by contract rather than by tariff"); *New England Power Generators*, 707 F.3d at 366 ("FERC's review of tariff rates is subject to considerable discretion. On the other hand, unless a contract rate is contrary to the public interest, FERC must presume it to be just and reasonable under the *Mobile-Sierra* doctrine.")

Those cases reviewed Commission orders approving, under the ordinary just and reasonable standard,[6] a contested settlement agreement establishing annual auctions for installed capacity in New England. *See NRG*, 558 U.S. at 170. The settlement provided that future challenges to the prices resulting from the auctions would be adjudicated under the *Mobile-Sierra* public interest standard. *Id.*

NRG held that application of the *Mobile-Sierra* standard "does not depend on the identity of the complainant" and, therefore, applies not only to contracting parties, but also to third parties challenging the auction rates. *Id.* at 174, 176. Since the court below had not ruled on the separate argument that the *Mobile-Sierra* presumption did not apply to the auction rates

---

[6] *See Morgan Stanley*, 554 U.S. at 535 ("referring to the two differing applications of the just-and-reasonable standard as the 'ordinary' 'just and reasonable standard' and the 'public interest standard.'").

because they were "prescriptions of general applicability," rather than "contractually negotiated rates," or upon FERC's argument that it had discretion to apply the *Mobile-Sierra* presumption to the auction rates, the Court remanded the issue of "whether the rates at issue qualify as 'contract rates,' and, if not, whether FERC has discretion to treat them analogously." *Id.* at 176. The D.C Circuit, in turn, remanded these issues to the Commission. *Me. Pub. Utils. Comm'n v. FERC*, 625 F.3d 754, 759 (D.C. Cir. 2010).

On remand, the Commission found that the auction rates were not contract rates that compelled application of the *Mobile-Sierra* presumption, but that it had discretion to impose that standard in future challenges to those rates. *See Devon Power LLC*, 134 FERC ¶ 61,208, *on reh'g*, 137 FERC ¶ 61,073 (2011).

On appeal, the D.C. Circuit recognized the dichotomy between tariff and contract rates, noting that, while "[u]ntil recently, only two types of rates were involved: tariff rates and contract rates," the "debut of capacity auctions poses a new challenge." *See New England Power Generators*, 707 F.3d at 366. Ultimately, however, the court did not reach the merits of the Commission's determination that the capacity auction rates were not contract rates requiring application of the *Mobile-Sierra* presumption. "Assuming, without deciding, that the auction rates [were] not contract rates," the court found it

was within the Commission's "considerable discretion" under the just and reasonable standard to adopt the public interest standard for the capacity auction rates. 707 F.3d at 370-71. The court found that it lacked jurisdiction to consider petitioners' arguments that the auction rates were contract rates that required application of the *Mobile-Sierra* presumption. *Id.* at 369.

Thus -- while not reaching the merits of the Commission's determination that auction rates were more akin to tariff rather than contract rates -- both *NRG* and *New England Power Generators* recognized that the *Mobile-Sierra* presumption applies only to negotiated contracts as opposed to tariffs and, therefore, that the Commission must determine whether the particular instrument before it is more akin to a tariff or a contract.

B. The Commission Reasonably Rejected The Argument That *Mobile-Sierra* Necessarily Applies To All Contracts

Transmission Owners argue that the *Mobile-Sierra* presumption "applies by default" to the Transmission Owners Agreement because it is a contract "that is silent regarding the standard applicable to proposed changes to [Appendix B] Section VI." TO Br. at 34, 43; *see also* MISO Br. at 10, 18. However, while the *Mobile-Sierra* presumption is the default rule for "provisions in bilateral power sales contracts freely negotiated at arm's length between sophisticated parties," Initial Order at P 178, JA 161 (citing

Morgan Stanley, 554 U.S. at 530, 534), it does not apply to the terms of an agreement "properly classified as tariff rates." *Id.*[7]

Thus, the Commission reasonably found that Transmission Owners and MISO were mistaken in arguing that all contracts, regardless of their characteristics, are entitled to *Mobile-Sierra* protection. Rehearing Order at P 117, JA 502. *See also* Initial Order at P 176, JA 161 ("[T]he fact that a federal right of first refusal is contained in a contract does not establish that the contract is entitled to a *Mobile-Sierra* presumption. The *Mobile-Sierra* presumption applies to a contract only if the contract has certain characteristics that justify the presumption."). Such an overly-broad approach would inappropriately include agreements that are incorporated into all present and future customers' service agreements, even though they are properly classified as tariff rates. Rehearing Order at P 117, JA 502; Initial Order at P 178, JA 161 (citing orders finding the *Mobile-Sierra* presumption inapplicable to settlements whose terms will be incorporated

---

[7] Because the Commission found the Transmission Owners Agreement was not a contract to which the *Mobile-Sierra* presumption applied, the Commission never reached the issue of whether the provisions of the contract permitted unilateral changes to Appendix B, which would contractually override the default application of *Mobile-Sierra*. *See Morgan Stanley*, 554 U.S. at 534. It should be noted, however, that, in prior proceedings concerning the Agreement, MISO and the Transmission Owners have represented, and the Commission has found, that MISO was authorized to unilaterally revise the Agreement without unanimous consent of the Transmission Owners, except for provisions regarding pricing and revenue. *See* Background, *supra* at pp. 11-13.

into the service agreements of all present and future shippers: *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 at P 17 (2011); *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105 at P 19 (2011); *Petal Gas Storage, L.L.C.*, 135 FERC ¶ 61,152 at P 12 (2011); *Southern LNG Co., LLC*, 135 FERC ¶ 61,153 at P 19 (2011).

Both tariffs and *Mobile-Sierra* contracts involve contractual relationships. As this Court has recognized, "[t]he tariff is an offer that the customer accepts by using the product." *Metro E. Ctr. for Conditioning & Health v. Qwest Commc'n Int'l, Inc.*, 294 F.3d 924, 926 (7th Cir. 2002). *See also, e.g.*, *ANR Pipeline Co. v. FERC*, 931 F.2d 88, 90 n.1 (D.C. Cir. 1991) (a tariff is "the contract which governs a pipeline's service to its customers"). Tariffs differ from private contracts, therefore, not in the creation of a contractual relationship but, rather, because tariffs, unlike private contracts, "are not subject to alteration one customer (or one clause) at a time." *Metro East*, 294 F.3d at 926. A tariff is a "take-it-or-leave-it proposition" and thus not an "agreement" in the sense that it is reached by individual negotiation. *Id. See also, e.g.*, 18 C.F.R. § 35.2(c)(1) (Commission regulation defining a tariff as a statement of electric service "offered on a generally applicable basis").

It is individual negotiation that gives rise to the *Mobile-Sierra* presumption of reasonableness. *See Morgan Stanley*, 554 U.S. at 545 (The

Mobile-Sierra presumption is "grounded in the commonsense notion that '[i]n wholesale markets, the party charging the rate and the party charged are often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them.'") (quoting *Verizon*, 535 U.S. at 479); *NRG*, 558 U.S. at 167 ("*Mobile-Sierra* holds sway, however, because well-informed wholesale market participants of approximately equal bargaining power generally can be expected to negotiate just-and-reasonable rates").

C. The Commission Reasonably Determined That The Agreement Has The Characteristics Of A Generally-Applicable Tariff

The Commission reasonably determined that the MISO Transmission Owners Agreement was more akin to a generally-applicable tariff than to an individually-negotiated contract. As the Commission found, new MISO members must accept the right of first refusal provision as-is, with limited room for negotiation. Initial Order at P 181, JA 162. *See also* Rehearing Order at P 118, JA 503. "As a result, new MISO members are placed in a position that differs fundamentally from that of parties who are able to negotiate freely, like buyers and sellers entering into a typical power sales contract that would be entitled to a *Mobile-Sierra* presumption." Initial Order at P 181, JA 162. *See also* Rehearing Order at P 118, JA 503.

The Commission's determination was based on substantial evidence. The Transmission Owners Agreement was originally filed with the Commission in 1998 by nine "Midwest ISO Participants."[8] Order Establishing MISO, 84 FERC at 62,138 & n.2. After the nine original signatories filed the Agreement, MISO simply filed a new signature page when an additional transmission owner joined the Agreement. *See id.* at 62,139, 62,141.

As MISO stated in its Order No. 1000 compliance filing, any transmission provider seeking to become a MISO Transmission Owner must sign the Transmission Owners Agreement. *See* Initial Order at P 35, JA 96. Moreover, as the Comments of the Organization of MISO States pointed out, entities seeking to become new transmission-owning members of MISO are

---

[8] The nine Midwest ISO Participants filing the Transmission Owners Agreement for Commission approval were: Cinergy Corp. (on behalf of Cincinnati Gas & Electric Co., PSI Energy, Inc. and Union Light, Heat & Power Co.); Commonwealth Edison Company (including Commonwealth Edison of Indiana); Wisconsin Power Co.; Hoosier Energy Rural Electric Cooperative, Inc.; Wabash Valley Power Association, Inc.; Ameren (on behalf of Central Illinois Public Service Co. and Union Electric Co.); Kentucky Utilities Co.; Louisville Gas & Electric Co.; and Illinois Power Co. *See* Order Establishing MISO, 84 FERC at 62,138 n.2. Three of the original nine signatories subsequently withdrew from MISO: Commonwealth Edison in 2001; and Louisville Gas & Electric and Kentucky Utilities in 2006. *See* MISO 2011 Annual Report Audited Financials at 9 (membership withdrawals), available at: https://www.misoenergy.org/Library/Repository/Communication%20Material/Financial%20Information/2011%20Annual%20Report%20Audited%20Financials.pdf.

"required to 'sign the [Transmission Owners] [A]greement' as is." *See* Initial Order at P 181, JA 162.[9] According to MISO's website, there are currently 51 transmission-owning members of MISO.[10] Their executed signature pages for the Transmission Owners Agreement can be viewed on the website.[11] Such a take-it-or-leave-it relationship to the generally applicable Agreement hardly suggests individualized contract negotiation.

Furthermore, Transmission Owners and MISO argued below that the right of first refusal provision applies to new MISO transmission owners even though they had no role in negotiating that provision. Initial Order at P 185, JA 164; Rehearing Order at P 120, JA 504. In its compliance filing, MISO advised the Commission that Entergy Corporation and its five operating companies intended to join MISO and to "sign the Transmission Owners

---

[9] *See* Notice of Intervention and Comments of the Organization of MISO States, R. 74 at 5 & n.4, JA 59. The MISO States cite to the "Becoming a Member" page on MISO's website, instructing transmission-owning applicants that they must fully execute and submit the signature page for the Transmission Owners Agreement, available at: https://www.misoenergy.org/StakeholderCenter/Members/Pages/BecomingaMember.aspx.

[10] *See* MISO Membership List as of June 2015, available at: https://www.misoenergy.org/Library/Repository/Communication%20Material/Corporate/Current%20Members%20by%20Sector.pdf.

[11] *See* Transmission Owners Executed Signature Pages to the Transmission Owners Agreement, available at: https://www.misoenergy.org/Library/Repository/Tariff/Rate%20Schedules/Transmission%20Owner%20Executed%20Signature%20Pages%20to%20the%20Transmission%20Owners%20Agreement.pdf.

Agreement." R. 17, Transmittal Letter at 17, JA 17. Then, in their January 18, 2013 Answer, the Transmission Owners and MISO stated that, when the Entergy Operating Companies sign it, they "will be subject to the same set of rights and obligations in the Transmission Owners Agreement that apply to prior signatories." R. 118 at 13-14 n.48, JA 80.

As evidence of negotiation, the Transmission Owners note a reference in the 1998 Order Establishing MISO to additional transmission owners signing the Transmission Owners Agreement "[a]fter further negotiations." TO Br. at 46 (quoting Order Establishing MISO, 84 FERC at 62,139). Neither the Transmission Owners nor MISO cited this statement to the Commission on rehearing, so the challenged orders do not address it. It is evident from the Order Establishing MISO, however, that the referenced "further negotiations" occurred among the nine "Midwest ISO Participants" that originally filed the Transmission Owners Agreement. *See* Order Establishing MISO, 84 FERC at 62,138 n.2 and 62,139. *See also, e.g.*, MISO Rehearing Request, R. 136 at 11, 13, 14, JA 332, 334, 335 (arguing that the Transmission Owners Agreement was freely negotiated among the *original* parties to the agreement); MISO Br. at 24 (arguing that the Transmission Owners that originally negotiated the Agreement were sophisticated parties). This shows nothing about the ability of transmission owners joining MISO after the 1998 filing to negotiate provisions of the Agreement.

Transmission Owners also point, for the first time, to a statement in the 2001 Order Granting MISO RTO Status, 97 FERC at 62,522. TO Br. at 46. But that statement simply notes that MISO made changes to "its governing documents" to permit participation by tax-exempt-financed governmental entities. It is not evidence of negotiations relating to or changes to the Transmission Owners Agreement's right of first refusal provision, let alone adoption of any individualized terms to that Agreement.

Thus, the Commission's determination that new MISO members must execute the Transmission Owners Agreement as-is, with limited room for negotiation, Initial Order at P 181, JA 162; Rehearing Order at P 118, JA 503, is fully supported in the record. Moreover, this finding amply supports the Commission's determination that the Transmission Owners Agreement is more akin to a generally-applicable tariff than to an individually-negotiated contract. *See, e.g.*, *Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 284 (D.C. Cir. 2006) (expressing doubt that *Mobile-Sierra* was properly applied to a Transmission Operating Agreement among transmission owners in ISO New England because it is "a complex agreement establishing a new regional structure impacting all market participants").

That the original nine signatories to the Agreement engaged in negotiations does not undermine this conclusion. *See, e.g.*, MISO Br. at 24. As this Court has recognized, although "published tariffs may have been

determined initially by way of private negotiation," such rates are nonetheless tariff rates once they are published and generally applied. *Fla. E. Coast Ry. Co. v. CSX Transp., Inc.*, 42 F.3d 1125, 1130 n.5 (7th Cir. 1994). The term "contract rates" refers "to privately negotiated rates that remain private. . . ." *Id.* The Transmission Owners and MISO have not cited any circumstance in which a Transmission Owner succeeded in negotiating an individualized variation on the Transmission Owners Agreement's provisions.

Nor did the Commission find, *see* MISO Br. at 20-21, that the "mere possibility" of adding new signatories to a multi-party agreement renders the agreement one of general applicability. Rehearing Order at P 118, JA 503. Rather, the Commission found that, because new members must accept the right of first refusal provision as-is, with limited room for negotiation, the right of first refusal provision is not a freely-negotiated contract entitled to a *Mobile-Sierra* presumption. *Id.* "Whether a multi-party agreement that allows for new signatories is restrictive in this sense depends on the situation that new signatories face at the time of their accession to membership." *Id.*

NRG's holding that *Mobile-Sierra* applies to third party challenges to a *Mobile-Sierra* contract, *see* MISO Br. at 21-22, is not relevant here. Rehearing Order at P 119, JA 504. While the issue in *NRG* was whether outside parties can challenge a contract that is subject to the *Mobile-Sierra*

presumption, the issue here is whether the Transmission Owners Agreement possesses the attributes that trigger the *Mobile-Sierra* presumption of reasonableness in the first place. *See* Initial Order at P 187, JA 164.

Transmission Owners and MISO also point out that FERC reviewed the Transmission Owners Agreement in the 1998 Order Establishing MISO under the ordinary just and reasonable standard. TO Br. at 6-7, 22, 38; MISO Br. at 10. In their view, because the Commission previously found the Transmission Owners Agreement just and reasonable, the Commission is now foreclosed from "deny[ing] application of the *Mobile-Sierra* presumption." TO Br. at 38; *see also* MISO Br. at 10-11, 18 (same); TO Br. at 38 (arguing that the Commission failed to "acknowledge the much narrower scope of the Commission's authority to deny application of the *Mobile-Sierra* presumption for a contract, like the Owners Agreement, that the Commission previously has approved as just and reasonable, relative to its power to decline to accept the application of *Mobile-Sierra* when it initially reviews a contract.") (citing *Me. Pub. Utils. Comm'n*, 454 F.3d 278); *id.* at 39-41, 44 (citing *Boston Edison Co. v. FERC*, 233 F.3d 60 (1st Cir. 2000); *Ne. Utils. Serv. Co.*, 66 FERC ¶ 61,332 (1994), *aff'd, Ne. Utils. Serv. Co. v. FERC*, 55 F.3d 686 (1st Cir. 1995)).

But the cases upon which Transmission Owners rely predate *Morgan Stanley*, which rejected the proposition that *Mobile-Sierra* depends upon or

arises from a prior finding by the Commission that the contract is just and reasonable. In the decision under review in *Morgan Stanley*, the Ninth Circuit had held that the *Mobile-Sierra* presumption should not apply to contracts absent an initial opportunity by the Commission to review the contract without that presumption. *See Morgan Stanley*, 554 U.S. at 544. *Morgan Stanley* rejected the notion that *Mobile-Sierra* should apply differently "depending on *when* a contract rate is challenged." *Id.* at 545. *Mobile-Sierra* is not an estoppel doctrine, "whereby an initial Commission opportunity for review prevents the Commission from modifying the rates absent serious future harm to the public interest." *Id.* at 546. Rather, for contracts to which *Mobile-Sierra* applies, *Mobile-Sierra* "provide[s] a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context -- a definition that applies regardless of when the contract is reviewed." *Id.* at 546.

Because *Mobile-Sierra* applies in the same manner regardless of when a contract is challenged, the fact that the Commission initially approved the Transmission Owners Agreement -- including Appendix B's right of first refusal provision -- under the ordinary just and reasonable standard supports rather than undermines the Commission's determination here that the *Mobile-Sierra* presumption does not apply.

Moreover, when the Commission directed MISO to make changes to Transmission Owners Agreement Appendix B to allow third-party participation in constructing transmission projects in the Order Granting RTO Status, 97 FERC at 62,520, it did so without applying the *Mobile-Sierra* public interest standard. MISO did not seek rehearing of that Order, *see Midwest Indep. Transm. Sys. Operator*, 103 FERC ¶ 61,169 at P 3 (order on rehearing), and the MISO Transmission Owners did not seek rehearing of the directive to alter Appendix B. *See id.* PP 24-27.[12]

D. The Commission Reasonably Explained Why Commission Orders Cited By Transmission Owners And MISO Were Not Relevant Here

Transmission Owners and MISO claim the Commission failed to distinguish several Commission orders addressing agreements they contend are similar to the Transmission Owners Agreement. TO Br. at 27-34; MISO Br. at 12-17. This claim is mistaken.

Primarily, the Transmission Owners (Br. at 30-33) and MISO (Br. at 12-16, 21) rely on two orders in which the Commission reviewed multilateral agreements under the ordinary just and reasonable standard and then determined, in its discretion, that it would resolve any future challenges to certain provisions of the agreements there under the public interest

[12] As discussed *infra* at p. 52, *Midwest Indep. Transm. Sys. Operator, Inc.*, 122 FERC ¶ 61,090 at n.41 (2008) ("2008 Order") is inapposite as well.

standard. *See ISO New England Inc.*, 109 FERC ¶ 61,147 at PP 72-74 (2004) (reviewing proposed Transmission Operating Agreement); and *Sw. Power Pool*, 117 FERC ¶ 61,207 at PP 1, 5, 29 (2006), *on reh'g*, 119 FERC ¶ 61,021 (2007) (reviewing a proposed settlement's Balancing Function Agreement).

New England Power Generators, 707 F.3d at 369-71, affirmed that, when the Commission reviews a proposed agreement under the ordinary just and reasonable standard, it has discretion to choose to review future changes to that agreement's provisions under the *Mobile-Sierra* public interest standard. *See also* Rehearing Order at P 122, JA 506 ("Such discretionary action occurs in instances where an agreement is not subject to a *Mobile-Sierra* presumption as a matter of law"). Indeed, Transmission Owners and MISO acknowledge that *ISO New England* involved an exercise of the Commission's discretion. TO Br. at 30-31; MISO Br. at 14.

The issue before the Commission here, however, was not whether it should exercise its discretion to apply the *Mobile-Sierra* presumption to the right of first refusal provision, but, rather, whether it was required to do so. Thus, the cited cases, which address the Commission's discretion, were not relevant here. Rehearing Order at P 122, JA 505-06.

The rationales employed in the cited cases do not help Transmission Owners and MISO either. The Commission chose to exercise its discretion to apply *Mobile-Sierra* in *ISO New England*, 109 FERC ¶ 61,147, because it

found the transmission planning and expansion provision there (section 3.09 of the Transmission Operating Agreement) "provide[d] direction to the Transmission Owners and [ISO New England] to follow planning procedures contained in [ISO New England's Tariff]" and, "[a]s such, this provision will have no adverse impact on third parties or the New England market." *ISO New England*, 109 FERC ¶ 61,147 at P 78.[13]

It is highly unlikely, post-Order No. 1000, that the Commission would conclude, as it did in 2004 regarding the provision at issue in *ISO New England*, that the right of first refusal here would have no adverse impact on third parties or on MISO. As already discussed, the Commission determined in Order No. 1000 that rights of first refusal undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs, which can result in unjust and unreasonable rates. *See South Carolina*, 762 F.3d at 72, 74, 77; Order No. 1000 at PP 7, 320; Order No. 1000-A at P 70. Furthermore, in ISO New England's Order No. 1000 compliance proceeding, the Commission found that the right of first refusal provision in section 3.09 of its Transmission Operating Agreement "has a

[13] Transmission Owners mistakenly assert that the Commission also based its discretionary determination on a finding that "'prospective investors in new transmission facilities demand certainty.'" Br. at 31 (quoting *ISO New England*, 109 FERC ¶ 61,147 at P 77). While some parties asserted the Commission should apply *Mobile-Sierra* because of certainty, *see ISO New England*, 109 FERC ¶ 61,147 at P 77, the Commission did not exercise its discretion to apply *Mobile-Sierra* on that basis, *see id.* at P 78.

direct and substantial impact on third parties, including customers and any potential competitor to an existing incumbent transmission owner." *ISO New England*, 143 FERC ¶ 61,150 at P 195 (2013), *on reh'g*, 150 FERC ¶ 61,209 (2015), *on appeal*, *Emera Maine, et al. v. FERC*, Nos. 15-1139, *et al.* (D.C. Cir. filed May 15, 2015). In fact, the Commission determined that ISO New England's right of first refusal provision severely harms the public interest. *ISO New England*, 143 FERC ¶ 61,150 at P 172; *ISO New England*, 150 FERC ¶ 61,150 at P 197.[14]

Similarly, *Southwest Power Pool* involved the Commission's review of a proposed settlement, including a Balancing Authorities Agreement setting out the division of responsibilities among a regional transmission organization and the balancing authorities participating in its imbalance energy market. Rehearing Order at n. 216, JA 506; *Sw. Power Pool*, 117 FERC ¶ 61,207 at P 1, *on reh'g*, 119 FERC ¶ 61,021 at P 3. Transmission Owners and MISO assert that the Commission approved the *Mobile-Sierra* provision in that agreement because it would provide certainty and maintain the sanctity of contracts. TO Br. at 32; MISO Br. at 15.

[14] This same point applies to MISO's argument, Br. at 16, that *ISO New England*, 106 FERC ¶ 61,280 at P 213 & n. 128 (2004), stands for the proposition that transmission owners' rights and obligations to build affect only MISO and the transmission owners.

In fact, however, the Commission approved the *Mobile-Sierra* provision in the Balancing Authorities Agreement based on several factors: (1) it was consistent with the Commission's approval, in *Midwest Indep. Transm. Sys. Operator, Inc.*, 110 FERC ¶ 61,177 (2005), of a *Mobile-Sierra* provision in a MISO balancing authority agreement; (2) the *Mobile-Sierra* provision was limited, as it provided that signatories will modify that agreement to reflect any changes in Commission policy on standard of review; (3) it would provide stability in energy markets; and (4) it would provide certainty to the signatories and maintain the important role of contracts. *Sw. Power Pool*, 119 FERC ¶ 61,021 at P 11. Certainty and respect for contracts was only one of several case-specific factors that together caused the Commission to approve the *Mobile-Sierra* provision in that case.

Transmission Owners also cite to *Vermont Transco LLC*, 118 FERC ¶ 61,244 (2007), and *Public Utils. With Existing Contracts in the Cal. Indep. Sys. Operator Corp. Region*, 125 FERC ¶ 61,228 (2008), for the proposition that the just and reasonable standard applies equally to rates and other terms and conditions of jurisdictional services and, therefore, *Mobile-Sierra* can apply to a contract's rates and non-rate terms and conditions. TO Br. at 33-34. This is undisputed. *See*, *e.g.*, Initial Order at P 177, JA 161 (noting that the *Mobile-Sierra* presumption applies to "individualized rates, terms, or

conditions that apply only to sophisticated parties who negotiated them freely at arm's length"); Rehearing Order at P 108, JA 498 (same).

Likewise, the other point for which Transmission Owners cite *Public Utilities* -- that the *Mobile-Sierra* presumption is the default rule regarding contracts, TO Br. at 34 -- is also undisputed. As the Commission explained, individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's-length necessarily qualify for a *Mobile-Sierra* presumption. *E.g.*, Initial Order at PP 177-78, 180, JA 161, 162 (citing *Morgan Stanley*, 554 U.S. at 530, 534); Rehearing Order at P 119, JA 503-04; *see also supra* at p. 25.

III. The Commission Reasonably Determined That The *Mobile-Sierra* Presumption Did Not Apply Because The Right of First Refusal Provision Did Not Result From Arm's-Length Bargaining

Alternatively, the Commission reasonably found that the *Mobile-Sierra* presumption did not apply to the Transmission Owners Agreement's right of first refusal provision because it resulted from the transmission owners' common interest rather than from arm's-length bargaining. Initial Order at P 183, JA 163; *see also id.* at PP 176-79, 182, 184, JA 161-62; Rehearing Order at PP 111-15, JA 499-502.

Under *Mobile-Sierra*, contract rates, terms and conditions are presumed to be just and reasonable if they result from fair, arm's-length negotiations. *Morgan Stanley*, 554 U.S. at 554, cited Initial Order at n.339,

JA 163. Since wholesale energy market buyers and sellers tend to be sophisticated businesses with equal bargaining power, the Supreme Court has explained, it can be expected that they will negotiate contracts containing just and reasonable rates, terms and conditions. *Morgan Stanley*, 554 U.S. at 545 (citing *Verizon*, 535 U.S. at 479); *see also Me. Pub. Utils. Comm'n*, 625 F.3d at 759 ("A freely-negotiated contract rate, the Court held in *Morgan Stanley*, was presumptive evidence that the rate was just and reasonable because it reflected market forces."); Initial Order at n.339, JA 163 ("Arm's length bargaining serves an important role in confirming that the transaction price reflects fair market value.").

The right of first refusal provision at issue here, however, did not result from arm's-length negotiations. Initial Order at P 183, JA 163; *see also id.* at PP 176-79, 182, 184, JA 161-62, 163; Rehearing Order at PP 111-15, JA 499-502. While recognizing that some provisions in the Transmission Owners Agreement may have resulted from negotiations in which the Transmission Owners had competing interests, the Commission found the right of first refusal provision did not. Initial Order at PP 179, 183, 190, JA 162, 163; Rehearing Order at PP 111-14, JA 499-502.

Instead, the right of first refusal provision, which precludes competition in transmission development, arose from a common interest among the Transmission Owners. Initial Order at PP 183-84, JA 163; Rehearing Order

at PP 113-14, JA 500-02; *see also* TO Br. at 6 (section VI of the Transmission Owners Agreement (the section containing the right of first refusal provision) "states the rights and obligations of the MISO Transmission Owners to construct and own additions and expansions of the MISO transmission system"); MISO Br. at 25 (noting that the Transmission Owners' interests are "sometimes competing"); TO Rehearing Request, R. 138, at 25 n.71, JA 368 (the "Transmission Owners Agreement matches the obligations that MISO can impose on a transmission owner to construct a facility with the right of transmission owners to construct and own transmission facilities that connect to their systems."). Thus, the Commission found that the right of first refusal "provision arose in circumstances that do not provide the assurance of justness and reasonableness on which the *Mobile-Sierra* presumption rests" and, therefore, that the *Mobile-Sierra* presumption does not apply. Initial Order at PP 182-83, JA 163; Rehearing Order at PP 111-14, JA 499-502.

The Transmission Owners and MISO raise several arguments in an attempt to undercut this finding. None of these arguments has merit.

A. The Commission Reasonably Determined That The Right Of First Refusal Provision Resulted From The Transmission Owners' Common Interest

MISO claims that, to be arm's-length, bargaining only has to be between sophisticated parties with equal bargaining power. MISO Br. at 23-24. The precedent cited by the Commission establishes, however, that there is

a third essential feature of arm's-length bargaining, i.e., that the bargaining parties have adversarial interests.[15] Rehearing Order at PP 111-13, JA 499-501 (citing cases[16]); Initial Order at P 184 & nn.341-42, JA 163 (citing Commission precedent and regulation recognizing this point in market-based-rate/merger/affiliate contexts). Thus, "arm's-length bargaining is a process in which each party pursues its individual interests, and a negotiation in which the parties pursue a single, common, and shared

---

[15] Transmission Owners, the petitioners here, do not join in this claim. They agree with the Commission that "independent interests . . . characterize arm's length negotiations." Br. at 50.

[16] *A.T. Kearney, Inc. v. Int'l Business Machines Corp.*, 73 F.3d 238, 242 (9th Cir. 1995) (arm's length transactions are those in which "adversarial parties," i.e., "business adversaries in the commercial sense," seek "to further their own economic interests"); *Jeanes Hosp. v. Sec'y of Health and Human Servs.*, 448 Fed. Appx. 202, 206 (3rd Cir. 2011) (agreement "bore the hallmark characteristics of arm's-length bargaining" where the parties "negotiated rigorously, selfishly and with adequate concern for price"); *Santomenno v. Transamerica Life Ins. Co.*, 2013 WL 603901 at 6 & n.3 (C.D. Cal. 2013) ("arm's length negotiations or transactions are characterized as adversarial negotiations between parties that are each pursuing independent interests;" "[t]he typical arm's length transaction involves an adversarial negotiation in which the parties have independent interests and each tries to obtain the best deal for itself") (citing, *e.g.*, Black's Law Dictionary 109 (6th ed. 1991) (defining arm's length transaction as one "negotiated by unrelated parties, each acting in his or her own self interest;" "[a] transaction in good faith in the ordinary course of business by parties with independent interests"); Oxford English Dictionary, Dec. 2012 ("The parties must be put so much at arm's length that they stand in adverse relations")); *Nw. Central Pipeline Corp.*, 44 FERC ¶ 61,200 at 61,719 (1988) ("If the negotiating parties have a common economic interest in the outcome of the negotiations, they cannot bargain at arm's length"). *See also Holly Stores v. Judie*, 179 F.2d 730, 733 (7th Cir. 1950) ("That the parties were dealing at arm's length is obvious. In one corner was Judie, . . . and in the opposite corner was Holly").

interest is thus inconsistent with such bargaining." Rehearing Order at P 113, JA 500.

Transmission Owners contend that the arm's-length bargaining requirement is met here because the Transmission Owners Agreement was negotiated by a diverse group of transmission owners "with widely different interests in business and regulatory issues." TO Br. at 49; *see also id.* at 51. As the Commission found, however, that does not mean the Transmission Owners are competitors in all matters. Rehearing Order at P 114, JA 501-02; *see also* Initial Order at PP 178-79, JA 161-62 (noting that some provisions of the Agreement may satisfy the arm's-length requirement); MISO Br. at 25 ("the Transmission Owners were a diverse group of companies with differing, and sometimes competing, interests."). Rather, while the Transmission Owners may have different, competing interests regarding sales of energy and the other matters they proffered, *see* Rehearing Order at P 114, JA 501-02, they had a common interest in the right of first refusal provision, which protects them from competition in transmission development, *id. See also* Initial Order at PP 183-84, JA 163; Rehearing Order at P 113, JA 501-02.[17]

Next, the Transmission Owners and MISO contend that no one contemplated competition in transmission development when the

[17] This also resolves the claim that the Commission relied on nothing more than the common interest in reaching an agreement that motivates all parties who enter into any negotiation. *See* TO Br. at 47; MISO Br. at 27.

Transmission Owners Agreement was negotiated in 1998 (TO Br. at 49; MISO Br. at 34), and that there is no evidence in the record here that the right of first refusal provision was intended to protect the transmission owners' common interest in preventing competition in facilities construction (TO Br. 48, 49-50; MISO Br. at 24). The Transmission Owners' and MISO's own filings, however, refute these contentions.

For example, MISO's Rehearing Request, R. 136, at 13, JA 334, stated that "the *original* [transmission owners] were sophisticated parties that negotiated and entered into a legally binding agreement to transfer operational control of transmission assets to MISO, in exchange for, among other things, retention of the right of first refusal." In addition, the Transmission Owners' Answer in the proceeding establishing MISO and approving the Transmission Owners Agreement (FERC Docket No. ER98-1438, Dkt. Accession No. 19980402-0031 at 44-45) (Attached at Addendum B to this brief), explained that intervenors there argued for "competitive bidding to allow third parties to construct facilities," but the transmission owners opposed. Moreover, Transmission Owners' and MISO's Order No. 1000 compliance filing (R. 17, Transmittal Letter at 31, JA 24) and the Transmission Owners' Rehearing Request (R. 138, at 25 n.71, JA 368) explain that Transmission Owners Agreement Appendix B Section VI (the right of first refusal provision) provides the Transmission Owners not only an

obligation, but also a right, to construct and own facilities approved for construction under MISO's Tariff. *See also* Initial Order at P 138 & n.237, P 171, JA 144, 159 (same); Rehearing Order at P 98, JA 493 (same); TO Br. at 6 (same).

Accordingly, competition in transmission development was contemplated when the Transmission Owners Agreement was developed. Furthermore, there was substantial evidence in the record here that the right of first refusal provision was intended to protect the transmission owners' common interest in preventing such competition. *See Turlock Irr. Dist. v. FERC*, 786 F.3d 18, 28 (D.C. Cir. 2015) ("The 'substantial evidence' standard requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.") (internal quotation omitted); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 276 (7th Cir. 1995) (same).

Transmission Owners and MISO assert that their rehearing requests stated that Appendix B Section VI's "purpose was to ensure that MISO's planning decisions would be implemented by all transmission owners." TO Br. at 50 (citing R. 138, at 24-27, JA 367-70); MISO Br. at 24 (citing R. 136, at 11, JA 332). "The question [the Court] must answer, however, is not whether record evidence supports [petitioners' and intervenor's] version of events, but whether it supports FERC's." *Fla. Mun. Power Agency v. FERC*, 315 F.3d

362, 368 (D.C. Cir. 2003); *see also La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (same). As just explained, it does.

Transmission Owners and MISO also argue that "an agency may not reasonably focus on a single term of a contract as the basis for finding that the agreement did not result from arm's length bargaining." TO Br. at 52 (citing *Jeanes Hosp.*, 448 Fed. Appx. at 206-07); MISO Br. at 26 (same). But the Commission did not find that the Transmission Owners Agreement was not the result of arm's-length bargaining. Rather, as already discussed, the Commission found that other provisions of the Transmission Owners Agreement may have resulted from arm's-length bargaining, but the right of first refusal provision did not. Rehearing Order at PP 113-14, JA 500-01; Initial Order at PP 179, 182-83, JA 162, 163.

Transmission Owners point out that developing the Transmission Owners Agreement "encompassed many trade-offs among the negotiating parties, and there can be no doubt that the various parties assigned different degrees of import to the agreement's various provisions." Br. at 52. It is hard to imagine, however, that any of the transmission owners would have bargained against retaining their right of first refusal to construct and own facilities, and the record establishes no such behavior by any of the transmission owners. *See supra* at p. 16.

Transmission Owners question the Commission's purpose in discussing *Indiana and Michigan Mun. Distribs. Ass'n v. Indiana Michigan Power Co.*, 62 FERC ¶ 61,189 at 62,238 (1993). Br. at 50-51. But the Commission's purpose is plain. After noting "that in certain situations, a transaction may be deemed to be an arm's-length transaction when parties cannot be assumed to be pursuing individual, adverse interests," the Commission cited *Indiana*, which sets out the market price test the Commission applies to determine whether a transaction between affiliates is just and reasonable. Rehearing Order at n.193, JA 500. Because the Commission cannot presume such a transaction is prudent or the result of arm's-length negotiations, the Commission looks to a range of market prices for comparable transactions during the same time period. *Id.* The Commission then noted that this alternative approach was not available here because this case did not involve a price term that could be compared to prices in competitive markets. *Id.*

Transmission Owners and MISO further assert that the Commission had the burden to demonstrate that a *Mobile-Sierra* presumption does not apply to the right of first refusal provision. TO Br. at 22, 49; MISO Br. at 28, 29, 30, 34. Because Transmission Owners and MISO failed to raise this assertion to the Commission in their requests for rehearing (R. 136, JA 322; R. 138, JA 344), however, they waived their opportunity to raise it on appeal. Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b) (FPA § 313(b) ("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."); *see also*, *e.g.*, *Ind. Util. Regul. Comm'n v. FERC*, 668 F.3d 735, 738-40 (D.C. Cir. 2012) (jurisdiction to review FERC orders is limited to arguments specifically raised in rehearing request); *Wis.-Mich. S. Central Power Co. v. FPC*, 197 F.2d 472, 475 (7th Cir. 1952) (failure to raise an issue on rehearing "should be conclusive" in light of FPA § 313(b)'s rehearing requirement).

In any event, as the Commission explained in Order No. 1000 and the Initial Order, the Transmission Owners and MISO had the burden to show that the *Mobile-Sierra* presumption applied to the right of first refusal provision; if they met that burden, the Commission would then have the burden to show that removal of the right of first refusal was required in the public interest. *See* Order No. 1000-A at P 389 ("a public utility transmission provider that considers its contract to be protected by a *Mobile-Sierra* provision may present its arguments as part of its compliance filing. . . . The Commission will first decide, based on a more complete record, including the viewpoints of other interested parties, whether the agreement is protected by a *Mobile-Sierra* provision, and if so, whether the Commission has met the applicable standard of review such that it can require the modification of the particular provisions."); Initial Order at PP 137, 174, JA 143, 160 (same). The

Initial Order found that the Transmission Owners and MISO had not met their burden to show that the Transmission Owners Agreement was entitled to a *Mobile-Sierra* presumption and, therefore, that there was no need for the Commission to demonstrate that the right of first refusal provision adversely affects the public interest. Initial Order at PP 176, 192, JA 161, 167.

MISO further argues that the Commission did not make an individualized *Mobile-Sierra* determination here despite stating in Order No. 1000 that it would do so. Br. at 28-36 (citing Order No. 1000-A at PP 387-89). This argument, like MISO's burden of proof argument, was not raised to the Commission on rehearing (R. 136, JA 322; *see also* R. 138, JA 344) and, therefore, cannot be raised on appeal.

Even if this argument were properly before the Court, it lacks merit. The Commission determined that, rather than addressing whether any particular agreement is protected by *Mobile-Sierra* in the generic Order No. 1000 rulemaking proceeding, it would address that issue in the transmission providers' compliance proceedings. Order No. 1000-A at PP 388-89; Order No. 1000-B at P 40. As shown throughout this Brief, the Commission properly evaluated the circumstances surrounding the right of first refusal provision's development, *see* MISO Br. at 29-30, and fully considered the *Mobile-Sierra* arguments raised by the parties on compliance, *see id.* at 28. Thus, it makes no difference that the Commission used some of the same language in

addressing the Agreement as it used in other Order No. 1000 compliance proceedings. *See* MISO Br. at 31-33. The Commission often adopts language from other orders where, as here, that language appropriately applies to the particular matter before it.

B. The Commission Reasonably Determined Its Statement Regarding *Mobile-Sierra* In The 2008 Order Was Inapposite Here

The Transmission Owners and MISO argue that, in a footnote in a 2008 Order, *Midwest Indep. Transm. Sys. Operator, Inc.*, 122 FERC ¶ 61,090 at n.41 (2008) ("2008 Order"), the Commission determined that the entire Agreement is subject to the *Mobile-Sierra* presumption, and failed to distinguish that determination in the orders challenged here.[18] TO Br. at 24-27; MISO Br. at 7-12. In fact, however, the Commission provided two reasonable alternative bases why its statement regarding *Mobile-Sierra* in

---

[18] The cited footnote stated:

> "We agree with Union Electric that the [Transmission Owners] Agreement and Service Agreement impose a *Mobile-Sierra* standard of review. Accordingly, the Commission may modify those agreements only if it 'adversely affect[s] the public interest.' *Sierra*, 350 U.S. at 355. That standard is a demanding one, satisfied only in extraordinary 'circumstances of unequivocal public necessity.' *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968). However, as discussed below, we find that the proposed tariff revisions are consistent with the [Transmission Owners] Agreement and Service Agreement. Accordingly, there is no need to address changes to those documents."

2008 Order, 122 FERC ¶ 61,090 at n.41.

the 2008 Order did not stand as precedent in addressing the *Mobile-Sierra* issue here.

1. The 2008 Order's Statement Was Dictum

First, the Commission explained, the cited statement was dictum, as it "provide[d] no reasoning" and "was not necessary to decide the question presented." Initial Order at P 191, JA 166; Rehearing Order at P 121, JA 505; *see also* Initial Order at P 189, JA 165. "[S]tatements not necessary in the determination of the issues presented are *obiter dictum*. They are not binding and do not become law." *Wiegle v. SPX Corp.*, 729 F.3d 724, 736-37 (7th Cir. 2013). *See also Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998) ("Dicta are the parts of an opinion that are not binding" because "not being integral elements of the analysis underlying the decision -- not being grounded in a concrete legal dispute and anchored by the particular facts of that dispute -- they may not express the [decisionmakers'] most careful, focused thinking.").

The Transmission Owners' and MISO's Briefs merely mention, but do not present any argument challenging, the Commission's finding that its statement in footnote 41 of the 2008 Order was dictum. *See* TO Br. at 13-14 (discussing challenged orders); *id.* at 24-27 (argument section addressing 2008 Order); MISO Br. at 8-12 (argument section addressing 2008 Order).

It is well established that arguments not presented in an opening brief are waived. *See*, *e.g.*, *Sere v. Bd. of Trs. of the Univ. of Ill. at Chi.*, 852 F.2d

285, 287 (7th Cir. 1988) ("We consistently and evenhandedly have applied the waiver doctrine when appellants have failed to raise an issue in their opening brief."); *Nationwide Ins. Co. v. Cent. Laborers' Pension Fund*, 704 F.3d 522, 527 (7th Cir. 2013) ("arguments raised for the first time in a reply brief are waived."). Accordingly, the Transmission Owners and MISO have waived their opportunity to challenge the Commission's finding that its statement in the 2008 Order was dictum and, therefore, had no precedential value.[19]

Even if the Transmission Owners and MISO had challenged this finding, that challenge would not prevail. The Commission's determination that its prior statement was dictum was a reasonable interpretation of its own order that deserves deference and should be upheld. *See NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007) (courts "defer to the Commission's interpretations of its own precedents"); *Cent. States Enters., Inc. v. ICC*, 780 F.2d 664, 678 n.18 (7th Cir. 1985) ("a reviewing court must afford a considerable deference to a federal agency's interpretation of its own precedent, unless the interpretation is clearly erroneous"). The 2008 Order itself stated that there was "no need to address" whether the Transmission Owners Agreement was subject to the *Mobile-Sierra* presumption because the

[19] Transmission Owners and MISO also waived their opportunity to challenge the Commission's dictum finding by failing to challenge that finding in their requests for rehearing to the Commission (R. 136, JA 322; R. 138, JA 344). Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b); *Ind. Util. Regul. Comm'n*, 668 F.3d at 738-40; *Wis.-Mich. S. Central Power Co.*, 197 F.2d at 475.

tariff revisions proposed there were consistent with, and therefore required no changes to, that document. 2008 Order, 122 FERC ¶ 61,090 at n.41.

2. The 2008 Order's Statement Addressed A Different Section Of The Agreement Than The Section At Issue Here

Since the Transmission Owners and MISO waived any challenge to the first of the Commission's bases for finding the 2008 Order's statement inapposite here, the Court need not address their challenge (TO Br. at 25-27; MISO Br. at 9-12) to the Commission's alternative basis for that determination -- that the statement was directed only to the portion of the Transmission Owners Agreement at issue in that case (the revenue distribution provisions of Appendix C), and not to the entire Transmission Owners Agreement or its right of first refusal provision. *See*, *e.g.*, *Williams v. Leach*, 938 F.2d 769, 772 (7th Cir. 1991) (failure to address one of alternative findings on an issue waives any claim of error regarding that issue); *Landstrom v. Ill. Dep't of Children & Family Servs.*, 892 F.2d 670, 678 (7th Cir. 1990) (same).

In any event, the 2008 Order's *Mobile-Sierra* statement was a narrow determination limited to the specific provision at issue in that proceeding. Initial Order at PP 188-90, JA 165-66; Rehearing Order at P 121, JA 505. The 2008 Order addressed a filing by MISO and the Transmission Owners to revise certain provisions of MISO's Tariff. Initial Order at P 188, JA 165;

2008 Order, 122 FERC ¶ 61,090 at PP 1, 6. One party to that proceeding contended that the proposed Tariff revisions would adjust revenue distribution among the transmission owners (as set forth in Transmission Owners Agreement Appendix C) without the owners' unanimous consent (as required in Transmission Owners Agreement Article 2, section IX). *See* 2008 Order, 122 FERC ¶ 61,090 at PP 12, 21, 23, 40 & n.13; Initial Order at P 188, JA 165; *see also supra* at pp. 11-13 (discussing the Agreement's revenue distribution provisions). The Commission stated that, while the Transmission Owners Agreement imposed a *Mobile-Sierra* standard of review, the proposed Tariff changes were consistent with Appendix C's revenue distribution methodology and, therefore, there was no need to address changes to that document. 2008 Order, 122 FERC ¶ 61,090 at P 47 & n.41; Initial Order at PP 188-90, JA 165-66.

Thus, the Commission's statement that *Mobile-Sierra* applied was directed to the claim that the proposed Tariff revisions would modify Appendix C's revenue distribution provisions, which required unanimous transmission owner approval. Initial Order at P 190, JA 166; *see supra* at pp. 11-13 (discussing filing rights associated with pricing and revenue). The Commission's "conclusion that the public interest standard applies to modifications to the revenue distribution provisions in Appendix C states nothing about the standard that applies to modifications to Appendix B,

which is the portion of the Transmission Owners Agreement affected by the requirements of Order No. 1000 concerning rights of first refusal." Initial Order at P 190, JA 166. *See also* Rehearing Order at P 121, JA 505 ("when this statement in the MISO 2008 Order is read in context, it has neither the meaning nor the precedential value that MISO attributes to it. Our statements on *Mobile-Sierra* in that instance are best understood as directed to a specific rate matter that is dealt with in the Transmission Owners Agreement, not to everything contained in that agreement.") (citing Initial Order at PP 190-91, JA 166).

The Transmission Owners ignore this context in arguing that "the Commission stated unequivocally that the Owners Agreement 'impose[s] a *Mobile-Sierra* standard of review,' and may be modified only if it 'adversely affect[s] the public interest.'" TO Br. at 25. MISO does the same, baldly asserting that "the 2008 Order simply is not susceptible to the Commission's limiting interpretation." MISO Br. at 10; *see also id.* at 10-11 (asserting that the Commission cannot "retroactively withdraw" its prior finding that *Mobile-Sierra* applies to the entire Transmission Owners Agreement).

Likewise, the Transmission Owners' claim that the Commission failed to explain why Appendix C of the Transmission Owners Agreement is subject to the *Mobile-Sierra* presumption, but Appendix B's right of first refusal provision is not, Br. at 26, ignores the Commission's finding that its prior

determination regarding Appendix C was dictum and, therefore, lacked precedential value.

Moreover, the distinction between Appendix C's revenue distribution provision and Appendix B's right of first refusal provision in the context of arm's-length bargaining is plain. While Transmission Owners have a common interest in establishing rights of first refusal, they have competing interests regarding how MISO distributes revenue among Transmission Owners. *See* 2008 Order, 122 FERC ¶ 61,090 at PP 6, 44-47 (noting that changes in revenue distribution under the Transmission Owners Agreement can create revenue cross-subsidies among the Transmission Owners).

CONCLUSION

For the reasons stated, the petition for review should be denied.

Respectfully submitted,

Max Minzner
General Counsel

Robert H. Solomon
Solicitor

/s/ Beth G. Pacella
Beth G. Pacella
Deputy Solicitor

Lona T. Perry
Deputy Solicitor

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel.: (202) 502-6048
Fax: (202) 273-0901

October 2, 2015

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent contains 13,350 words, including the glossary but excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Beth G. Pacella
Beth G. Pacella
Deputy Solicitor

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel.: (202) 502-6048
Fax: (202) 273-0901

October 2, 2015

ADDENDA

TABLE OF CONTENTS

PAGE

ADDENDUM A
Statutes & Regulation

dicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

(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;

may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

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

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

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

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

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

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

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

EFFECTIVE DATE OF 2005 AMENDMENT

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

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Pub. L. 95–617, title II, §214, Nov. 9, 1978, 92 Stat. 3149, provided that:

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

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

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

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

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

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

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

(c) Temporary connection and exchange of facilities during emergency

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

previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) Compliance with order of Commission

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Notes or drafts maturing less than one year after issuance

Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78*l*, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon

complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and 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 classi-

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 classi-

fication 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 of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms ''electric utility companies'' and ''registered holding company'' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.[1]

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term ''short-term sale'' means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term ''applicable Commission rule'' means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject

[1] See References in Text note below.

vertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

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

CODIFICATION

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

Power Act absent the agreement of all parties thereto.

(4) Rate schedules covered by the terms of paragraph (d)(1) of this section, but which are not covered by paragraphs (d)(2) or (d)(3) of this section, are not required to contain either of the boilerplate provisions set forth in paragraph (d)(2) or (d)(3) of this section.

(e) No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge or compensation for or in connection with electric service subject to the jurisdiction of the Commission, or impose any classification, practice, rule, regulation or contract with respect thereto, which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown.

(f) A rate schedule applicable to the sale of electric power by a public utility to the Bonneville Power Administration under section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act (Pub. L. No. 96–501 (1980)) shall be filed in accordance with subpart D of this part.

(g) For the purposes of paragraph (a) of this section, any service agreement that conforms to the form of service agreement that is part of the public utility's approved tariff pursuant to §35.10a of this chapter and any market-based rate agreement pursuant to a tariff shall not be filed with the Commission. All agreements must, however, be retained and be made available for public inspection and copying at the public utility's business office during regular business hours and provided to the Commission or members of the public upon request. Any individually executed service agreement for transmission, cost-based power sales, or other generally applicable services that deviates in any material respect from the applicable form of service agreement contained in the public utility's tariff and all unexecuted agreements under which service will commence at the request of the customer, are subject to the filing requirements of this part.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 541, 40 FR 56425, Dec. 3, 1975; Order 541–A, 41 FR 27831, July 7, 1976; 46 FR 50520, Oct. 14, 1981; Order 337, 48 FR 46976, Oct. 17, 1983; Order 541, 57 FR 21734, May 22, 1992; Order 2001, 67 FR 31069, May 8, 2002; Order 714, 73 FR 57530, 57533, Oct. 3, 2008; 74 FR 55770, Oct. 29, 2009]

§35.2 Definitions.

(a) *Electric service.* The term *electric service* as used herein shall mean the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale for resale in interstate commerce, and may be comprised of various classes of capacity and energy sales and/or transmission services. *Electric service* shall include the utilization of facilities owned or operated by any public utility to effect any of the foregoing sales or services whether by leasing or other arrangements. As defined herein, *electric service* is without regard to the form of payment or compensation for the sales or services rendered whether by purchase and sale, interchange, exchange, wheeling charge, facilities charge, rental or otherwise.

(b) *Rate schedule.* The term *rate schedule* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing and may take the physical form of a contract, purchase or sale or other agreement, lease of facilities, or other writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A rate schedule is designated with a Rate Schedule number.

(c)(1) *Tariff.* The term *tariff* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section offered on a generally applicable basis, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in

any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A tariff is designated with a Tariff Volume number.

(2) *Service agreement*. The term *service agreement* as used herein shall mean an agreement that authorizes a customer to take electric service under the terms of a tariff. A service agreement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A service agreement is designated with a Service Agreement number.

(d) *Filing date*. The term *filing date* as used herein shall mean the date on which a rate schedule, tariff or service agreement filing is completed by the receipt in the office of the Secretary of all supporting cost and other data required to be filed in compliance with the requirements of this part, unless such rate schedule is rejected as provided in §35.5. If the material submitted is found to be incomplete, the Director of the Office of Energy Market Regulation will so notify the filing utility within 60 days of the receipt of the submittal.

(e) *Posting* (1) The term posting as used in this part shall mean:

(i) Keeping a copy of every rate schedule, service agreement, or tariff of a public utility as currently on file, or as tendered for filing, with the Commission open and available during regular business hours for public inspection in a convenient form and place at the public utility's principal and district or division offices in the territory served, and/or accessible in electronic format, and

(ii) Serving each purchaser under a rate schedule, service agreement, or tariff either electronically or by mail in accordance with the service regulations in Part 385 of this chapter with a copy of the rate schedule, service agreement, or tariff. Posting shall include, in the event of the filing of increased rates or charges, serving either electronically or by mail in accordance with the service regulations in Part 385 of this chapter each purchaser under a rate schedule, service agreement or tariff proposed to be changed and to each State Commission within whose jurisdiction such purchaser or purchasers distribute and sell electric energy at retail, a copy of the rate schedule, service agreement or tariff showing such increased rates or charges, comparative billing data as required under this part, and, if requested by a purchaser or State Commission, a copy of the supporting data required to be submitted to this Commission under this part. Upon direction of the Secretary, the public utility shall serve copies of rate schedules, service agreements, or tariffs, and supplementary data, upon designated parties other than those specified herein.

(2) Unless it seeks a waiver of electronic service, each customer, State Commission, or other party entitled to service under this paragraph (e) must notify the public utility of the e-mail address to which service should be directed. A customer, State Commission, or other party may seek a waiver of electronic service by filing a waiver request under Part 390 of this chapter providing good cause for its inability to accept electronic service.

(f) *Effective date*. As used herein the *effective date* of a rate schedule, tariff or service agreement shall mean the date on which a rate schedule filed and posted pursuant to the requirements of this part is permitted by the Commission to become effective as a filed rate schedule. The effective date shall be 60 days after the filing date, or such other date as may be specified by the Commission.

(g) *Frequency regulation*. The term *frequency regulation* as used in this part will mean the capability to inject or withdraw real power by resources capable of responding appropriately to a system operator's automatic generation control signal in order to correct

ADDENDUM B

Answer of Midwest ISO Participants (FERC Docket No. ER98-1438, Dkt. Accession No. 19980402-0031)

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of	)	
	)	
Cincinnati Gas & Elec. Co., et al.	)	Docket No. EC98-24
	)	
Midwest Independent Transmission System Operator, Inc.	)	Docket No. ER98-1438

ANSWER OF
MIDWEST ISO PARTICIPANTS

Michael E. Small
David S. Berman
Wright & Talisman, P.C.
1200 G Street, N.W.
Suite 600
Washington, D.C. 20005-3802
(202) 393-1200

Attorneys for
Midwest ISO Participants

March 31, 1998

ORIGINAL

Commission found in Order No. 888, for both policy and legal grounds, it cannot ignore otherwise legitimate costs that might not be recovered as a result of the transition to open access. Order No. 888 at 61,789. Owners must have a reasonable opportunity to recover their transmission costs. See Transmittal Letter at 10 n.22.

C. Construction Of Facilities

With regard to the construction of transmission facilities, intervenors argue for competitive bidding to allow third parties to construct facilities[65] and permitting ISO ownership of facilities.[66] The filed documents contemplate that in most cases the Owners will construct transmission facilities. This was done for two reasons. First, Owners have eminent domain rights; in most states other entities do not. In a California ISO order, the Commission recognized that competitive bidding for new transmission facilities could not be implemented until eminent domain issues are worked out. PG&E II, 80 FERC at 61,433. Those eminent domain issues are much more complicated for the Midwest ISO as it may cover eight or more states rather than the one state involved in the California ISO. Second, the filing complies with the Commission's pro forma tariff which requires transmission owners to construct transmission facilities. The Midwest ISO tariff and Agreement impose on the transmission providers the obligation to construct. Moreover, allowing only transmission owners to construct the new facilities is not unusual. The Commission-approved PJM documents limit the construction of new facilities to the Owners. See Amended and Restated Operating Agreement of PJM Interconnection,

---

65 Wisconsin Intervenors at 46; Illinois Commission at 34.

66 Wisconsin Intervenors at 46-47; Illinois Commission at 32.

L.L.C. ("PJM Operating Agreement"), Schedule 6, Section 1.7 (filed June 2, 1997). Thus, the filing's treatment of the construction of facilities is practical because of eminent domain issues and is consistent with the Commission's pro forma tariff and with PJM. Notwithstanding these facts, at some future time the ISO has the ability to change these provisions subject to receiving regulatory approval.

The intervenors' request for ISO ownership of transmission facilities also has other problems. ISO ownership of transmission facilities makes it more difficult to obtain or maintain tax-exempt status. The Midwest ISO Participants will seek a ruling from the IRS that the Midwest ISO will qualify for tax-exempt treatment. A principal argument will be that the ISO will be essentially a passthrough entity with regard to transmission service revenues. If the ISO owns transmission facilities, that weakens the argument and may make the ISO look like any other transmission owner earning a profit on those facilities. The absence of a tax-exempt ruling would be quite costly as the transmission rates then would need to reflect taxes. The dollar impact could involve hundreds of millions of dollars each year. See Midwest ISO filing, Exhibits 2 & 3.

The Commission also has expressed concerns about ISO ownership of transmission facilities. In the Primergy order the Commission stated that:

> The Commission is not convinced that it is necessary for an ISO to become a transmission owner to ensure system reliability and maximize transfer capability. To operate as an ISO, Midwest [the ISO in this instance] cannot have any incentives to favor some transmission facilities over others, and it would have such incentives if it were to own transmission facilities.

79 FERC at 61,734 (footnote omitted).

MISO Transmission Owners v. FERC
7th Cir. No. 14-2153

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 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/ *Beth G. Pacella*
Beth G. Pacella
Deputy Solicitor

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: (202) 502-6048
Fax: (202) 273-0901
Email: beth.pacella@ferc.gov