No. 14-2533

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LSP TRANSMISSION HOLDINGS, LLC, *et al.*,
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

DAVID L. MORENOFF
General Counsel

ROBERT H. SOLOMON
Solicitor

BETH G. PACELLA
Deputy Solicitor

CAROL J. BANTA
Senior Attorney

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

Final Brief: August 7, 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**

STATUTES: **PAGE**

GLOSSARY

Commission or FERC	Respondent Federal Energy Regulatory Commission
FPA	Federal Power Act
Initial Order	*Midwest Indep. Transmission Sys. Operator, Inc. and MISO Transmission Owners*, 142 FERC ¶ 61,215 (2013), JA 1573
JA	Joint Appendix
LS Power	Petitioners LSP Transmission Holdings, LLC and LS Power Transmission, LLC
Order No. 1000	*Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 136 FERC ¶ 61,051 (2011), JA 1
Order No. 1000-A	*Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 139 FERC ¶ 61,132 (2012), JA 621
Order No. 1000-B	*Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 141 FERC ¶ 61,044 (2012), JA 1216
P	Paragraph in a FERC order
Rehearing Order	*Midwest Indep. Transmission Sys. Operator, Inc. and MISO Transmission Owners*, 147 FERC ¶ 61,127 (2014), JA 2192
System Operator	Intervenor Midcontinent Independent System Operator, Inc. (formerly called Midwest Independent Transmission System Operator, Inc.)

COUNTER-STATEMENT OF JURISDICTION

The jurisdictional statement of Petitioners LSP Transmission Holdings, LLC and LS Power Transmission, LLC (together, "LS Power") is not complete and correct. *See* Cir. R. 28(b).

The instant petition for review challenges orders issued by Respondent Federal Energy Regulatory Commission ("Commission" or "FERC"), *Midwest Indep. Transmission Sys. Operator, Inc. and MISO Transmission Owners*, 142 FERC ¶ 61,215 (March 22, 2013) ("Initial Order"), JA 1573, *on reh'g*, 147 FERC ¶ 61,127 (May 15, 2014) ("Rehearing Order"), JA 2192. FERC had jurisdiction to issue the orders under Federal Power Act sections 201, 16 U.S.C. § 824, and 205, 16 U.S.C. § 824d.

LS Power timely sought rehearing of the Initial Order on April 22, 2013, which the Commission denied in the Rehearing Order. *See* Federal Power Act section 313(a), 16 U.S.C. § 825*l*(a). LS Power timely filed a petition for review of the Initial and Rehearing Orders on July 11, 2014. As a general matter, therefore, the Court has jurisdiction over this case under Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b).

LS Power has not established, however, that it has standing to raise one of the three issues asserted in this appeal. To obtain judicial review of an order issued by FERC, a party must meet the requirements of Article III standing. *See State of Wis. v. FERC*, 192 F.3d 642, 646 (7th Cir. 1999) (party

is not "aggrieved" within the meaning of Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b), unless it can establish constitutional and prudential standing); *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011) (same) (potential transmission developer failed to establish immediate, definitive injury). The "irreducible constitutional minimum" for standing requires the party to have suffered (1) an "injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that likely "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and quotation marks omitted); *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Wisconsin*, 192 F.3d at 646.

The orders on review approved tariff revisions proposed by Intervenor Midcontinent Independent System Operator, Inc. ("System Operator") to modify the cost allocation method for a certain category of transmission facilities, called Baseline Reliability Projects, to conform to the Commission's definition of local transmission facilities in its recent Order No. 1000

rulemaking.[1] LS Power asserts a general interest, on behalf of potential competing transmission developers, in the challenged Orders' determination to allow certain transmission providers to have a right of first refusal to construct such projects. *See* Br. 16-17. But LS Power does not assert any basis for its standing to challenge the Commission's determination that the allocation of project costs to the pricing zones in which facilities are located is just and reasonable. *See* Br. 6, 19-20, 44-49. LS Power has not shown that it has a cognizable interest in the rates to be paid by other transmission providers' customers. *See* Argument, Part III.A, *infra*; *see also Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009) (plaintiff bears burden of establishing standing).

STATEMENT OF ISSUES

As noted above, the System Operator proposed to revise its tariff provisions for a certain type of transmission project (Baseline Reliability Projects) to conform to the Commission's definition of local transmission facilities in its Order No. 1000 rulemaking. In particular, the System

---

[1] *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011) ("Order No. 1000"), JA 1, *order on reh'g and clarification*, 139 FERC ¶ 61,132 ("Order No. 1000-A"), JA 621, *order on reh'g and clarification*, 141 FERC ¶ 61,044 (2012) ("Order No. 1000-B"), JA 1216, *aff'd*, *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) ("*South Carolina*").

Operator proposed that all project costs would be assigned to the pricing zone(s) in which the project is physically located.

The issues presented for review are:

1. Whether the Commission reasonably determined that the proposal was consistent with Order No. 1000 because the System Operator's separate provisions for regional transmission planning and cost allocation will cover regional reliability projects in compliance with Order No. 1000;

2. Whether the Commission reasonably determined that it was consistent with Order No. 1000 to allow a right of first refusal for a Baseline Reliability Project geographically located in more than one pricing zone, provided that all costs of the portion of the project in a zone are allocated to that zone; and

3. Assuming jurisdiction, whether the Commission reasonably determined, based on substantial record evidence, that the primary benefits of a Baseline Reliability Project are realized in the zone(s) in which it is located and that, therefore, allocating all costs of such a project to that zone(s) is appropriate.

STATEMENT OF THE CASE

This appeal arises from a tariff filing the System Operator submitted concurrently with its filing to comply with the regional transmission planning and cost allocation requirements established in the Commission's Order No.

1000 rulemaking. (Separate challenges to the Operator's compliance filing itself are before the Court in related Case Nos. 14-2153 and 15-1316.) This case concerns only the System Operator's filing to modify provisions of its tariff governing certain transmission facilities, called Baseline Reliability Projects, to distinguish that category of primarily local facilities from regional projects. The challenged orders largely approved the Baseline Reliability Projects filing. Initial Order, JA 1573; Rehearing Order, JA 2192.[2]

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). *See also*, *e.g.*, *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 770 (7th Cir. 2013) ("*Illinois*

---

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

II") ("The Federal Power Act requires that the fee be 'just and reasonable,' 16 U.S.C. § 824d(a), and therefore at least roughly proportionate to the anticipated benefits to a utility of being able to use the grid.") (citing *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009) ("*Illinois I*")); *Ill. Commerce Comm'n v. FERC*, 756 F.3d 556, 559 (7th Cir. 2014) ("*Illinois III*").

Ensuring reliable service is also a priority under the Federal Power Act. *See Consol. Edison Co. v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) (Federal Power Act "has multiple purposes in addition to preventing 'excessive rates' including protecting against 'inadequate service' and promoting the 'orderly development of plentiful supplies of electricity'") (quoting *Cities of Anaheim v. FERC*, 723 F.2d 656, 663 (9th Cir. 1984), and *Pub. Utils. Comm'n of Cal. v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004)).

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

2. 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 have led to the creation of independent system operators and regional transmission organizations. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-

37 (2008). These independent regional entities operate the transmission grid on behalf of transmission-owning member utilities and are required to maintain system reliability. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 169 & n.1 (2010) (explaining responsibilities of regional system operators). In this case, the System Operator, formerly called Midwest Independent Transmission System Operator, Inc., is a regional transmission organization comprising 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).

In its recent opinion affirming the Commission's Order No. 1000 rulemaking, the D.C. Circuit provided a concise overview of the pertinent 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 established 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 that rates for FERC-jurisdictional services would be, as required by the Federal Power Act, just and reasonable and not unduly discriminatory or preferential. *See id.* at 52. Accordingly, in July 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 Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *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 Transmission Serv.*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007).

planning processes to include regional cost allocation methods for new transmission facilities selected in the regional plan for purposes of cost allocation that would satisfy certain principles set forth by the Commission, which focused on cost causation, transparency, and regional flexibility. *See id.* at 53.

Of particular relevance to this case, Order No. 1000 directed transmission providers to eliminate "any [tariff] provisions that grant a right of first refusal to transmission facilities that are selected in a regional transmission plan for purposes of cost allocation." Order No. 1000 at P 7, JA 14. Such rights of first refusal give an incumbent utility (i.e., a utility that develops a transmission project within its own retail distribution territory or footprint) the option to build any new transmission in its service area, even if the proposal for a project comes from a third party. *South Carolina*, 762 F.3d at 72 & n.6; *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). The Commission was concerned that such provisions "have the potential to undermine the identification and evaluation of a more efficient or cost-effective solution to regional transmission needs . . . ." Order No. 1000 at P 7, JA 14; *see also id.* at P 320, JA 256 (removing federal rights of first refusal would address

"disincentives that may be impeding participation by nonincumbent developers in the regional transmission planning process").

This concern, however, was specific to *regional* transmission planning and cost allocation. *See*, *e.g.*, *id.* at PP 318, 320, JA 254, 256. Thus, in response to comments that the "right of first refusal is necessary for incumbent transmission providers to develop transmission facilities needed to comply with a reliability standard or an obligation to serve customers," the Commission explained that Order No. 1000 was:

> not intended to diminish the significance of an incumbent transmission provider's reliability needs or service obligations. Currently, an incumbent transmission provider may meet its reliability needs or service obligations by building new transmission facilities that are located solely within its retail distribution service territory or footprint. The Final Rule continues to permit an incumbent transmission provider to meet its reliability needs or service obligations by choosing to build new transmission facilities that are located solely within its retail distribution service territory or footprint and that are not submitted for regional cost allocation.

Order No. 1000 at P 262, JA 209-10. "Alternatively," the Commission added, "an incumbent transmission provider may rely on transmission facilities selected in a regional plan for purposes of cost allocation." *Id.*, JA 210.

Order No. 1000's requirements apply to new transmission facilities "selected in a regional transmission plan for purposes of cost allocation," not to "local transmission facilities." Order No. 1000 at PP 63, 318, JA 53-54, 254; *see also id.* P 318 ("The Commission's focus here is on the set of transmission

facilities that are evaluated at the regional level and selected in the regional transmission plan for purposes of cost allocation"). The Commission defined a "local transmission facility" in terms of physical location and cost responsibility as a facility that (1) is "located solely within" a provider's retail distribution service territory or footprint and (2) "is not selected in the regional transmission plan for purposes of cost allocation." *Id.* at P 63, JA 54.

Moreover, Order No. 1000 explicitly stated that it did not require removal of rights of first refusal for local transmission facilities. Order No. 1000 at PP 258, 318, JA 206, 256; Order No. 1000-A at P 382, JA 912-13; *see also id.* at P 423, JA 942-43 (explaining that Order No. 1000 does not require elimination of a right of first refusal for a new transmission facility if all of the facility's costs are allocated to the public utility transmission provider in whose retail distribution service territory or footprint the facility is to be located); *South Carolina*, 762 F.3d at 73.

In Order No. 1000, the Commission repeatedly emphasized that its requirements for regional planning and cost-sharing would not alter transmission providers' prerogatives to plan and build local facilities: "[N]othing in Order No. 1000 prevents an incumbent transmission developer/provider from choosing to meet a reliability need or service obligation by building new transmission facilities that are located solely within its retail distribution service territory or footprint and that [are] not

submitted for regional cost allocation." Order No. 1000-A at P 85, JA 693; *accord id.* at PP 179, 366, 368, 379, 425, 428, JA 763, 899, 901, 945, 948.

The Commission's rulemaking allowed significant flexibility, directing transmission providers, working with their stakeholders, to implement the Commission's requirements and principles through processes tailored to different regional needs and characteristics. *See* Order No. 1000 at PP 14, 61-62, JA 19, 52.

3. The System Operator's Pre-Order No. 1000 Tariff Provisions

Both the System Operator's Order No. 1000 compliance and Baseline Reliability Projects filings proposed to adapt existing categories of transmission projects under its tariff, which the Commission had approved in other proceedings over the previous decade.

Baseline Reliability Projects. The Commission first approved the System Operator's tariff provisions for Baseline Reliability Projects (i.e., projects of 100 kilovolts and above needed to maintain system reliability, in accordance with regulatory and industry requirements and criteria, to serve existing transmission customers) in 2006. *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,106 at P 26, *on reh'g*, 117 FERC ¶ 61,241 (2006). The Tariff provisions approved in 2006 provided that, to receive any cost-sharing, a project must either cost at least $5 million or constitute at least five percent of the transmission owner's net plant. *Id.* at P 27. For

Baseline Reliability Projects from 100 kilovolts up to 344 kilovolts, all costs were allocated sub-regionally to transmission customers in the pricing zones impacted by the particular project. That impact, and the resulting allocation, was determined using a Line Outage Distribution Factor analysis (described *infra* at p. 33). *See id.* at PP 28-29. For Baseline Reliability Projects of 345 kilovolts and higher, 20 percent of costs were allocated system-wide to all transmission customers, with the remaining 80 percent allocated sub-regionally, using the same benefits flow analysis. *See id.*; *infra*, pp. 33-34.

Multi-Value Projects. In 2010, the System Operator proposed adding a new category of transmission projects with a regional orientation. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221 at P 1 (2010), *on reh'g*, 137 FERC ¶ 61,074 (2011). Multi-Value Projects must include facilities rated at 100 kilovolts or higher, must cost at least $20 million, and must meet one of three criteria: (1) the project must be developed through the System Operator's transmission expansion planning process for the purpose of supporting public policy mandates, and must enable the transmission system to deliver energy more reliably and/or more economically; (2) the project must provide multiple types of economic value across multiple pricing zones with a specified cost-benefit ratio; or (3) the project must address at least one reliability need and at least one economic issue, with quantifiable benefits that exceed quantifiable costs. 133 FERC

¶ 61,221 at PP 29, 207, 217; *see also Illinois II*, 721 F.3d at 774 ("[E]very multi-value project is to be large, is to consist of high-voltage transmission (enabling power to be transmitted efficiently across pricing zones), and is to help utilities satisfy renewable energy requirements, improve reliability. . . , facilitate power flow to currently underserved areas in the MISO region, or attain several of these goals at once."). Multi-Value Project costs would be allocated to all load throughout the System Operator's region. 133 FERC ¶ 61,221 at P 1. This Court largely affirmed the Commission's orders approving the proposal, including the regional cost allocation provisions. *See Illinois II*, 721 F.3d at 773-76.

Market Efficiency Projects. Market Efficiency Projects (previously called Regionally Beneficial Projects) are economic upgrades that satisfy certain cost/benefit tests, cost more than $5 million, and involve 345 kilovolt or higher facilities. *See* 133 FERC ¶ 61,221 at PP 9, 12-13. Costs are allocated both system-wide (20 percent) and sub-regionally based on a cost savings metric (80 percent). *Id.* at P 13.

Pricing Zones. The System Operator's tariff included 24 sub-regional pricing zones for cost allocation. Thirteen of the pricing zones covered a single transmission owner's facilities, and 11 were joint-owner pricing zones in which a single entity owned at least 75 percent of transmission plant. *See* Initial Order at PP 257-58, JA 1586-87; *Illinois II*, 721 F.3d at 773.

B. The Baseline Reliability Projects Filing

On October 25, 2012, the System Operator, together with a group of transmission owners, submitted proposed revisions to its Tariff, pursuant to section 205 of the Federal Power Act, 16 U.S.C. § 824d, to modify the cost allocation method for Baseline Reliability Projects. *See* Filing Letter at 1, R. 16, JA 1280. The System Operator explained that it proposed the modifications, "in recognition of the changes to transmission planning and cost allocation" it had adopted since establishing the Baseline Reliability Projects category of facilities in 2006, and "to reflect the local characteristics" and "localized function" of such facilities. *Id.* at 2, JA 1281. Furthermore, the System Operator explained, the Baseline Reliability Projects category was designed to address local reliability issues, whereas the newer categories of projects, Market Efficiency Projects and Multi-Value Projects, were designed to have a regional focus. *Id.* Market Efficiency and Multi-Value Projects had diminished the role of Baseline Reliability Projects in regional transmission planning (*id.* at 5, JA 1284), and the System Operator expected those types of projects to continue to displace Baseline Reliability Projects in the future. *Id.* at 17, JA 1296. For these reasons, the System Operator proposed to modify the cost allocation provisions for Baseline Reliability Projects to remove sub-regional and regional cost sharing, and to provide for 100 percent of the costs

of such a project to be allocated to the pricing zone in which it is located. *Id.* at 5, JA 1284.

C. The Challenged Orders

As discussed more fully in the Argument, *infra*, the Commission conditionally approved the Baseline Reliability Projects filing, finding that assigning all costs to the pricing zone in which a Baseline Reliability Project is located is, as the Federal Power Act requires, just and reasonable and not unduly discriminatory or preferential. Initial Order at PP 518, 520-22, JA 1609-11; Rehearing Order at P 436, JA 2215-16. In keeping with this Court's precedent on cost allocation, the Commission specifically found that the proposal "assigns the costs of Baseline Reliability Projects in a manner that [is] roughly commensurate with the benefits that these projects provide." Initial Order at P 518, JA 1609; *see also id.* at PP 520-21 & nn.956-57, JA 1610-11 (citing *Illinois I*, 576 F.3d at 476-77).

The Commission also determined that the filing was consistent with its Order No. 1000 rulemaking. Initial Order at PP 519, 524-25, JA 1609-12; Rehearing Order at PP 437-42, JA 2216-19. Order No. 1000's requirement that there be a regional cost allocation method for transmission facilities driven by reliability, economic, and public policy considerations was satisfied, since the regional cost allocation methodology for Multi-Value Projects includes transmission projects with reliability benefits. Initial Order P 519,

JA 1610; Rehearing Order P 437, JA 2216. Moreover, the Commission explained, Order No. 1000 did not require elimination of rights of first refusal for a project, like the Baseline Reliability Projects at issue here, that allocates all of the costs of the project to the pricing zone in which it is located. Initial Order at PP 524-25, JA 1612; Rehearing Order at PP 438-41, JA 2216-18.

SUMMARY OF ARGUMENT

The Commission reasonably determined that the System Operator's Baseline Reliability Projects filing was consistent with the Commission's Order No. 1000 rulemaking. Throughout Order No. 1000, the Commission emphasized that transmission providers could continue to plan and build local facilities to meet their reliability and service needs — with a right of first refusal — so long as those projects were not selected in a regional plan for purposes of cost sharing. The purpose of the System Operator's Baseline Reliability Projects filing, therefore, was consistent with the Commission's policy choices, rather than an effort to circumvent the Commission's directives.

With that continued role for local reliability planning in mind, the Commission found the System Operator's filing consistent with Order No. 1000. First, the Commission pointed out, Baseline Reliability Projects played no part in the System Operator's submission to implement the regional planning and allocation mandates of that rulemaking. The Commission

separately determined, in response to the System Operator's Order No. 1000 compliance filing, that Multi-Value Projects and Market Efficiency Projects meet the rulemaking's requirements; to the extent that LS Power now questions the sufficiency of the System Operator's Order No. 1000 compliance filing, it challenges that filing in the wrong appeal. Furthermore, the Commission agreed with the System Operator that provisions in its tariff make it likely that regional projects will displace Baseline Reliability Projects in future planning cycles, and required further filings to monitor the outcomes of those processes.

The Commission also properly concluded that Baseline Reliability Projects located in more than one zone can be local transmission facilities under Order No. 1000. In keeping with the rulemaking's distinction between regional cost sharing and in-zone assignment of local facility costs, the Commission determined that, because Baseline Reliability Project costs will be assigned based on physical location, those facilities are local projects as contemplated in Order No. 1000.

LS Power also challenges the Commission's determination that the cost allocation for Baseline Reliability Projects is just and reasonable. LS Power, however, has not demonstrated that it has standing to challenge the determination regarding the rates to be charged to other transmission developers' customers. In any event, the Commission properly determined

that it is just and reasonable to allocate all Baseline Reliability Project costs to the zone in which the project is located, since record evidence showed that those projects primarily benefit those zones. Thus, the Commission reasonably determined that ratepayers would receive, as this Court requires, benefits at least "roughly commensurate" with the costs assigned to their zones.

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). *Cf. Michael*, 687 F.3d at 348 ("Substantial evidence is such relevant evidence a reasonable person would deem adequate to support the ultimate conclusion.").

Under the Federal Power Act, "Congress has entrusted the regulation of the . . . industry to the informed judgment of the Commission, and therefore a presumption of validity attaches to each exercise of the Commission's expertise." *Village of Bethany v. FERC*, 276 F.3d 934, 940 (7th Cir. 2002) (quoting *N. Ind. Pub. Serv. Co.*, 782 F.2d at 739) (internal quotation marks omitted). Deference to FERC's decisions regarding rate issues is particularly appropriate, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin*, 390 U.S. at 790. "The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions." *Morgan Stanley*, 554 U.S. at 532. *See also Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) ("Because issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is highly deferential.") (internal quotation marks and citations omitted).

II. The Commission Reasonably Determined That the Baseline Reliability Projects Filing Was Consistent with Its Order No. 1000 Rulemaking

A. The Baseline Reliability Projects Filing Did Not Exclude Reliability Projects from Regional Planning and Cost Allocation

LS Power contends that Order No. 1000 required the regional planning process to provide for regional projects that address only reliability — apart from efficiency or public policy — concerns and, therefore, that the Baseline Reliability Projects filing removed the only regional cost allocation for reliability-only projects. Br. 23-34. This contention has no merit. And, in any event, this contention should have been raised, if at all, in a challenge to the System Operator's Order No. 1000 compliance filing, not in a challenge to the Commission's determinations regarding the Base Reliability Projects filing.

1. Order No. 1000 Did Not Require Regional Planning Processes to Include a Distinct Cost Allocation Method for Reliability-Only Projects

There is no requirement in Order No. 1000 that regional planning processes include a cost allocation method for reliability-only projects. *See* Initial Order at PP 443, 519, JA 1592, 1609-10; Rehearing Order at P 437, JA 2216. Instead, the Commission ruled that regional planning processes must consider reliability needs, economic considerations, and public policy requirements (Order No. 1000 at P 689, JA 489), and that a transmission provider "may not designate a type of transmission facility that has no regional cost allocation method applied to it, which would effectively exclude

that type of transmission facility from being selected in a regional transmission plan for purposes of cost allocation." *Id.* at P 690, *cited in* Initial Order at P 519, JA 1610, *and* Rehearing Order at PP 379, 437, JA 2204, 2216.

Order No. 1000 explained that "[a] transmission planning region may choose to use a different cost allocation method for different types of transmission facilities in the regional transmission plan, such as transmission facilities needed for reliability, congestion relief, or to achieve Public Policy Requirements." Order No. 1000 at P 685, JA 486 (setting out Regional Cost Allocation Principle 6); *see also id.* at P 686, JA 487 (sixth principle permits, but does not require, region to designate different types of transmission facilities, and to have a different cost allocation method for each type). The Commission chose to "leave it to each transmission planning region . . . to propose on compliance whether, and how, to distinguish between types of transmission facilities." *Id.* at P 689, JA 489; *see also id.* (rule allows transmission providers "to distinguish or not distinguish among these three types of transmission facilities" — referring to facilities driven by reliability, economic, and public policy considerations — "as long as each of the three types is considered in the regional transmission planning process and there is a means for allocating the costs of each type of transmission facility to beneficiaries."); *id.* at P 690, JA 490 (noting that a transmission facility may be intended to serve several functions).

The Commission found that the System Operator's Order No. 1000 compliance filing, which included regional cost allocation methods for Multi-Value and Market Efficiency Projects, provided a regional cost allocation method for each type of transmission facility. Initial Order at PP 443, 519, JA 1592, 1609; Rehearing Order at P 437, JA 2216. As the Commission explained, the regional cost allocation methodology for Multi-Value Projects covered transmission projects with reliability benefits. Initial Order at P 519, JA 1610; Rehearing Order at P 437, JA 2216. In addition, the Commission agreed with the System Operator that, "going forward, its [Market Efficiency] and [Multi-Value] project categories will displace Baseline Reliability Projects when more efficient or cost-effective regional solutions . . . are available to meet multiple transmission needs." Initial Order at P 519, JA 1610; Rehearing Order at P 442, JA 2218-19.

LS Power claims that this expectation lacked support. Br. 48. To the contrary, the Commission cited to the System Operator's tariff, which promotes the displacement of Baseline Reliability Projects by providing that "any transmission project that qualifies as a Multi-Value Project shall be classified as a [Multi-Value Project] irrespective of whether such project is also a Baseline Reliability Project . . . ." Tariff, Attachment FF, § II.C.4 (Transmission Planning Protocol) (7.0.0), JA 1353, *cited in* Initial Order at P 519 n.954, JA 1610. The tariff also requires the System Operator "to

identify the more efficient or cost-effective transmission plan." Initial Order at P 526, JA 1613; *see also id.* at P 516 & n.948, JA 1608 (noting System Operator's citation to tariff); Filing Letter at 16, JA 1295; Curran Testimony at 15-19, JA 1464-68 (explaining planning process).

Moreover, the Commission found in Order No. 1000 that there will continue to be incentives (such as system-wide cost sharing) for utilities to propose regional projects. *See* Order No. 1000-A at P 179, JA 763, *cited in South Carolina*, 762 F.3d at 78 (upholding the Commission's policy judgment). The Commission's predictive policy judgments are entitled to deference. *See*, *e.g.*, *South Carolina*, 762 F.3d at 96 ("It is within the scope of the agency's expertise to make a prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view.") (internal quotation marks, alterations, and citations omitted); *accord W. Fuels-Illinois, Inc. v. ICC*, 878 F.2d 1025, 1030 (7th Cir. 1989) ("We give great deference to an 'agency's predictive judgments about areas that are within the agency's field of discretion and expertise.'") (citation omitted).

To enable it to monitor the outcomes of the System Operator's planning processes, however, the Commission required the System Operator to submit an informational filing after the 2015 planning process. The informational filing must outline the number of Multi-Value Projects, Market Efficiency

Projects, and Baseline Reliability Projects approved during the first two planning cycles under the modified tariff provisions, and provide an analysis of approved Baseline Reliability Projects. Initial Order at P 519, JA 1610. This Court found similar oversight significant when it upheld the System Operator's previous (pre-Order No. 1000) cost allocation for Multi-Value Projects. *See Illinois II*, 721 F.3d at 774 (noting that the Commission had required the System Operator to provide annual updates on the status of such projects).

2. This Contention Is Raised in the Wrong Proceeding

Even if LS Power were right that Order No. 1000 required each type of transmission facility to have a distinct cost allocation method, its claim that this requirement was not satisfied should have been raised, if at all, in a challenge to the Commission's approval of the System Operator's Order No. 1000 compliance filing, not here in a challenge to the Baseline Reliability Projects filing.

The System Operator's compliance filing included regional cost allocation methods for Multi-Value and Market Efficiency Projects. *See* Initial Order at P 443, JA 1592. Neither LS Power nor any other party claimed that the System Operator's compliance filing failed to provide regional cost allocation methods for each type of transmission facility (i.e., transmission facilities driven by reliability, economic, and public policy

considerations), and the Commission determined that the compliance filing satisfied this Order No. 1000 requirement. *Id.*

The instant petition (No. 14-2533) challenges the Commission's approval of the filing to modify cost allocation for Baseline Reliability Projects. As the Commission pointed out, the System Operator's "proposed cost allocation for Baseline Reliability Projects is *not* the regional cost allocation method that [the System Operator] has proposed to comply with Order No. 1000." Initial Order at P 519, JA 1609 (emphasis added); *see also id.* at PP 11-12, 20, JA 1580-81, 1582-83 (describing separate filings); *cf. id.* at PP 434-45, JA 1588-93 (ruling on the separate Order No. 1000 compliance filing).

LS Power's contention questions whether the cost allocation methods proposed in the System Operator's compliance filing (regional cost allocation methods for Multi-Value Projects and Market Efficiency Projects) satisfy Order No. 1000's requirement that each type of transmission project be covered by a regional cost allocation method. Thus, this claim belongs, if anywhere, in LS Power's appeal challenging that compliance filing (7th Cir. No. 15-1316).

B. The Commission Reasonably Determined That Allowing Rights of First Refusal for Baseline Reliability Projects Is Consistent with Order No. 1000

LS Power further contends that permitting rights of first refusal for Baseline Reliability Projects is inconsistent with Order No. 1000 because those projects can be located in, and their costs can be allocated to, more than one pricing zone. Br. at 34-44. The Commission reasonably found otherwise.

As the Commission explained, Order No. 1000 did not require elimination of rights of first refusal for a transmission facility unless that facility was selected in a regional plan for purposes of cost allocation. Initial Order at P 525, JA 1612 (citing Order No. 1000 at P 313, JA 250); *see also* Rehearing Order at P 439, JA 2217 ("Baseline Reliability Projects are local transmission projects that are not selected in the regional transmission plan for purposes of cost allocation"). Moreover, the Commission pointed out, Order No. 1000-A clarified that a transmission facility is not selected in a regional plan for purposes of cost allocation if all of its costs are allocated to the pricing zone in which it is located. Initial Order at P 524, JA 1612 (citing Order No. 1000-A at P 423, JA 943); Rehearing Order PP 438-41, JA 2216-18.

The Commission found it consistent with Order No. 1000 to allow rights of first refusal for Baseline Reliability Projects, therefore, because, if a Baseline Reliability Project is physically located in more than one pricing zone, each "transmission owner will be responsible for the costs of the portion

of the Baseline Reliability Project physically located in its pricing zone."[5] Rehearing Order at P 439, JA 2217. In fact, the Commission directed the System Operator to revise its Tariff to "make clear . . . that for Baseline Reliability Projects located in more than one pricing zone, a transmission owner's cost responsibility is limited to the portion of the Baseline Reliability Project that is physically located in that transmission owner's pricing zone." *Id.* at P 440, JA 2217. Thus, Baseline Reliability Project costs will be directly assigned according to location, not selected in the System Operator's regional plan for purposes of cost allocation. Rehearing Order at PP 438-39, JA 2216-17 (citing Order No. 1000 at PP 63, 258, 262, 318, 329, JA 53-54, 206, 210, 254, 264; Order No. 1000-A at PP 366, 379, 423, 425, 428, JA 899, 910, 943, 945, 948).

While LS Power dismisses the Commission's directive as merely "[c]larifying the pricing" (Br. at 43), that "clarification" is key to the Commission's determination that a Baseline Reliability Project can be "local" to more than one zone so long as cost allocation is tied to the physical location(s) of the project. *See* Rehearing Order at P 438, JA 2217 (Order No.

---

[5] This is not, as LS Power claims, "precisely how Baseline Reliability Projects were cost allocated" before the System Operator filed to change the tariff. Br. 39. As explained more fully *infra* in Part III.B.1, previously, Baseline Reliability Project costs were allocated based on specific reliability benefits identified through a flow analysis and, in the case of higher-voltage facilities, automatically received a partial system-wide allocation.

1000 did not require elimination of right of first refusal where "100 percent of the transmission facility's cost [is] allocated to the public utility transmission provider in whose retail distribution service territory or footprint the facility is to be located") (citing Order No. 1000-A P 423, JA 943); *see also* Order No. 1000-A P 429, JA 948 (a "local" facility is one "located within the geographical boundaries" of a transmission provider's retail territory or footprint).

For that reason, the Commission required the System Operator to revise its tariff language to ensure that cost allocation would follow physical location. The Commission, reasonably interpreting its own rulemaking — here, its definition of what LS Power calls the "operative geographic scope" for determining what is "a local project" (Br. 35) — concluded that, in such circumstances, assignment of Baseline Reliability Project costs is "local" for purposes of the definitions and requirements in Order No. 1000.

LS Power argues that its interpretation of "local" and "regional" as used in Order No. 1000 should trump the Commission's. *See* Br. 43-44. But the Commission's reasonable interpretation of its own rulemaking, not LS Power's contrary interpretation, deserves deference and should be upheld. *See South Carolina*, 762 F.3d at 91 ("we defer to the Commission's reasonable interpretation of" a prior rulemaking); *id.* at 55 (courts give deference to Commission's policy judgments); *see also 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"); *see generally Transmission Access Policy Study Grp.*, 225 F.3d at 702 ("great deference" to Commission's policy assessments).

Moreover, while LS Power professes concern that, in the future, "transmission providers will adopt" a "variety of 'other' cost allocation methodologies that allow them to circumvent the intent of Order No. 1000 by applying an alternative cost allocation methodology that retains a right of first refusal," Br. 44, that concern is baseless. Transmission providers cannot unilaterally "adopt" cost allocation methodologies; rather, they can only propose them for Commission approval. And, as occurred here, the Commission will approve a proposed cost allocation methodology only if it finds the methodology consistent with pertinent rulemakings and precedent.

III. Assuming Jurisdiction, the Commission Reasonably Found the Proposed Cost Allocation Appropriate

A. LS Power Has Not Established Its Standing to Challenge the Cost Allocation

LS Power must demonstrate that it has standing to raise each claim on appeal. *See Davis v. FEC*, 554 U.S. 724, 734 (2008); *accord Johnson v. U.S. Office of Pers. Mgmt.,* 783 F.3d 655, 661 (7th Cir. 2015). LS Power has offered

no basis for its standing to challenge the Commission's approval of the proposed cost allocation for Baseline Reliability Projects.

LS Power argues that the cost allocation proposal does not assign all Baseline Reliability Project costs to customers in a manner that is roughly commensurate with the benefits the Project provides customers. Br. 44-49. But LS Power does not (and cannot) assert that it would be charged (as a transmission customer) rates under the approved cost allocation. And, since LS Power claims that "it is being excluded from competing for [Baseline Reliability Projects]," Br. 16-17, it does not assert that it would be a transmission provider charging these rates. *See*, *e.g.*, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("the fixing of 'just and reasonable' rates involves a balancing of the investor and the consumer interests"); *Morgan Stanley*, 554 U.S. at 532 (same). In any event, LS Power's challenge to the cost allocation proposal raises consumer interest, not investor interest, concerns.

LS Power also fails to offer any other basis for a cognizable interest in the cost allocations here. *See*, *e.g.*, *Wisconsin*, 192 F.3d at 646 (aggrievement requirement distinguishes a "'direct stake'" from a "'mere interest'") (quoting *City of Orrville v. FERC*, 147 F.3d 979, 985 (D.C. Cir. 1998)); *Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1028 (D.C. Cir. 2012) ("'an interest in [a] problem'" does not constitute aggrievement) (also quoting *Orrville*). Since

LS Power has not established its standing to challenge the Commission's cost allocation determinations, its claims regarding those determinations should be dismissed for lack of jurisdiction. *See*, *e.g.*, *Bennett*, 520 U.S. at 162; *Lujan*, 504 U.S. at 560-61; *Wisconsin*, 192 F.3d at 646.

B. The Commission Reasonably Found That the Filing Matches Transmission Costs with Benefits

1. The Evidence Showed That the Benefits of a Baseline Reliability Project Flow Primarily to the Zone (or Zones) in Which It Is Located

Assuming LS Power has standing to challenge the allocation of Baseline Reliability Project costs, its challenge fails on the merits. The Commission reasonably found that the benefits of a Baseline Reliability Project are realized primarily in the pricing zone(s) in which it is located and, therefore, that it is appropriate to allocate all Baseline Reliability Project costs to that pricing zone or zones. Initial Order at P 520, JA 1610; *id.* at P 521, JA 1611 (System Operator had shown that "the pricing zone in which a Baseline Reliability Project is located receives most of the benefits provided by that project"); *id.* at P 524, JA 1612 ("[the System Operator] has demonstrated that Baseline Reliability Projects primarily benefit the pricing zone in which they are located"); Rehearing Order at P 436, JA 2216 (same). *Cf. Illinois III*, 756 F.3d at 565 (finding that the reliability facilities at issue in that case "primarily benefit th[e] region" in which they are located).

The Commission's finding was supported by substantial record evidence, including System Operator-submitted testimony analyzing the 78 cost-sharing Baseline Reliability Projects authorized from 2006 to 2012 under the tariff provisions approved in 2006. About 90 percent of those cost-shared projects were physically located in a single pricing zone. Initial Order at P 487, JA 1595-96; Curran Testimony at 11, JA 1460.

Under the prior tariff provisions, cost allocation was determined by a Line Outage Distribution Factor analysis, i.e., a flow analysis that identified specific reliability beneficiaries. Tariff Filing Letter at 3 n.7, JA 1282 (explaining that the flow analysis "identifie[d] the beneficiaries of the [project] based on a flow-based impact that the new transmission line would have on the total flows in any other zone as a total percentage of all other zones."). Under that method, 100 percent of the costs of Baseline Reliability Projects less than 345 kilovolts (61 of the 78 authorized Baseline Reliability Projects) were allocated sub-regionally to transmission customers in the pricing zones the flow analysis identified as reliability beneficiaries. *See* Initial Order at P 487, JA 1596; *Midwest*, 117 FERC ¶ 61,241 at P 24; Curran Testimony at 5, 11, JA 1454, 1460. For high-voltage (345 kilovolts and above) projects (17 of the 78 authorized Baseline Reliability Projects), however, 20 percent of costs were automatically shared throughout the System Operator's region, without a specific tracing of benefits; the remaining 80 percent of

those projects' costs were allocated sub-regionally to transmission customers in the pricing zones the flow analysis identified as reliability beneficiaries. *See* Initial Order at P 487, JA 1596; *Midwest*, 117 FERC ¶ 61,241 at P 24; Curran Testimony at 5, 11, JA 1454, 1460.

The cost allocations determined under the benefits flow analysis showed that most of the benefits of a Baseline Reliability Project are received by the pricing zone in which the project is located. As the evidence showed, only minimal cost sharing occurred for more than half of the cost-shared projects, with 90 percent of their costs allocated within their own zones. *See* Initial Order at P 487, JA 1595; Curran Testimony at 10-11, JA 1459-60. Moreover, at least 75 percent of the costs of 62 of the 78 projects (representing about 80 percent of all cost-shared projects) were allocated to the pricing zone in which the project was located. *See* Initial Order at P 487, JA 1595; Curran Testimony at 10-11, JA 1459-60.

Accordingly, the Commission reasonably determined that the evidence showed that the pricing zone in which a Baseline Reliability Project is located receives most of the benefits provided by that project, and reasonably concluded, based on that evidence, that allocating all associated costs to that pricing zone aligns project costs with project benefits. Initial Order at P 521, JA 1611.

2. Allocating Project Costs to the Zone That Receives Most of a Project's Benefits Satisfies Cost Causation Principles

That finding is consistent with the traditional principle of cost causation, "which requires that 'rates reflect to some degree the costs actually caused by the customer who must pay them' and that 'the costs allocated to a beneficiary . . . are at least roughly commensurate with the benefits that are expected to accrue to that entity.'" Initial Order at P 520, JA 1610 (citing *Illinois I*, 576 F.3d at 476-77); *see also Illinois II*, 721 F.3d at 770; *Illinois III*, 756 F.3d at 559. While LS Power would prefer a more exact alignment of benefits and cost allocation, Br. 46, the Federal Power Act's just and reasonable standard requires only that cost allocation be "roughly commensurate" with benefits. *See Illinois I*, 576 F.3d at 476-77; *see also Illinois II*, 721 F.3d at 770; *Illinois III*, 756 F.3d at 559. Courts "have never required a ratemaking agency to allocate costs with exacting precision . . . ." *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1369 (D.C. Cir. 2004); *see also South Carolina*, 762 F.3d at 88 ("nothing requires the Commission to ensure full or perfect cost causation"); *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 266 (D.C. Cir. 2007) ("reasonableness is a zone, not a pinpoint"); *N. Ind. Pub. Serv. Co.*, 782 F.2d at 742 ("there exists a 'zone of reasonableness' in ratemaking within which the Commission may design rates") (citing *Permian Basin*, 390 U.S. at 797); *see also Illinois I*, 576 F.3d at

477 ("We do not suggest that the Commission has to calculate benefits to the last penny, or for that matter to the last million or ten million or perhaps hundred million dollars.") (citing *Midwest ISO*, 373 F.3d at 1369).

Here, LS Power does not contend that ratepayers in a pricing zone would receive "no benefits" or "benefits that are trivial in relation to the costs . . . ." *Illinois I*, 576 F.3d at 476. Nor would the record evidence support such an argument. As explained *supra* at p. 34, there is no dispute that about 80 percent of past Baseline Reliability Projects primarily benefited ratepayers in their own zones.

The cost allocation here is the inverse of the allocation that troubled the Court in *Illinois I* and *Illinois III*. In those cases, the Court rejected cost allocation methods that might shift costs from regions that primarily benefit from the facilities to other regions that might derive no benefits or only trivial benefits. See *Illinois I*, 576 F.3d at 476; *Illinois III*, 756 F.3d at 558, 562-63; *see also id.* at 564 ("The incidental-benefits tail mustn't be allowed to wag the primary-benefits dog."). As noted above, this Court previously has found that reliability-driven facilities primarily benefit the region in which they are located. *Illinois III*, 756 F.3d at 565; *see also id.* at 564 (emphasizing that the purpose of the new transmission lines at issue in that case was "to address specific reliability violations in the eastern part of PJM"). That is the crux of the Commission's ruling here: the System Operator proposed to

allocate all costs of Baseline Reliability Projects to the pricing zones in which those projects are physically located — using this Court's metaphor, to the "primary-benefits dog" rather than to the "incidental-benefits tail."

The Commission's approval of the System Operator's proposal here also is consistent with Commission precedent approving another regional transmission organization's proposal to allocate all costs of certain reliability projects to their host zones. *Sw. Power Pool, Inc.*, 131 FERC ¶ 61,252 at PP 94-95 & n.124 (2010), *cited in* Initial Order at P 520 n.956, JA 1610. In that case, the Commission found 100 percent zonal allocation was roughly commensurate with benefits because the reliability facilities primarily benefited local flows, and because most costs — 81 percent of mid-sized (100 to 300 kilovolts) facilities and 87 percent of lower-voltage (at or below 100 kilovolts) — had been zonally assigned under the previous method. *Sw. Power Pool*, 131 FERC ¶ 61,252 at PP 94-95 & n.124.

Given such precedents, together with substantial record evidence that even past Baseline Reliability Projects that qualified for cost sharing had little specific allocation (based on a benefits flow analysis) outside their host zones, the Commission appropriately found that ratepayers in a facility's own zone "receive[] most of the benefits provided by that project." Initial Order at P 521, JA 1611; *see also id.* at P 520, JA 1610 (benefits "are realized primarily" in that zone). Thus, the Commission has provided an "articulable

and plausible reason to believe" that Baseline Reliability Project costs allocated to ratepayers within the project's own pricing zone are "at least roughly commensurate" with the benefits they receive. *See Illinois I*, 576 F.3d at 477; *Illinois III*, 756 F.3d at 559.

Furthermore, to the extent that the Baseline Reliability Project allocation method might allow some minimal degree of free-riding — that is, if other zones that might have been identified by a flow analysis as receiving some benefits of a project do not share its costs — the Commission anticipated, and accepted, that risk in the Order No. 1000 rulemaking. There — in a variation on the argument that LS Power makes here — incumbent transmission owners contended that the Commission's regional cost allocation requirements would incentivize transmission providers to keep costs of local transmission facilities within their territories in order to retain a right of first refusal, thereby "encourag[ing] free ridership" by failing to allocate costs to entities outside of the provider's territory that may receive some benefit from such facilities. *See* Order No. 1000-B at P 45, JA 1252-53.

The Commission "agree[d] . . . that the Commission's requirements have not entirely eliminated opportunities for free ridership." *Id.* at P 55, JA 1260. Nevertheless, "the Commission balanced many competing interests in determining how to best implement the requirements of Order No. 1000. . . . [W]e find that the approach taken in [the rulemaking] provides the best

balance of competing considerations." *Id.* That considered policy choice was within the Commission's broad discretion in the rulemaking, and is consistent with the Commission's policy judgment here. *See South Carolina*, 762 F.3d at 55 (courts defer to Commission's policy judgments); *id.* at 88 (deferring to Commission's balancing of . . . competing goals"); *Village of Bethany*, 276 F.3d at 943 (upholding Commission's "policy determination that balanced the competing interests before it").

Moreover, as already discussed *supra* pp. 23-24, the Commission (and the System Operator) expected that, going forward, Baseline Reliability Projects would be displaced by regionally-allocated Multi-Value Projects or Market Efficiency Projects. *See* Initial Order at P 521, JA 1611. LS Power contends (Br. at 47) that this expectation was belied by the outcome of the 2012 planning process, in which no Multi-Value Projects were selected. Of course, 17 such projects, totaling $5.5 billion, had been approved in 2010-11 (*see* Br. 48) — and the Commission's Order No. 1000 rulemaking appropriately focused on the long view, rather than on any single year. *See* Order No. 1000 at PP 44-46, JA 39-42. As the D.C. Circuit found, the Commission acted on substantial evidence that government and industry experts anticipate considerable expansion of the transmission grid by 2030. *South Carolina*, 762 F.3d at 65-67. Indeed, as this Court noted in *Illinois II*, 721 F.3d at 774, that first group of Multi-Value Projects was "just the

beginning." Furthermore, as already discussed *supra* at pp. 24-25, the Commission will monitor the results of the System Operator's regional planning process. Thus, the Commission sufficiently explained its consideration of past projects, its expectations for future planning, and its ongoing review of actual outcomes.

CONCLUSION

For the reasons stated, the petition for review, to the extent not dismissed for failure to establish standing, should be denied on the merits.

Respectfully submitted,

David L. Morenoff
General Counsel

Robert H. Solomon
Solicitor

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

Carol J. Banta
Senior Attorney

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

June 5, 2015
Final Brief: August 7, 2015

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent contains 9,227 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) 502-6433
Fax: (202) 273-0901

August 7, 2015

ADDENDUM

Statutes

TABLE OF CONTENTS

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

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

§ 825k. Publication and sale of reports

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

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

CODIFICATION

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

(b) Writs of mandamus

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

(c) Employment of attorneys

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

(d) Prohibitions on violators

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

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

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

(A) electric energy; or

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

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

CODIFICATION

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

LSP Transmission Holdings, LLC, et al. v. FERC
7th Cir. No. 14-2533, et al.

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 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
beth.pacella@ferc.gov