ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 14-1281

OKLAHOMA GAS AND ELECTRIC COMPANY, *Petitioner*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*.

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

FINAL BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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December 2, 2015

CIRCUIT RULE 28(a)(1) CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties:

To counsel's knowledge, all parties before this Court and the Federal Energy Regulatory Commission are listed in the joint opening brief of Petitioner and supporting interveners.

B. Ruling Under Review:

1. *Southwest Power Pool, Inc.*, Order on Compliance Filings, Docket No. ER13-366-000, *et al.*, 144 FERC ¶ 61,059 (Jul. 18, 2013) (Initial Order), JA 406;

2. *Southwest Power Pool, Inc.*, Order on Rehearing and Compliance, Docket No. ER13-366-001, *et al.*, 149 FERC ¶ 61,048 (Oct. 16, 2014) (Rehearing Order), JA 672.

C. Related Cases:

The issue under review in this proceeding has not previously been before this Court or any other court. An additional petition for review involving the same agency dockets as this appeal (FERC Docket Nos ER13-366 and ER13-367), but involving issues separately raised on rehearing was filed and docketed with this Court on June 1, 2015. *See LS Transmission Holdings, LLC v. FERC*, Case No. 15-1157 (in briefing; Petitioner brief due January 15, 2016).

On June 19, 2015, this Court issued an order directing this case be scheduled for oral argument with *American Transmission Systems, Inc. v. FERC*, Case Nos.

14-1085, 14-1136, on the same day before the same panel. Similar issues concerning *Mobile-Sierra* also are presented in *Emera Maine v. FERC*, No. 15-1139 (in briefing; Petitioner brief due January 11, 2016), and before the Seventh Circuit in *MISO Transmission Owners v. FERC*, No. 14-2153 (briefing complete; awaiting date for oral argument).

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December 2, 2015

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Commission or FERC	Federal Energy Regulatory Commission
Initial Order	*Southwest Power Pool, Inc.*, Order on Compliance Filings, Docket No. ER13-366-000, *et al.*, 144 FERC ¶ 61,059 (Jul. 18, 2013)
Membership Agreement	Agreement between Southwest Power and Members by which a Southwest Power member authorized Southwest Power to administer regional transmission services.
Oklahoma Gas	Oklahoma Gas and Electric Company
Rehearing Order	*Southwest Power Pool, Inc.*, Order on Rehearing and Compliance, Docket No. ER13-366-001, *et al.*, 149 FERC ¶ 61,048 (Oct. 16, 2014)
Southwest Power	Southwest Power Pool, Inc.
Southwest Power Owners	Petitioner Oklahoma Gas and Electric Company and Intervenors Southwest Power Pool, Inc., ITC Great Plains, LLC, Mid-Kansas Electric Company, Sunflower Electric Power Corporation, Southwestern Public Service Company, and Xcel Energy Services, Inc.

In the United States Court of Appeals for the District of Columbia Circuit

No. 14-1281

OKLAHOMA GAS AND ELECTRIC COMPANY, *Petitioner*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*.

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

FINAL BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Petitioner Oklahoma Gas and Electric Company (Oklahoma Gas) objects to the Federal Energy Regulatory Commission's (FERC or Commission) consideration of a filing submitted by Southwest Power Pool, Inc. (Southwest Power or SPP), to comply with the regional transmission planning and cost allocation requirements established in the recent Order No. 1000 rulemaking.[1] The

[1] *Transm. & Cost Allocation by Transm. Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011) ("Order No. 1000"), *order on reh'g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and*

issue presented for review is:

Whether the Commission reasonably determined that a provision in Southwest Power's Membership Agreement, granting transmission owners a right of first refusal to construct transmission projects within their own service territories, lacks certain characteristics necessary to justify application of the *Mobile-Sierra* presumption that the provision is just and reasonable.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE FACTS

I. BACKGROUND

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 Commission review to assure that they are just and reasonable, and not

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clarification, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom.*, *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) ("*South Carolina*").

unduly discriminatory or preferential. *See* Federal Power Act sections 205 and 206, 16 U.S.C. §§ 824d(e), 824e(a).

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

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

2. The *Mobile-Sierra* Doctrine

The *Mobile-Sierra* doctrine derives from two Supreme Court cases: *Federal Power Commission v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956); and *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344-45 (1956). Those cases held that a contract rate cannot be superseded simply by filing a new tariff. *See Morgan Stanley*, 554 U.S. at 533.

Sierra also addressed how the Commission may evaluate whether a contract rate is just and reasonable. *See id.* Although the Commission normally could not impose a rate that would not produce a fair return, the Court found that a public utility itself might agree to a contract rate affording less than a fair return. *See id.* If a utility does so, it is generally not entitled to be relieved by the Commission of its improvident bargain. *See id.* Contract rates are instead presumed to be just and reasonable, and can be altered only when required in the public interest. *See id.* at 533, 545-46.

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

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

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

3. Commission Open Access And Regional Planning Rulemakings

In recent decades, the Commission's efforts to foster wholesale electricity competition over broader geographic areas have led to the creation of independent system operators and regional transmission organizations. *See Morgan Stanley*, 554 U.S. at 536-37. These independent regional entities operate the transmission

grid on behalf of transmission-owning member utilities. *See NRG*, 558 U.S. at 169 & n.1 (explaining regional system operators' responsibilities). Southwest Power operates the transmission facilities of utilities covering portions of eight states. *See Southwest Power Pool*, Order on Compliance, 144 FERC ¶ 059, at P 25 (2013) (Initial Order), JA 406. According to Southwest Power, it has 90 members serving a 370,000 square mile area. *See* Joint Opening Brief (Pet.) at 9.[2]

This Court's recent opinion affirming the Commission's Order No. 1000 rulemaking provided a concise overview of the history of the Commission's electric industry reforms. *See South Carolina*, 762 F.3d at 49-54. The *South Carolina* 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 directing public utilities to adopt open access non-discriminatory transmission

[2] In its Transmittal Letter containing its Compliance Filing, Southwest Power asserted that it has 68 members. *See* Initial Order at P 25 (citing R. 16-17, Order No. 1000 Compliance Filing of Southwest Power Pool, Inc., Docket No. ER13-367, Parts 1 and 2 (Nov. 13, 2012) (Transmittal Letter) at 28), JA 38-200.

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

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

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

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

allocate the costs of new transmission facilities that are selected in the regional plan for purposes of cost allocation. *See id.* at 53.

And, as relevant here, Order No. 1000 directed transmission providers "to remove provisions from Commission-jurisdictional tariffs and agreements that grant incumbent transmission providers [(*i.e.*, utilities that develop transmission projects within their own retail distribution territories)] a federal right of first refusal to construct transmission facilities selected in a regional transmission plan for purposes of cost allocation." Order No. 1000 at P 253; *South Carolina*, 762 F.3d at 72 & n.6; *see also id.* at 73 (noting that the Commission required removal of rights of first refusal only for facilities whose costs would be allocated according to the principles established in the regional transmission plan). Rights of first refusal give an incumbent utility the option to build any new transmission in its service area, even if the proposal for a project comes from a third party. *South Carolina*, 763 F.3d at 72; *see also id.* at n.6 (explaining that a "non-incumbent" may be either a developer that does not have its own retail distribution territory or a provider that proposes a project outside its own territory).

As Order No. 1000 and *South Carolina* found, such rights of first refusal discourage non-incumbents from proposing transmission facilities because, once the benefits of a proposed project are demonstrated, an incumbent is likely to exercise its right of first refusal to construct that project. *South Carolina*, 762 F.3d

at 72 (citing Order No. 1000 at PP 256-57). Thus, non-incumbents would not only be unlikely to recoup the full benefits of their project proposals. They would also be unable to recoup the costs of identifying the need and making the proposals in the first place. *Id.*

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

The *South Carolina* Court fully affirmed Order No. 1000, including its requirement that transmission providers remove rights of first refusal to construct transmission facilities selected in a regional transmission plan for purposes of cost allocation. *South Carolina*, 762 F.3d at 48-49, 72-81. The Court found that Order No. 1000's purpose was "improving the process through which needed infrastructure is identified and planned." *Id.* at 77. Removing the right of first refusal was consistent with that focus. *Id.* "[T]here is ample reason to think that injecting competition into the planning process will help to ensure that rates remain just and reasonable." *Id.*

Some parties argued during the Order No. 1000 rulemaking proceeding that their right of first refusal provisions were protected by the *Mobile-Sierra* doctrine and, therefore, that the Commission could not require changes to those provisions without first finding that they harmed the public interest. The Commission determined that it would address assertions that individual jurisdictional tariffs and agreements contain a federal right of first refusal protected by *Mobile-Sierra* when it reviewed the transmission providers' compliance filings, rather than in the generic rulemaking proceeding. Order No. 1000 at P 292; Order No. 1000-A at PP 388-89; Order No. 1000-B at P 40. The *South Carolina* Court found the *Mobile-Sierra* arguments premature, since the Commission deferred consideration of that issue to the compliance proceedings. 762 F.3d at 81.

4. The Membership Agreement

Southwest Power is an Arkansas non-profit organization that has administered a regional open-access transmission service tariff for its members since 1998. *See Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110, *reh'g granted in part*, 109 FERC ¶ 61,010 (2004), *pet. for review dismissed, N.M. Attorney Gen. v. FERC*, 466 F.3d 120 (D.C. Cir. 2006). The transmission owners transferred functional control over transmission facilities, but retained ownership and physical control. *See id.*; *Southwest Power Pool, Inc.*, 119 FERC ¶ 61,307, at P 11 (2007) (defining Southwest Power as a "public utility" within the meaning of the Federal Power Act); *see also Southwest Power Pool, Inc. v. FERC*, 736 F.3d 994 (D.C. Cir. 2013) (concerning contract dispute between Southwest Power and an adjacent regional transmission organization).

In 1999, Southwest Power filed with the Commission a "Membership Agreement," which served as the new agreement by which a Southwest Power member would authorize Southwest Power to administer regional transmission services. *Southwest Power Pool, Inc.*, 89 FERC ¶ 61,284 at 61,887 (1999), *reh'g granted in part*, 98 FERC ¶ 61,038 (2002). The Commission reviewed the Agreement under the just and reasonable standard of section 205 of the Federal Power Act. *Id.*

Following the filing of the Membership Agreement, an entity wishing to join Southwest Power must sign a signature page accepting the Membership Agreement in full and undertaking the obligations defined under the Agreement. *See* R. 16-17, Transmittal Letter at 28, JA 70; *see also* R. 67, Missouri Public Service Commission Protest at 9 n.23 (quoting Becoming a SPP Member, available at http://www.spp.org/section.asp?pageID=211), JA 291. The prospective member then need only return the signature page – which Southwest Power files with the Commission. *See id.*

In 2004, the Commission conditionally granted Southwest Power's request to become a regional transmission organization, subject to the fulfillment of certain requirements and Commission jurisdiction over matters affecting the rates, terms and conditions of jurisdictional service. *See Southwest Power Pool*, 106 FERC ¶ 61,009 (2004), *reh'g granted in part*, 109 FERC ¶ 61,010 (2004). Regional transmission organizational status was contingent upon Southwest Power ensuring that the board of directors was independent of any market participant. *Id.* at P 37. The Commission further mandated that an advisory members committee be expanded beyond transmission owners and users to prevent disproportionate influence. *Id.* at P 42.

The Commission also required Southwest Power to obtain clear operational authority over the transmission facilities within its footprint. *Id.* at P 79. The

Commission found "promising" Southwest Power's efforts to accommodate third-party participation, *id.* at P 186, but concluded that Southwest Power did not have the authority to independently determine the priority of transmission planning projects. *Id.* at P 188. Instead, Southwest Power had to rely upon the planning studies of transmission owners. *Id.*

5. Order No. 1000 Compliance Filing

On November 13, 2012, Southwest Power submitted proposed revisions to the Southwest Power Tariff and the Membership Agreement to comply with the Commission's Order No. 1000 rulemaking. Transmittal Letter Parts 1 and 2, JA 38-200; *see also* Initial Order at P 1, JA 409. As pertinent here, the compliance filing asserted that Southwest Power's right of first refusal provision, set forth in section 3.3 of the Membership Agreement, JA 876-77, is subject to a *Mobile-Sierra* presumption of justness and reasonableness and, therefore, that the Commission could require that it be changed only if it found that change required in the public interest. Transmittal Letter at 38-43, JA 80-85.

Numerous parties protested this portion of the compliance filing, arguing, among other things, that the Membership Agreement's right of first refusal provision is not subject to a *Mobile-Sierra* presumption because it lacks certain characteristics on which that presumption is based. *See* Initial Order at PP 99-114, JA 453-60.

B. The Challenged Orders

The Commission determined that it must decide, under the Federal Power Act, whether the right of first refusal provision in section 3.3 of the Membership Agreement has certain characteristics that entitle the agreement to the *Mobile-Sierra* presumption. Initial Order at PP 126-27, JA 464-65; *Southwest Power Pool, Inc.*, Order on Rehearing and Compliance, 149 FERC ¶ 61,048 (2014) (Rehearing Order) at PP 94, 106, JA 717, 722. On two separate bases, the Commission found that the Membership Agreement and right of first refusal provision lack the characteristics that justify application of the *Mobile-Sierra* presumption. Initial Order at PP 123-35, JA 464-71; Rehearing Order at PP 94-112, JA 717-25.

First, the *Mobile-Sierra* presumption does not apply because the right of first refusal provision is a rule of general applicability. Initial Order at PP 130-31, JA 466-67; Rehearing Order at PP 100-06, JA 720-22. It is therefore properly considered as more akin to a tariff rate, term or condition, rather than to a contract (individually negotiated) rate, term or condition. *Id.* On rehearing, the Commission clarified that the Membership Agreement in its entirety is a form contract "containing rates, terms, or conditions that are generally applicable to all entities seeking SPP membership." Rehearing Order at P 100, JA 720.

Second, the Commission found that the *Mobile-Sierra* presumption does not apply because the right of first refusal provision is not the result of arm's-length

bargaining and, therefore, "lacks the premise on which the *Mobile-Sierra* presumption rests." Initial Order at P 132 (quoting *Morgan Stanley*, 554 U.S. at 554), JA 467; *see also id.* at PP 133-34, JA 467; Rehearing Order at PP 95-99, 109, JA 717-20, 723-24. The right of first refusal provision resulted from the Southwest Power transmission owners' common purpose of preventing entry into the market. Initial Order at P 132, JA 467; Rehearing Order at P 109, JA 723-24.

On October 16, 2014, Oklahoma Gas petitioned for review of the Commission's determination on the right of first refusal. Southwest Power and transmission providers ITC Great Plains, LLC, Mid-Kansas Electric Company, Sunflower Electric Power Corporation, Southwestern Public Service Company, and Xcel Energy Services, Inc., intervened in support of Oklahoma Gas. Oklahoma Gas and the intervenors filed a joint opening brief (collectively the Southwest Power Owners).

SUMMARY OF ARGUMENT

The Commission reasonably determined that, under the Federal Power Act and Supreme Court precedent, it must distinguish between agreements that are more akin to tariffs and those to which the *Mobile-Sierra* presumption should apply. An agreement constitutes a "tariff" and carries no *Mobile-Sierra* presumption if it is generally applicable and must be accepted as-is. Further, to justify application of the *Mobile-Sierra* presumption of reasonableness, the

Commission found that the agreement must arise from arm's-length negotiations and not negotiations between parties with a common purpose.

Applying this standard, the Commission reasonably found, on two alternative bases, that the Membership Agreement's right of first refusal provision lacks certain characteristics that underlie the application of a *Mobile-Sierra* presumption.

I. Rule Of General Applicability

First, the Membership Agreement has the characteristics of a form contract rather than an individually negotiated contract rate, term or condition. As the Commission explained, prospective members must accept that Agreement as-is, with limited room for negotiation.

The Southwest Power Owners claim that the Commission has no basis in law for this distinction. The Federal Power Act and Supreme Court precedent establish, however, that utilities may set rates either through generally applicable tariffs or individually negotiated contracts and that the Commission must apply the *Mobile-Sierra* presumption only to the latter. So the Commission must determine whether the contract resulted from individual negotiations to decide whether the *Mobile-Sierra* presumption applies. The Southwest Power Owners' argument that *Mobile-Sierra* applies to all contracts ignores that tariffs may also result from

contractual agreements and would improperly encompass contracts that apply to all prospective members.

The record amply supports the Commission's conclusion. The Membership Agreement was filed with the Commission in 1999 as a standardized form contract. Although the Southwest Power Owners assert that the Membership Agreement resulted from negotiations among members of a task force, the generally applicable character refers to the effect on new members after filing. Prospective members are required to accept the entire Agreement with Southwest Power, and those that joined Southwest Power after the original members (Southwest Power asserts there are currently 90 members) simply executed signature pages to do so. Amending existing provisions of the Membership Agreement would require negotiations not only with Southwest Power, but with every existing member. Accordingly, the Commission reasonably concluded that both the Agreement in its entirety, and the right of first refusal provision specifically, are generally applicable provisions to which the *Mobile-Sierra* presumption of reasonableness does not apply.

The voluntary nature of the Membership Agreement does not undermine the Commission's determination; the fact an entity either can accept the Membership Agreement as-is or not at all only underscores the Agreement's general applicability. Further, while the Membership Agreement was amended in 2008, as the Commission found, those amendments only added provisions preserving tax-

exempt status for certain members – a far cry from varying the Membership Agreement's particular right of first refusal provision. The Southwest Power Owners have not pointed to any circumstance where such an alteration was attempted or occurred.

II. Lack Of Arm's-Length Bargaining

Alternatively, the Commission reasonably found that the *Mobile-Sierra* presumption does not apply because the Membership Agreement's right of first refusal provision is not the result of arm's-length bargaining. As the Supreme Court has held, the presence of arm's-length bargaining provides the premise for the presumption that the resulting contract rate is just and reasonable.

Here, the Southwest Power Owners had a common interest in a right of first refusal, as it protects transmission owners from competition in transmission development. The Southwest Power Owners cannot demonstrate that the parties did not contemplate competition in transmission development when the Membership Agreement was negotiated, or that the right of first refusal was not intended to protect a common interest in preventing competition.

The Commission likewise rejected the argument that Southwest Power's participation in the Membership Agreement constituted arm's-length bargaining. Southwest Power is not a commercial entity that acts solely in its self-interest. So the Membership Agreement between Southwest Power and a prospective member

cannot be characterized as one in which each party sought to promote its individual economic interests.

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.*, *Freeport-McMoRan Corp. v. FERC*, 669 F.3d 302, 308 (D.C. Cir. 2012). Commission decisions will be upheld as long as the Commission "examined the relevant data and articulated a rational connection between the facts found and the choice made." *South Carolina*, 762 F.3d at 54; *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (same); *accord Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b); *see also, e.g.*, *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 407 (D.C. Cir. 2000) (citations omitted) (same).

An agency's construction of the statute it administers – here, the difference between "schedules" (referred to as "tariffs" by the Supreme Court) and "contracts" under the Federal Power Act – is subject to the *Chevron* two-step

analysis. *See Morgan Stanley*, 554 U.S. at 531. If Congress has directly spoken to the precise question at issue, the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). But if the terms are undefined or ambiguous, a court will defer to an agency's reasonable interpretation. *See City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863, 1868 (2013); *see also Me. Public Utilities Comm'n v. FERC*, 454 F.3d 278, 285 (D.C. Cir. 2006) ("To the extent that the FPA does not expressly address this question, FERC's interpretation of its authority under Section 205 is permissible and therefore entitled to deference by the court under step two of the *Chevron* analysis.").

II. THE COMMISSION REASONABLY FOUND THAT IT MUST DETERMINE WHETHER AN AGREEMENT'S CHARACTERISTICS MAKE IT SUBJECT TO THE *MOBILE-SIERRA* PRESUMPTION

In Southwest Power Owners' view, "so long as a contract is a 'valid' or 'freely-negotiated' contract, e.g., a contract 'resulting from fair, arms-length negotiations,' the Commission's authority to abrogate the contract is limited by the *Mobile-Sierra* presumption." *See* Pet. at 22-23. But as the Commission found, the Federal Power Act – along with the Supreme Court and this Court's precedent – also require the Commission to determine whether the agreement contains "prescriptions of general applicability," and is thus akin to a tariff, or

"contractually negotiated rates" subject to the *Mobile-Sierra* presumption. Initial Order at PP 126-28, JA 464-65; Rehearing Order at P 94, JA 717.

A. The Federal Power Act And Supreme Court Precedent Distinguish Between Generally-Applicable Tariffs And Individually-Negotiated Contracts For *Mobile-Sierra* Purposes

Section 205(c) of the Federal Power Act, 16 U.S.C. § 824d(c), requires that utilities file with the Commission "schedules showing all rates and charges" for any jurisdictional transmission or sale, "together with all contracts which in any manner affect or relate to" such rates or charges. Under the statute, utilities may set rates by filing "compilations of their rate schedules, or 'tariffs,' with the Commission," or they may set rates "with individual electricity purchasers through bilateral contracts." *Morgan Stanley*, 554 U.S. at 531 (citing Federal Power Act §§ 824d(c), (d)); *see also NRG*, 558 U.S. at 171 (Federal Power Act "allows regulated utilities to set rates unilaterally by tariff; alternatively, sellers and buyers may agree on rates by contract"); *New England Power Generators*, 707 F.3d at 366 (same).

The *Mobile-Sierra* presumption of reasonableness applies only to "the authority of the Commission to modify rates set bilaterally by contract rather than unilaterally by tariff." *Morgan Stanley*, 554 U.S. at 532. For example, *United Gas Pipeline Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 115 & n.8 (1958), held that *Mobile-Sierra* does not apply to so-called "tariff and service" contracts that do not contain an individually-negotiated rate, but rather "refer to

rate schedules of general applicability on file with the Commission." *See also Verizon*, 535 U.S. at 478-79 (tariff schedules are reviewed under the ordinary just and reasonable standard, whereas negotiated contracts are subject to *Mobile-Sierra*); *New England Power Generators*, 707 F.3d at 366 (same).

In addition, as Southwest Power Owners recognize, Pet. at 22-23, the Commission must only presume that a contract rate is just and reasonable if it "result[s] from fair, arms-length negotiations." *NRG*, 558 U.S. at 174-75. *Accord Morgan Stanley*, 554 U.S. at 554 (*Mobile-Sierra* is premised upon "contract rates [that] are the product of fair, arms-length negotiations"). That is because *Mobile-Sierra* is "grounded in the commonsense notion that '[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a just and reasonable rate as between the two of them.'" *Morgan Stanley*, 554 U.S. at 545 (quoting *Verizon*, 535 U.S. at 479).

B. The Commission Reasonably Determined That *Mobile-Sierra* Only Applies To Agreements Containing The Characteristics Upon Which The *Mobile-Sierra* Doctrine Is Premised

While Southwest Power Owners point to the fact that the Membership Agreement is a valid contract, *see* Pet. at 23-25, the Commission reasonably found that not all contracts are entitled to *Mobile-Sierra* protection. Rehearing Order at P 98, JA 718-19; *see also* Initial Order at P 126 ("[T]he fact that a federal right of

first refusal is contained in a contract does not establish that the contract is entitled to a *Mobile-Sierra* presumption. The *Mobile-Sierra* presumption applies to a contract only if the contract has certain characteristics that justify the presumption."), JA 464. While bilateral power sales contracts negotiated at arm's length may generally come within the presumption, the Southwest Power Owners' overly-broad approach would inappropriately include agreements that are incorporated into all present and future customers' service agreements, even though they are properly classified as tariff rates. Rehearing Order at P 98, JA 718-19; Initial Order at P 128 (citing orders finding the *Mobile-Sierra* presumption inapplicable to settlements whose terms will be incorporated into the service agreements of all present and future shippers: *Carolina Gas Transmission Corp*., 136 FERC ¶ 61,014 at P 17 (2011); *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105 at P 19 (2011); *Petal Gas Storage, L.L.C.*, 135 FERC ¶ 61,152 at P 12 (2011); *Southern LNG Co., LLC*, 135 FERC ¶ 61,153 at P 19 (2011)), JA 465.

Both tariffs and *Mobile-Sierra* agreements involve contractual relationships. As this Court has recognized, a tariff is "the contract which governs a pipeline's service to its customers." *ANR Pipeline Co. v. FERC*, 931 F.2d 88, 90 n.1 (D.C. Cir. 1991); *accord MCI Telecom. Corp. v.* FCC, 917 F.2d 30, 38 (D.C. Cir. 1990) (a tariff can be reached through negotiations and then made generally available); *see also Metro E. Ctr. for Conditioning & Health v. Qwest Commc'n Int'l, Inc*.,

294 F.3d 924, 926 (7th Cir. 2002) ([t]he tariff is an offer that the customer accepts by using the product"). Tariffs differ from private contracts not in the creation of a contractual relationship but because tariffs, unlike private contracts, "are not subject to alteration one customer (or one clause) at a time." *Metro East*, 294 F.3d at 926; *see MCI Telecom. Corp.*, 917 F.2d at 38 (a tariff provides a generally applicable rate following negotiations). A tariff is a "take-it-or-leave-it proposition" and thus not an "agreement" in the sense that it is reached by individual negotiation. *Metro East*, 294 F.3d at 926.

The Supreme Court and this Court have recognized this distinction. In *NRG*, the Supreme Court held that application of the *Mobile-Sierra* standard "does not depend on the identity of the complainant" and, therefore, applies not only to contracting parties, but also to third parties challenging the auction rates. 558 U.S. at 174, 176. Since the court below had not ruled on the separate argument that the *Mobile-Sierra* presumption does not apply to the auction rates because they are "prescriptions of general applicability," rather than "contractually negotiated rates," the Court remanded the issue of "whether the rates at issue qualify as 'contract rates,' and, if not, whether FERC has discretion to treat them analogously." *Id*. at 176. The D.C Circuit, in turn, remanded these issues to the Commission. *Me. Pub. Utils. Comm'n v. FERC*, 625 F.3d 754, 759 (D.C. Cir. 2010).

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

On appeal, this Court recognized the need to differentiate between tariff and contract rates with regard to a new instrument. While the Court found that, "[u]ntil recently, only two types of rates were involved: tariff rates and contract rates," the Court recognized that "[t]he debut of capacity auctions poses a new challenge." *See New England Power Generators*, 707 F.3d at 366. Ultimately, however, this Court did not reach the merits of the Commission's determination that the capacity auction rates are not contract rates requiring application of the *Mobile-Sierra* presumption, finding it lacked jurisdiction to consider petitioners' arguments. *Id.* at 369. "Assuming, without deciding, that the auction rates are not contract rates," the court found it was within the Commission's "considerable discretion" under the just and reasonable standard to adopt the public interest standard for the capacity auction rates. *Id.* at 370-71.

So although the Courts did not reach the merits of the Commission's determination that auction rates are more akin to tariff rather than contract rates, both *NRG* and *New England Power Generators* recognized the need to determine

whether a particular instrument qualifies as the type of particular "contract" to which the *Mobile-Sierra* presumption applies.

This Court has further recognized that the Commission's market-oriented reforms – specifically, the rise of regional transmission organizations – have resulted in agreements that do not neatly fit as tariff rates or *Mobile-Sierra* contract rates. In *Maine Public Utilities Commission*, this Court expressed doubt that *Mobile-Sierra* applies to a transmission operating agreement among transmission owners in the regional transmission organization covering New England, because the "contract is a complex agreement establishing a new regional structure impacting all market participants." 454 F.3d at 284. This Court continued that "[t]his hardly seems the situation *Mobile-Sierra* was designed to guard against, *viz.*, where one party to a rate contract on file with FERC attempts to effect a unilateral rate change by asking FERC to relieve its obligations under a contract whose terms are no longer favorable to that party." *Id.* (citations omitted).

C. The Commission Reasonably Determined When An Agreement Should Be Characterized As A Tariff Or An Individually-Negotiated Contract

As the Supreme Court has found that the *Mobile-Sierra* presumption only applies to certain agreements, the Commission must determine whether an agreement has those characteristics. To do so, the Commission must, in the first instance, differentiate between "rate schedules or 'tariffs'" and "contracts" under

the Federal Power Act. *See Morgan Stanley*, 554 U.S. at 531. These terms are undefined in the statute. The Commission therefore – contrary to the Southwest Power Owners' claims – has discretion to interpret these terms. *See New England Power Generators*, 707 F.3d at 371 ("Whether the auction results are contract rates or not, FERC's determination that the logic of *Mobile-Sierra* still applied is a 'reasonable choice within a gap left open by Congress' and so within the purview of the agency's discretion under § 205(a) of the FPA.") (quoting *Chevron*, 467 U.S. at 866).

In applying this discretion, the Commission reasonably determined what characteristics identify an agreement as a tariff or as a contract entitled to the *Mobile-Sierra* presumption. Pursuant to the Federal Power Act, the Commission has defined a "tariff" as a "'statement of . . . electric service . . . offered on a generally applicable basis.'" Rehearing Order at P 106 (quoting 18 C.F.R. § 35.2(c)(1)), JA 722. *See also United Gas Pipeline Co.*, 358 U.S. at 115 & n.8 (distinguishing an individually negotiated contract from contracts incorporating generally applicable tariff rates).

By contrast – as noted – "FERC itself must presume just and reasonable a contract rate resulting from fair, arms-length negotiations." *NRG*, 558 U.S. at 174-75. The Commission therefore need not apply the *Mobile-Sierra* presumption to contracts that do not "result[] from" such individualized negotiations. *See id.*

On this basis, the Commission reasonably concluded that an agreement has the characteristics of a tariff if it includes "rates, terms, or conditions" that are "generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations." Rehearing Order at P 106, JA 722. The *Mobile-Sierra* presumption, by contrast, applies to "individualized rates, terms, or conditions" between "sophisticated parties who negotiated them freely at arm's length." Initial Order at P 127, JA 465. The Commission found such a distinction not only authorized by its discretion under the Federal Power Act but also consistent with precedent. *See* Initial Order at P 130 ("We note that, in its most recent statement on the *Mobile-Sierra* doctrine, the U.S. Supreme Court acknowledged the potential distinction between 'prescriptions of general applicability' and 'contractually negotiated rates.'") (*quoting NRG*, 558 U.S. at 176), JA 466.

III. THE COMMISSION REASONABLY DETERMINED THAT THE MEMBERSHIP AGREEMENT HAS THE CHARACTERISTICS OF A GENERALLY APPLICABLE TARIFF

A. The Commission's Determination That The Membership Agreement Is Akin To A Generally Applicable Tariff Was Based On Substantial Evidence

In applying this standard, the Commission reasonably determined, based upon substantial evidence, that the Membership Agreement had the characteristics

of a prescription of general applicability, or tariff, rather than an individualized, negotiated contract.

As Southwest Power acknowledges, the Membership Agreement was a standardized form contract submitted to the Commission for approval. Rehearing Order at P 100, JA 720. New Southwest Power members must accept the Membership Agreement as-is, with limited room for negotiation. Initial Order at P 131, JA 466-67; *see also* Rehearing Order at P 101 ("Prospective SPP members must accept [the right of first refusal] provision with limited room for negotiation."), JA 720-21. "As a result, new SPP Transmission Owners are placed in a position that differs fundamentally from that of parties who are able to negotiate freely, like buyers and sellers entering into a typical power sales contract that would be entitled to a *Mobile-Sierra* presumption." Initial Order at P 131, JA 466-67. *See also* Rehearing Order at P 101, JA 720-21.

Southwest Power conceded that "'any entity desiring to enroll in the SPP region for purposes of compliance with Order No. 1000 may become a member of SPP by executing the Membership Agreement and undertaking the obligations of a Transmission Owner under the Membership Agreement . . . .'" Initial Order at P 27 (quoting SPP Transmittal Letter at 28, JA 70), JA 419. Prospective members are required to execute the agreement in full and need only return the signature page to Southwest Power. *See* Missouri Public Service Comm'n Protest at 9 n.23

(asserting that the Membership Agreement does not appear to be a "freely negotiated agreement" because new members are required to 'sign the agreement' as is) (quoting SPP 'Become a Member,' available at http://www.spp.org/section.asp?pageID=211), JA 291.

Amending the Membership Agreement requires an affirmative vote of at least five of seven directors. Initial Order at P 131 (citing Membership Agreement, § 8.12 (Amendment); Bylaws §4.2.1), JA 466. A prospective member cannot eliminate the right of first refusal provision simply by negotiating with Southwest Power. Rehearing Order at P 103, JA 721. Instead, as Southwest Power acknowledges, any modification must be negotiated with all the other parties that have entered the Membership Agreement – meaning 90 members. *Id.*

The Commission therefore reasonably concluded that prospective members face significant barriers to eliminating any provision, requiring new members to accept the right of first refusal as-is. Rehearing Order at P 103, JA 721; Initial Order at P 131, JA 466-67.

B. The Southwest Power Owners' Arguments Do Not Undermine The Commission's Conclusions

Southwest Power Owners make much of initial negotiations that resulted in the Membership Agreement, asserting that the Agreement was negotiated by a task force and that the terms were critical for those task force members. *See* Pet. at 40;

see also Pet. at 26 ("In the lead-up to the initial filing of the Membership Agreement with the Commission in 1999, the Membership Agreement was negotiated by a task force . . . ."). *See also id*. at 41 (noting that 13 transmission-owning members (who were in some cases different from task force members) agreed to participate in the Southwest Power Pool tariff in 1999).

Yet the evidence of original negotiations shows nothing about the ability of entities joining Southwest Power after the 1999 filing to negotiate provisions of the Agreement or negate the generally applicable characteristics. The Commission clarified that what matters is not how the Membership Agreement was drafted, but its effect on prospective members after it was submitted to the Commission for approval. Rehearing Order at P 100, JA 720. Once filed, the Membership Agreement became a "standardized form contract" that an entity must enter with Southwest Power. *See id.* As this Court has recognized, a tariff can be "based upon contracts," namely "negotiations between a carrier and an individual customer" that result in the agreement being "made generally available to other similarly situated customers." *MCI Telecom. Corp.*, 917 F.2d at 38. *See also Fla. E. Coast Ry. Co. v. CSX Transp., Inc*., 42 F.3d 1125, 1130 n.5 (7th Cir. 1994) (holding that tariffs like contracts can be based upon private negotiations; the difference is that tariffs are then made generally available while contracts remain private).

Southwest Power Owners point out that no customer can take transmission service under the Membership Agreement, Pet. at 38, but that does not change the fact that the Membership Agreement "define[s] the rights, obligations and duties of SPP and SPP's members." *Id*. at 9, 40. *See, e.g.*, *Southwest Power Pool, Inc*., 109 FERC ¶ 61,009 at P 34 (2004) (finding that "the Membership Agreement is a filed tariff"), *on reh'g*, 110 FERC ¶ 61,137 (2005). While the Membership Agreement may not take the form of a traditional tariff, this Court has recognized that new instruments arising from the Commission's regional market reforms "pose[] a new challenge." *See New England Power Generators*, 707 F.3d at 366. *See also, e.g*., *Me. Public Utilities Comm'n*, 454 F.3d at 284 (expressing doubt that *Mobile-Sierra* applied where the "contract is a complex agreement establishing a new regional structure impacting all market participants").

The negotiations associated with the 2008 additions to the Membership Agreement, *see* Pet. at 42-43, also do not undermine the Commission's conclusion that new members must accept the agreement as-is. As the Commission found, the 2008 negotiations did not modify any existing provisions to the Membership Agreement. *See* Rehearing Order at P 102, JA 721. The amendments added provisions that preserved tax-exempt status and other special legal requirements for newly joined public power entities. *Id. See Southwest Power Pool, Inc*., 127 FERC ¶ 61,078 at P 3 (2009) (noting that the 2008 revisions to the Membership

Agreement "were designed to acknowledge the Nebraska Entities' non-jurisdictional status, accommodate their obligations under state and municipal law, and prevent any changes to their tax exempt status"). The amendments did not lessen the burden a prospective member would face in altering existing provisions. Rehearing Order at P 102, JA 721. Nor did they demonstrate that a prospective member has been able to modify existing provisions. *See id.*

Nor is the voluntary nature of the Membership Agreement relevant. *See* Pet. at 41. As the Commission found, voluntariness does not alter the character of the agreement – it underscores it. Rehearing Order at P 104, JA 721-22. "The fact that an entity has the option of either voluntarily accepting those terms and conditions or not transacting at all demonstrates that they constitute a provision of general applicability." *Id.*

Southwest Power Owners complain that, in the Initial Order, the Commission found only that section 3.3 is a provision of general applicability, leading Owners to speculate that the Commission may rely on a single provision of general applicability to find an entire contract "ineligible for the *Mobile-Sierra* presumption." Pet. at 33, 35. *See also id*. at 30 (arguing that under the Commission's analysis, "[i]f a contract includes a single tariff-like provision, then the contract no longer qualifies for the *Mobile-Sierra* presumption") (citing Initial Order at P 127, JA 465). As the Commission made clear in the Initial Order,

however, the Commission made no such finding regarding the remainder of the Membership Agreement. *See* Initial Order at P 129, JA 465-66 (finding that, while section 3.3 lacks the characteristics necessary for *Mobile-Sierra*, '[o]ther provisions of the Membership Agreement not at issue in this proceeding may have those characteristics. Given the breadth and complexity of the Membership Agreement, we find that it is neither practical nor necessary to evaluate whether the preponderance of the Membership Agreement's provisions include tariff rates or contract rates.").

Further, as Southwest Power Owners acknowledge, Pet. at 34, the Commission on rehearing found – as demonstrated by the above-referenced evidence – that the Membership Agreement as a whole is a "form contract." Rehearing Order P 100, JA 720. As such, "the Membership Agreement must be viewed in its entirety as containing rates, terms or conditions that are generally applicable to all entities seeking SPP membership." *Id.* More specifically, as part of this form contract, section 3.3 itself qualifies as a provision of general applicability. *Id*. at P 101, JA 720-21.

Accordingly, the Commission orders did not find, as Southwest Power Owners contend, that a single provision of general applicability caused the entire Membership Agreement to be ineligible for *Mobile-Sierra* protection. Rather, the Commission found that the entire Agreement, including section 3.3, constitutes a

generally applicable form contract that is more akin to a tariff than an individually negotiated contract rate.

The Commission's review of the Membership Agreement "years after" the Commission found the Membership Agreement to be just and reasonable is beside the point. *See* Pet. at 32; 36 ("Here, for example, FERC found SPP's Membership Agreement to be just and reasonable in 1999."). *Morgan Stanley* rejected the proposition that *Mobile-Sierra* depends upon or arises from a prior finding by the Commission that a contract is just and reasonable, 554 U.S. at 544, or that *Mobile-Sierra* should apply differently "depending on *when* a contract rate is challenged." *Id*. at 545. *Mobile-Sierra* is not an estoppel doctrine, "whereby an initial Commission opportunity for review prevents the Commission from modifying the rates absent serious future harm to the public interest." *Id*. at 546.

Rather, for contracts to which the *Mobile-Sierra* presumption applies, *Mobile-Sierra* "provide[s] a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context – a definition that applies regardless of when the contract is reviewed." *Id*. at 546. Because *Mobile-Sierra* applies in the same manner regardless of when a contract is challenged, the fact that the Commission initially approved the Membership Agreement – including Section 3.3's right of first refusal provision – under the ordinary just and

reasonable standard supports rather than undermines the Commission's determination that the *Mobile-Sierra* presumption does not apply.

IV. THE COMMISSION REASONABLY DETERMINED THAT THE *MOBILE-SIERRA* PRESUMPTION DOES NOT APPLY BECAUSE THE RIGHT OF FIRST REFUSAL PROVISION DID NOT RESULT FROM ARM'S-LENGTH BARGAINING

Alternatively, the Commission reasonably found that the *Mobile-Sierra* presumption does not apply to the Membership Agreement's right of first refusal provision because it resulted from the transmission owners' common interest rather than arm's-length bargaining. Initial Order at P 133, JA 467; *see also id.* at PP 127-28, 132, 134, JA 465, 467; Rehearing Order at PP 95-100, 106, JA 717-20, 722. *See NRG*, 558 U.S. at 174 (FERC "must presume just and reasonable a contract rate resulting from fair, arms-length negotiations"); *Morgan Stanley*, 554 U.S. at 554 (*Mobile-Sierra* is premised upon "contract rates [that] are the product of fair, arms-length negotiations."); *see also Pierce v. SEC*, 786 F.3d 1027, 1034 (D.C. Cir. 2015) ("A reviewing court will uphold an agency action resting on several independent grounds if any of those grounds validly supports the result."). That is because *Mobile-Sierra* is "grounded in the commonsense notion that '[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a just and reasonable rate as between the two of them.'" *Morgan Stanley*, 554 U.S. at 545 (quoting *Verizon*, 535 U.S. at 479).

While Southwest Power Owners recognize the requirement that a contract "'result from fair, arms-length negotiations,'" *see* Pet. at 23 (quoting *NRG*, 558 U.S. at 174-75), they claim that *Morgan Stanley* limits contract formation defenses to those that would support abrogation of the contract. *Id*. *See also id*. at 44-45. *Morgan Stanley*, however, established that the presumption is premised upon the assumption that fair, arm's-length negotiations will result in a just and reasonable rate. 554 U.S. at 554. Anything that undermines that assumption "eliminates the premise on which the *Mobile-Sierra* presumption rests." *Id*. The contracts at issue in *Morgan Stanley* were of the same type at issue in *Mobile* and *Sierra* – bilateral power sales agreements between willing buyers and sellers who have obviously opposing "arms-length" interests. *See id*. at 532-33, 541. Under such circumstances, the Court required proof of seller behavior that "directly affects contract negotiations" to undermine the *Mobile-Sierra* premise of fair, arm's-length negotiations. *Id*. at 554.

But here, the Membership Agreement at issue is far removed from the paradigmatic example of bilateral rate-setting contracts between willing buyers and sellers. Accordingly, the Commission reasonably considered whether the contract provision at issue, the right of first refusal provision, fairly could be considered to have been negotiated at arm's-length. Thus, while grounds for contract abrogation can undermine the assumption of fair, arm's-length negotiations, *see id*. at 547, so

can other circumstances of contract formation, such as a contract provision agreed upon between parties with common interests to exclude competition.

In determining what constitutes arm's-length negotiations, the Commission concluded – based upon precedent – that arm's-length means "adversarial negotiations between parties that are each pursuing independent interests." Rehearing Order at P 96 (citing *Santomenno v. Transamerica Life Ins. Co.*, 2013 WL 603901, at *6 (C.D. Cal.)), JA 718. A "'typical arm's length transaction involves an adversarial negotiation in which the parties have independent interests and each tries to obtain the best deal for itself.'" Rehearing Order at P 96 (quoting *A.T. Kearney, Inc. v. Int'l Bus. Machines Corp.*, 73 F.3d 238, 242 (9th Cir. 1995)), JA 718. The hallmark of such negotiations is bargaining that is "'negotiated rigorously, selfishly and with an adequate concern for price.'" Rehearing Order at P 96 (quoting *Jeanes Hosp. v. Sec'y of HHS*, 448 F. App'x 202, 206 (3d Cir. 2011)), JA 718. The basis for only applying the *Mobile-Sierra* presumption to such transactions is that the "pursuit of self-interest in competitive markets promotes economic efficiency." Rehearing Order at P 98 (citing *Morgan Stanley*, 554 U.S. at 530), JA 718-19.

By contrast, the Commission found that "if negotiating parties have a common economic interest in the outcome of negotiations, they cannot bargain at arm's length." Rehearing Order at P 97, JA 718. This is particularly true if the

parties are protecting themselves from competition. *See* Initial Order at P 133, JA 467.

The Commission here determined that the Membership Agreement did not arise from such arm's-length, adversarial negotiations. *See* Initial Order at P 133, JA 467; Rehearing Order at P 100, JA 700. Rather, the Commission found that the right of first refusal provision was aimed at restricting competition by preventing the entry of competing transmission owners into particular markets. *See* Initial Order at P 133, JA 467; Rehearing Order at P 109, JA 723-24.

Although Southwest Power Owners argue that the Membership Agreement was negotiated "between unaffiliated parties with distinct interests," Pet. at 25, they point to no opposing party in the Membership Agreement negotiations with an incentive to limit the rights of transmission owners to exclude non-incumbent development. Transmission owners may have had certain interests that were "distinct" from the interests of other transmission owners, Pet. at 27, 45, but on this issue their interests were aligned.

The Commission's finding is not predicated upon the transmission owners being competitors in all matters. Rather, while the transmission owners may have different, competing interests regarding sales of energy and the other matters they proffered, they had a common interest in the right of first refusal provision, which protects them from competition in transmission development. *See* Rehearing

Order at P 109, JA 723-24; Initial Order at PP 132-133, JA 467; *see also South Carolina*, 762 F.3d at 77 (the Commission can rest anti-competitive findings on economic competition theory); Pet. at 41 (citing *Southwest Power Pool*, 82 FERC ¶ 61,267, at 62,050 n.2 (1998)) (noting that the Membership Agreement was initially adopted by 13 transmission owners). Because the Membership Agreement – by its terms – "restrict[s] competition by preventing entry into the market" – the Commission reasonably concluded that that the right of first refusal provision was aimed at protecting transmission owners from competition. Rehearing Order at P 109, JA 723-24.

Southwest Power Owners likewise contend that "SPP itself was a party with interests distinct from the interests of the individual Transmission Owners." Pet. at 45. But as the Commission found, Southwest Power is "not a commercial entity that acts solely in its own self-interest." Rehearing Order at P 100, JA 720. *See, e.g.*, *Morgan Stanley*, 554 U.S. at 536-37 (independent system operators are "not-for-profit entities that operate transmission facilities in a nondiscriminatory manner"); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 803 (D.C. Cir. 2007) (independent system operator motivated to ensure grid stability and reliability). So the execution of the Membership Agreement between Southwest Power and a joining member could not be characterized as each party "promot[ing] its

individual economic interest, a central feature of arm's-length bargaining." Rehearing Order at P 100, JA 720.

CONCLUSION

For the foregoing reasons, Oklahoma Gas's petition should be denied and the Commission's orders should be upheld.

Respectfully submitted,

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Federal Energy Regulatory Commission

December 2, 2015

Washington, D.C. 20426

Okla. Gas & Elec. Co. v. FERC **Docket Nos. ER13-366; ER13-367**
No. 14-1281

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(5), Fed. R. App. P. 32(a)(6), and Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Final Brief of Respondent Federal Energy Regulatory Commission contains 8,804 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum, and has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point, Times New Roman font.

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December 2, 2015

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injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 703. Form and venue of proceeding

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.
801. Congressional review.
802. Congressional disapproval procedure.
803. Special rule on statutory, regulatory, and judicial deadlines.
804. Definitions.
805. Judicial review.
806. Applicability; severability.
807. Exemption for monetary policy.
808. Effective date of certain rules.

§ 801. Congressional review

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

(i) a copy of the rule;

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

(iii) the proposed effective date of the rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

commission's regulatory responsibilities affecting the provision of electric service.

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

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

Section 214 of Pub. L. 95–617 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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

Power Act absent the agreement of all parties thereto.

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

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

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

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

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

§ 35.2 Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 2nd day of December 2015, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system:

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