ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 15-1447

STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Washington, D.C. 20426

October 18, 2016

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in Petitioner's Rule 28(a)(1) certificate.

B. Rulings Under Review

1. *Southwest Power Pool, Inc.*, 149 FERC ¶ 61,113 (2014), JA 414;

2. *Southwest Power Pool, Inc.*, 153 FERC ¶ 61,051 (2015), JA 477.

C. Related Cases

This case has not previously been before this Court or any other court. There are no related cases pending judicial review.

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

October 18, 2016

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GLOSSARY

Basin Electric	Basin Electric Power Cooperative
Commission	Federal Energy Regulatory Commission
FERC	Federal Energy Regulatory Commission
First Order	*Southwest Power Pool, Inc.*, 149 FERC ¶ 61,113 (2014)
Heartland	Heartland Consumers Power District
Integrated Marketplace	Southwest Power Pool's centralized day ahead and real-time energy and operating reserve markets
Integrated System	A transmission system owned by the Western Area Power Administration, Basin Electric, and Heartland
Integrated System Parties	Western Area Power Administration, Basin Electric, and Heartland
Rehearing Order	*Southwest Power Pool, Inc.*, 153 FERC ¶ 61,051 (2015)
Western Area Power Administration	The Western Area Power Administration - Upper Great Plains Region

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STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION RESPONDENT.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

In this proceeding, a regional transmission system operator, the Southwest Power Pool, submitted proposed changes to its Tariff, under Federal Power Act section 205, 16 U.S.C. § 824d, to facilitate the integration of public power transmission facilities into its system. The Federal Energy Regulatory Commission ("FERC" or "Commission") found that existing Southwest Power Pool members will benefit substantially from the integration, and approved the

proposed Tariff changes as just and reasonable and not unduly discriminatory. *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,113 (2014) ("First Order"), JA 414, *on reh'g*, 153 FERC ¶ 61,051 (2015) ("Rehearing Order"), JA 477.

The issue on appeal is whether the Commission reasonably approved Southwest Power Pool's proposed Tariff changes to facilitate the public power transmission facilities' integration into its system.

STATUTES AND REGULATIONS

The pertinent statutory and regulatory provisions are contained in the Addendum to this Brief.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. Open Access Transmission, Regional Transmission Organizations, And Order No. 2000

"Historically, electric utilities were vertically-integrated, owning generation, transmission, and distribution facilities and selling these services as a 'bundled' package to wholesale and retail customers in a limited geographical service area." *Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC*, 272 F.3d 697, 610 (D.C. Cir. 2001). The Commission found that it was in the economic interest of these vertically integrated utilities to deny transmission service to others altogether,

or to offer it on terms less favorable to those offered to themselves.[1] To remedy these anti-competitive practices, the Commission, in 1996, issued Order No. 888, which directed public utilities to adopt open access transmission tariffs containing minimum terms for non-discriminatory service. Order No. 888 at 31,770.

The electric industry changed significantly in response to Order No. 888. *Snohomish Cnty.*, 272 F.3d at 610. The availability of open access transmission service resulted in far greater reliance on wholesale markets to provide generation resources, which increased interregional electricity transfers and put new stresses on regional transmission systems. *Id.*

In response, in 1999 the Commission issued Order No. 2000[2] to advance the formation of regional transmission organizations to remedy two identified remaining barriers to a competitive wholesale electric market: (1) engineering and economic inefficiencies in the current transmission grid; and (2) lingering

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[1] *See Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. Preambles ¶ 31,036 at 31,682 (1996), *clarified*, 76 FERC ¶¶ 61,009 and 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & 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 Transm. Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[2] *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs ¶ 31,089 (1999), 65 Fed. Reg. 810 (2000) ("Order No. 2000"), *on reh'g*, Order No. 2000-A, FERC Stats. & Regs ¶ 31,092, 65 Fed. Reg. 12,088 (2000).

opportunities for transmission owners to discriminate to favor their own activities. *Snohomish Cnty.*, 272 F.3d at 611.

As pertinent here, Order No. 2000 determined that public power participation would enhance a regional transmission organization's reliability and economic benefits and, therefore, that "a properly formed [regional transmission organization] should include all transmission owners in a specific region, including municipals, cooperatives, [and] Federal Power Marketing Agencies . . . ." Order No. 2000 at 31,200-01; *see also id.* at 31,201 ("participation by public power entities and cooperatives is vital to ensure that each [Regional Transmission Organization] is appropriate in size and scope."). Thus, Order No. 2000 encouraged accommodating public power entities' and cooperatives' participation in regional transmission organizations and stated that the Commission would review proposals regarding their participation flexibly and on a case-by-case basis. *Id.* at 31,201; *see also Southwest Power Pool, Inc.*, 125 FERC ¶ 61,239 at P 15 (2008) (same); *TRANSLink Transmission Co., L.L.C.*, 101 FERC ¶ 61,140 at P 26 (2002) (same); R. 111, Kansas Commission Request for Rehearing at 19, JA 472 (Order No. 2000 stated that the Commission "would be flexible and would analyze proposals to include non-jurisdictional public power entities into [a regional transmission organization] on a 'case-by-case basis'").

B. The Federal Power Act And The Energy Policy Act of 2005

Federal Power Act section 205, 16 U.S.C. § 824d(a) and (b), requires that rates charged by public utilities for the transmission or sale of electric energy subject to the Commission's jurisdiction are just and reasonable and not unduly discriminatory.

Section 1232 of the Energy Policy Act of 2005, 42 U.S.C. § 16431, provides a statutory framework for federal power marketing agencies[3] to transfer control and use of their transmission systems to regional transmission organizations.

II. Southwest Power Pool And The Integrated System

Southwest Power Pool is a regional transmission organization that operates its members' transmission facilities in portions of Arkansas, Kansas, Louisiana, Missouri, Nebraska, New Mexico, Oklahoma and Texas. R.2, Transmittal Letter at 4, JA 26.

The Integrated System -- "the backbone of the bulk electric transmission system across seven states in the Upper Great Plains region" -- is a 9,500 mile transmission system from the Canadian border into Nebraska and from Eastern Montana and Wyoming into western Minnesota and Iowa. *Id.* at 6, JA 28. The Integrated System is owned by the Western Area Power Administration - Upper

[3] A federal power marketing agency is "any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy." FPA section 3(19), 16 U.S.C. § 796(1).

Great Plains Region ("Western Area Power Administration"), Basin Electric Power Cooperative ("Basin Electric"), and Heartland Consumers Power District ("Heartland") (collectively, "Integrated System Parties"). First Order at P 7, JA 415-16; Rehearing Order at P 10, JA 479. The Integrated System is a highly integrated and jointly planned system built to facilitate the delivery of power from federal hydro resources to preference power customers within that system and to neighboring systems. First Order P 51, JA 427.

The Western Area Power Administration is a federal power marketing agency that owns and operates transmission facilities throughout the Upper Great Plains Region. First Order at P 4, JA 415; Rehearing Order at P 7, JA 479. Basin Electric is a not-for-profit electric generation and transmission cooperative organized to meet the energy needs of its members that are not met by the Western Area Power Administration. R.2, Transmittal Letter at 6, JA 28; Rehearing Order at P 8, JA 479. Heartland is a public corporation and political subdivision of South Dakota that supplies wholesale power to municipalities, state agencies and an electric cooperative in South Dakota, Minnesota and Iowa. *Id.* at P 9, JA 479.

In 2012, the Integrated System Parties engaged the Brattle Group to analyze which regional transmission organization they should join -- Southwest Power Pool or the Midcontinent Independent System Operator, Inc. (commonly known as "MISO"). R.2, Exh. SPP-3 at 5, JA 81. During the analysis, Southwest Power

Pool staff "had extensive discussions with the [Integrated System] Parties and the Brattle Group and provided information about [Southwest Power Pool], including the design of the Integrated Marketplace[4]." *Id.* at 5-6, JA 81-82. The Brattle Group completed the analysis in March 2013, and the Integrated System Parties determined that they would negotiate terms and conditions to join Southwest Power Pool. *Id.* at 6, JA 82.

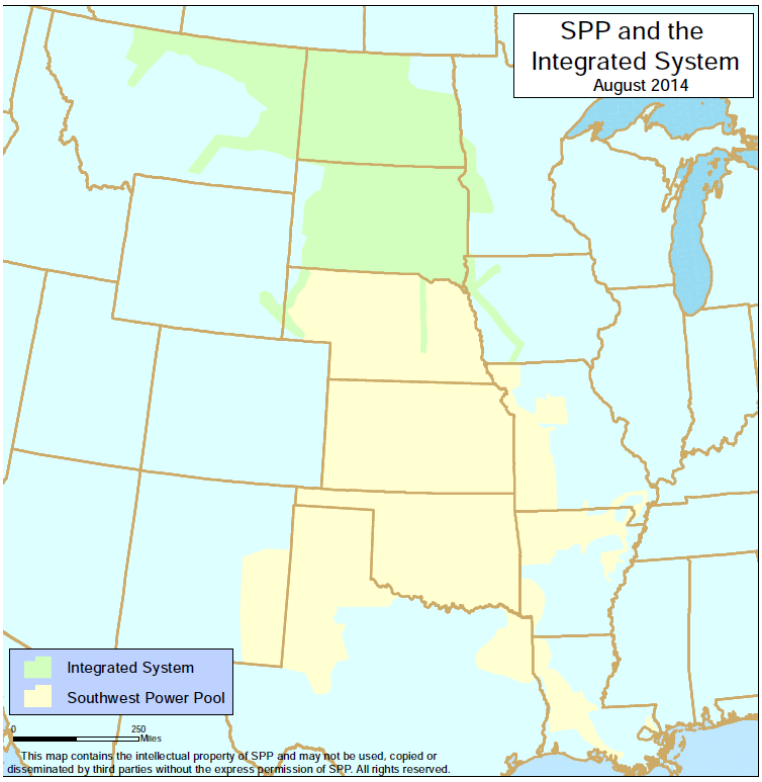
III. Southwest Power Pool's Tariff Filing

On September 11, 2014, Southwest Power Pool submitted a Federal Power Act section 205, 16 U.S.C. § 824d, filing with the Commission proposing revisions to its Tariff to facilitate the Integrated System Parties' decision to join Southwest Power Pool. R.2, Transmittal Letter at 1, JA 23. In support of its filing, Southwest Power Pool attached the testimony of its Executive Vice President and Chief Operating Officer, Mr. Carl Monroe. R.2, Exh. SPP-3 (Monroe Testimony), JA 76-111.

Southwest Power Pool explained that the Integrated System's 9,500 miles of transmission lines across a seven-state region would substantially expand Southwest Power Pool's existing 48,930 mile transmission line system. *Id.* at 2, 4, 6, 42, JA 24, 26, 28, 64. Exhibit SPP-19 (JA 239-41) illustrates Southwest Power

[4] The "Integrated Marketplace" is Southwest Power Pool's centralized day ahead and real-time energy and operating reserve markets. R.2, Transmittal Letter at 4, JA 26.

Pool's footprint before and after integration:



Moreover, Southwest Power Pool pointed out, the Integrated System is unique, as it spans the Eastern and Western Interconnections of the United States' electric grid. R.2, Transmittal Letter at 6-7, JA 28-29.

Southwest Power Pool proposed, as relevant here, that the Integrated System Parties would continue to fund their legacy transmission system (i.e., their existing transmission facilities and planned transmission facilities with a need-by date prior the integration date, October 1, 2015). *Id.* at 20, 30-32, JA 42, 52-54. Likewise, Southwest Power Pool members would continue to fund Southwest Power Pool's legacy transmission system (i.e., its existing transmission facilities and planned transmission facilities with a need-by date prior to October 1, 2015). *Id.* at 20, 31,

JA 42, 53. Regional cost sharing would apply to projects in both the Integrated System footprint and the current Southwest Power Pool footprint with need-by dates of October 1, 2015 and later, i.e., after the integration. *Id.* at 31, JA 53.

Southwest Power Pool explained that this was consistent with how other Southwest Power Pool members entered into regional cost sharing under the Tariff. *Id.* Like here, those Southwest Power Pool members' legacy transmission facilities and projects with a need-by date prior to implementation of regional cost sharing were not eligible for regional cost sharing. *Id.* (citing R.2, Exh. SPP-3 (Monroe testimony) at 16, JA 92). Regional cost sharing occurred only on a going-forward basis. *Id.*

Furthermore, Southwest Power Pool explained that the proposed integration date of October 1, 2015 offered Southwest Power Pool and the Integrated System Parties "a reasonable amount of time to seek stakeholder and regulatory approvals as necessary, and satisfy all other operational requirements necessary to integrate the [Integrated System] Parties." *Id.* at 31-32, JA 53-54 (citing R.2, Exh. SPP-3 at 16-17, JA 92-93); *see also id.* at 3, JA 25.

In addition, Southwest Power Pool pointed out that its existing members would benefit substantially from the integration. *Id.* at 2, 10-11, 48, JA 24, 32-33, 70. Southwest Power Pool had "assessed the economic impacts of the [Integrated System] Parties' membership on current [Southwest Power Pool] members," and

this cost-benefit analysis showed that current members could expect approximately $334 million in net benefits over the ten years following the Integrated System's integration, as shown in the chart below. *Id.* at 10-11, JA 32-33 (citing R.2, Exh. SPP-3 at 10-11, JA 86-87).

Metric	10 Year Total	Net Present Value at 8% over 10 Years
Schedule 1-A (Membership Fee payments to Southwest Power Pool)	$185,889,000	$119,875,000
Schedule 1, 7 & 8 (Point-to-Point revenue allocations from Point-to-Point Transmission Service)	(50,830,000)	($34,107,000)
Schedule 11 (Base Plan Funding cost allocations taking into account an exemption for Western Area Power Administration's load obligations under Federal statute)	($107,698,000)	($76,522,000)
Reserve Sharing Benefits (Increased reserves existing Southwest Power Pool members would have to carry if Integrated System Parties joined MISO rather than Southwest Power Pool)	$34,380,000	$23,069,000
Integrated Marketplace Benefits (Savings based on results from Brattle Group study, the input assumptions and results of which Southwest Power Pool staff reviewed for reasonableness)	$272,375,000	$187,408,000
Benefits Total	$334,116,000	$219,723,000

R.2, Exh. SPP-3 at 10-11, JA 86-87.

In addition to these quantifiable benefits, the integration will benefit Southwest Power Pool's existing members by improving the grid's reliability and efficiency. *Id.* at 2, JA 24; R.2, Exh. SPP-3 at 12, JA 88. Specifically, by increasing the ability to commit and dispatch generation impacting 345 kilovolt flows through and out of Nebraska, generation curtailments on Southwest Power Pool's western side will decrease, and Southwest Power Pool's grid reliability and congestion management will increase. R.2, Exh. SPP-3 at 12, JA 88. Reduced generation curtailment will also increase the availability of lower-priced energy throughout Southwest Power Pool. *Id.* Moreover, Southwest Power Pool's members will have access to any lower-cost Western Area Power Administration hydropower generation in excess of its statutory load obligation. *Id.*

Southwest Power Pool further pointed out that the integration was consistent with the Commission's longstanding policy of encouraging public power participation in regional transmission organizations. R.2, Transmittal Letter at 2, 18 & n.67, JA 24, 40 (citing, *e.g.*, Order No. 2000 at 31,200-01; *Sw. Power Pool*, 125 FERC ¶ 61,239 at P 15; *TRANSLink*, 101 FERC ¶ 61,140 at P 26). It also "furthers the congressional preferences expressed in Section 1232 of the Energy Policy Act of 2005[,] which provides the basic roadmap to allow Federal entities to place transmission facilities under a Commission-jurisdictional open access tariff." *Id.*

IV. The Kansas Commission's Protest

The Kansas Commission protested this portion (and other portions not challenged on appeal) of Southwest Power Pool's tariff filing, arguing that, under the proposal, existing Southwest Power Pool members would be "unreasonably subsidizing" Southwest Power Pool's expansion. R.62, Kansas Commission's Protest at 7, JA 310. In support of its protest, the Kansas Commission submitted the testimony of its Senior Managing Auditor, Mr. John Bell. R. 62, Kansas Commission Protest Attachment, JA 337-78.

Mr. Bell's benefits analysis accepted Southwest Power Pool's analysis, Br. at 43, but added to it costs for Southwest Power Pool's legacy transmission facilities, R.62 (Bell Testimony) at 4-5, JA 341-42. Based on that adjustment, Mr. Bell concluded that existing Southwest Power Pool members would not benefit from the integration. *Id.*

V. The Challenged Orders

After reviewing the record, including both Mr. Monroe's and Mr. Bell's testimony, the Commission approved the tariff revisions at issue here as just and reasonable and not unduly discriminatory. First Order at PP 48-53, 61-63, 72-77, JA 427-28, 431-32, 435-36; Rehearing Order at PP 1-5, 7-10, 14, 19-22, 35-42, JA 477-80, 482-83, 488-91.

The Commission determined that the record showed Southwest Power Pool's existing customers would benefit substantially from the proposed integration. First Order at PP 53, 75, JA 428, 436; Rehearing Order at P 21, JA 482-83. The integration will significantly expand Southwest Power Pool's footprint, increase Southwest Power Pool's grid efficiency and reliability, and provide Southwest Power Pool's existing members with more than $334 million in quantifiable net benefits. First Order at PP 53, 75, JA 428, 436; Rehearing Order at P 21, JA 482-83. The Commission found that the proposal was a practical, reciprocal just and reasonable and not unduly discriminatory cost allocation approach that was consistent with Commission precedent. First Order at PP 75-76, JA 436; Rehearing Order at P 41, JA 491.

SUMMARY OF ARGUMENT

The Commission reasonably approved Southwest Power Pool's Federal Power Act section 205 Tariff changes to facilitate the public power transmission facilities' integration into Southwest Power Pool.

As the Commission found, the record established that existing Southwest Power Pool members will benefit substantially from the integration. The Integrated System will greatly expand Southwest Power Pool's footprint, increase Southwest Power Pool's reliability and efficiency, and provide existing Southwest

Power Pool members with approximately $334 million in quantifiable net benefits over the ten years following integration.

The Commission considered the testimony of both Southwest Power Pool's witness, Mr. Monroe, and the Kansas Commission's witnesses, Mr. Bell, in making its benefits determination. The Commission found Mr. Monroe's benefits analysis more balanced, however, as Mr. Bell's analysis ignored that existing Southwest Power Pool members will not be allocated costs for the Integrated System's legacy transmission system. The Commission's resolution of the witnesses' factual dispute regarding benefits deserves deference and should be upheld.

The Commission also reasonably determined that there was no need for a trial-type evidentiary hearing regarding integration benefits. While the Commission determined that a trial-type hearing was necessary to address other Southwest Power Pool proposed Tariff changes (not on appeal), a hearing was not necessary regarding the benefits issue since the Commission was able to resolve that issue on the written record.

In addition, the Commission appropriately approved Southwest Power Pool's reciprocal and balanced cost allocation proposal as a just and reasonable and not unduly discriminatory proposal to integrate the two transmission systems. Both existing Southwest Power Pool members and the Integrated System Parties

will continue to be allocated costs for transmission projects approved through pre-integration transmission planning processes. This "license plate" rate design, i.e., effectively treating existing Southwest Power Pool members and Integrated System Parties as separate zones, was consistent with Commission precedent. As the Commission explained, it has approved license-plate cost allocation methods for existing facilities because they reflect prior investment decisions and the fact that existing facilities were built principally to support load within the sub-region.

That the cost allocation here differs from cost allocations agreed to by prior Southwest Power Pool entrants does not undercut the Commission's finding that the proposal is just and reasonable and not unduly discriminatory. As the Commission explained, there can be more than one just and reasonable cost allocation approach. In fact, consistent with Order No. 2000, the Commission has accepted a range of just and reasonable approaches to integrating facilities into regional transmission organizations. Moreover, approving this proposal was consistent with Commission policy and section 1232 of the Energy Policy Act of 2005, which promote public power membership in regional transmission organizations.

ARGUMENT

I. Standard of Review

The Commission's determinations are reviewed under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Review under this standard is narrow. *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id.* "Rather, the court must uphold a rule if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)) (alterations by Court); *Aera Energy LLC v. FERC*, 789 F.3d 184, 190 (D.C. Cir. 2015). "The Commission's factual findings are conclusive if supported by substantial evidence." *S. Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires more than a scintilla but less than a preponderance of evidence." *Id.* (internal quotation and citation omitted).

"Furthermore, in rate-related matters, the court's review of the Commission's determinations is particularly deferential because such matters are

either fairly technical or involve policy judgments that lie at the core of the regulatory mission." *Id.* at 54-55 (internal quotation omitted). "The court owes the Commission great deference in this realm because the statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and the Commission must have considerable latitude in developing a methodology responsive to its regulatory challenge." *Id.* at 55 (internal quotation and citation omitted). Likewise, "deference is due to the Commission's interpretation of its own precedent." *Mo. Pub. Serv. Comm'n v. FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015).

An agency's construction of the statute it administers is reviewed under well-settled principles. 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). If the statute is silent or ambiguous, the Court "must defer to a 'reasonable interpretation made by the [agency].'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 481 (2001) (quoting *Chevron*, 467 U.S. at 844).

II. The Commission Reasonably Approved Southwest Power Pool's Proposed Tariff Changes

The challenged orders approved as just and reasonable and not unduly discriminatory certain tariff provisions proposed by Southwest Power Pool, under

Federal Power Act section 205, 16 U.S.C. § 824d, to integrate the Integrated System's substantial public power transmission facilities into its regional grid.

Under section 205, the burden of proof to show that the proposed rate is just and reasonable is on the public utility. *S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 181 (D.C. Cir. 2013). The Commission must approve the proposed rate as long as it is just and reasonable. *Id*. (citing *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 254 (D.C. Cir. 2007)); *Atlantic City v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002).

As discussed more fully below, the Commission reasonably determined that the proposed cost allocation was just and reasonable. Specifically, the Commission determined that the proposed integration would provide substantial benefits to existing Southwest Power Pool members, *see* Rehearing Order at P 21, JA 482-83; First Order at P 75, JA 436, and that the proposed cost allocation was a "practical, reciprocal cost allocation approach for facilities in service before the integration date that is consistent with Commission precedent." Rehearing Order at P 41, JA 491.

A. Existing Southwest Power Pool Members Will Benefit Substantially From The Integration

1. The Commission's Substantial Benefits Finding

As the Commission found, the record established that existing Southwest Power Pool members will benefit substantially from the integration of these public

power transmission facilities. First Order at PP 53, 75, JA 428, 436; Rehearing Order at P 21, JA 482-83.

First, the Integrated System's 9,500 miles of transmission lines will substantially expand Southwest Power Pool's existing footprint. First Order at P 53, JA 428; *see also supra* p. 8 (Exhibit SPP-19 (JA 239-41), map showing Southwest Power Pool's footprint before and after integration); R.2, Transmittal Letter at 2, 4, 6, 42, JA 24, 26, 28, 64. As the Kansas Commission acknowledged in the proceeding below, the Integrated System will increase Southwest Power Pool's footprint by more than 20 percent. R.62, Kansas Commission Protest at 4, JA 307.

Moreover, the integration will increase Southwest Power Pool's reliability and efficiency, and reduce the need for congestion management. First Order at PP 53, 75, JA 428, 436 (citing R.2, Exh. SPP-3 (Monroe Testimony) at 12, JA 88); Rehearing Order at P 21, JA 483 (citing same); *see also Wis. Pub. Power*, 493 F.3d at 277 (affirming the Commission's finding that greater reliability benefitted existing members and, along with other benefits, justified cost allocation shift). Southwest Power Pool will now be able to commit and dispatch all generation affecting west to east flows and north to south flows on Southwest Power Pool's western edge, which have caused generation curtailments. First Order at PP 53, 75, JA 428, 436 (citing R.2, Exh. SPP-3 (Monroe Testimony) at 12, JA 88);

Rehearing Order at P 21, JA 483 (citing same). Reducing generation curtailment will increase the availability of lower-priced energy throughout the region. First Order at PP 53, 75, JA 428, 436 (citing R.2, Exh. SPP-3 (Monroe Testimony) at 12, JA 88).

In addition to these benefits, the record showed that the integration would provide Southwest Power Pool's existing members with approximately $334 million in quantifiable net benefits over the ten years following the integration. First Order at PP 52-53, JA 428 (citing R.2, Exh. SPP-3 (Monroe Testimony) at 9-12, JA 85-88; Rehearing Order at P 21, JA 482-83 (citing same); *see also supra* at p. 10 (chart showing the cost-benefit calculation).

2. The Kansas Commission's Challenges To The Commission's Benefits Finding Lack Merit

The Kansas Commission asserts "that there is no record evidence that supports" the Commission's substantial benefits finding. Br. at 40; *see also* Br. at 38-41 (same). To the contrary, the Commission's finding was supported by substantial evidence in the record -- Mr. Monroe's testimony regarding both the quantifiable and unquantifiable benefits to existing Southwest Power Pool members from the integration (R.2, Exh. SPP-3, JA 76-111). First Order at PP 53, 75, JA 428, 436; Rehearing Order at P 21, JA 483. *See, e.g.*, *Exxon Co., USA v. FERC*, 182 F.3d 30, 41 (D.C. Cir. 1999) (expert testimony provides substantial evidence in support of FERC's decision).

The Kansas Commission questions the Commission's "expectation" that the integration will increase Southwest Power Pool's reliability and efficiency and reduce the need for congestion management. Br. at 38-39. But the Kansas Commission makes no substantive challenge to that finding, and "'a reviewing court must generally be at its most deferential'" where, as here, the Commission is "'making predictions, within its area of special expertise . . . .'" *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 702 (D.C. Cir. 2007) (quoting *Balt. Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 103 (1983)); *see also Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 74 (D.C. Cir. 2000) ("In the absence of contrary evidence, it is to the expert agency's prediction, rather than to the petitioner's, that [the Court] must defer.").

The Kansas Commission's substantive challenges address the approximately $334 million in quantifiable net benefits that will accrue to existing Southwest Power Pool members over the ten years following the integration. First Order at PP 52-53, JA 428 (citing R.2, Exh. SPP-3 (Monroe Testimony) at 9-12, JA 85-88); Rehearing Order at P 21, JA 482-83 (citing same).

First, the Kansas Commission contends that the Commission "ignored" the testimony of Kansas Commission witness, Mr. Bell, (R. 62 at Bell Testimony, JA 337-78), challenging this calculation. *See* Br. at 42-43. The Commission did not ignore this evidence. Rather, the Commission considered Mr. Bell's analysis, but

found that it ignored the benefits existing Southwest Power Pool members will receive from the Integrated System Parties' legacy system. First Order at PP 75-76, JA 436; Rehearing Order at PP 21, 37, 41 JA 483, 488, 491. While Mr. Bell's analysis included the "costs" he asserted existing Southwest Power Pool members would incur because the Integrated System Parties would not be allocated costs for Southwest Power Pool's legacy transmission system, it ignored that existing Southwest Power Pool members likewise would not be allocated costs for the Integrated System's legacy transmission system. Rehearing Order at P 21, JA 483 (citing Bell testimony at 4-5, JA 341-42); *id.* at PP 37, 41, JA 488, 491; First Order at PP 75-76, JA 436. Thus, the Commission found that Mr. Monroe's analysis was more balanced than Mr. Bell's. First Order at P 75, JA 436; Rehearing Order at P 21, JA 483.

This reasonable determination should be upheld. The Court "must 'defer[] to the Commission's resolution of factual disputes between expert witnesses.'" *Sacramento Mun. Util Dist. v. FERC*, 616 F.3d 520, 530 (D.C. Cir. 2010) (quoting *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1236 (D.C. Cir. 2005) (alteration by Court). "The question [the Court] must answer . . . is not whether record evidence supports [petitioner's] version of events, but whether it supports FERC's." *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003).

The Kansas Commission also argues that the Commission improperly relied on the Integrated Marketplace metric in the benefits calculation (*see* chart *supra* p. 10) because the analysis underlying the calculation of that metric was not in the record. Br. at 39-41. In fact, however, the record includes Southwest Power Pool's explanation of its Integrated Marketplace benefits methodology, and establishes that Southwest Power Pool provided the Kansas Commission with the workpapers underlying the Integrated Marketplace benefits calculation. R.62 (Kansas Commission Protest) at Response to Information Request No. 1 p. 2 (dated June 11, 2014), JA 389; *see also* R.2, Exh. SPP-3 at 9-10, JA 85-86 (explaining that Southwest Power Pool's benefits analysis was presented to its stakeholders and its Regional State Committee (in which the Kansas Commission is a member, Br. at 9) at meetings held before the instant FERC proceeding began); First Order at P 52, JA 428 (Southwest Power Pool presented and discussed the proposed integration at a number of Regional State Committee meetings in 2014).

In addition, while the Kansas Commission criticizes Southwest Power Pool's reliance on the Brattle Group study, Br. at 39-41, the record shows that Southwest Power Pool used only two data points from that study in its Integrated Marketplace benefits calculation, and did so only after extensively discussing the study's assumptions and results with the Brattle Group and determining that the data points could be confidently relied upon. First Order at P 52, JA 428 (citing,

e.g., R.2, SPP-3 at 9-11, JA 85-87); R. 62 (Kansas Commission Protest) at Response to Information Request No. 1 p. 2, JA 389, and 11 p. 2, JA 412.

The record further shows that, before the underlying FERC proceeding began, the Kansas Commission had access to the publicly available redacted version of the Brattle Group study,[5] which explained the study's methodology, assumptions, and results. *See* R.62 (Kansas Commission Protest) Transmittal Letter at 9 n.24, JA 31, citing and linking to Mr. Monroe's Direct Testimony at the Kansas Commission,[6] which, at 7 n.5, cited and linked to the Brattle Group Study. And, the record shows that Southwest Power Pool provided the Kansas Commission with the confidential information it requested regarding that study's underlying data and analysis relied upon by Southwest Power Pool in determining the Integrated Marketplace benefits. *See* R. 62 (Kansas Commission Protest) at Response to Information Request Nos. 1 (dated June 11, 2014) p. 2, JA 389, and 11 (dated July 30, 2014) pp. 1, 3, JA 411, 413.

[5] The redacted Brattle Group Study can be found at: https://www.wapa.gov/regions/UGP/PowerMarketing/Documents/ISNodalStudyRedacted030813.pdf.

[6] Mr. Monroe's Direct Testimony at the Kansas Commission can be found at: http://estar.kcc.ks.gov/estar/ViewFile.aspx/S20140730160036.pdf?Id=18ae761d-f969-4940-a2ac-be08b08207fb.

Despite having all of this information, the Kansas Commission has pointed to nothing to undercut the Commission's reliance on Southwest Power Pool's Integrated Marketplace benefits determination.

Moreover, the Commission's reliance on the evidence here is wholly distinguishable from the cases the Kansas Commission cites, Br. at 41 n.35. Unlike in *Office of Consumers' Counsel v. FERC*, 783 F.2d 206, 228 (D.C. Cir. 1986), the evidence the Commission relied on here was not a hypothetical estimate, but an actual calculation of Integrated Marketplace benefits. In addition, while the evidence in *Washington Water Power Co. v. FERC*, 775 F.2d 305, 330 (D.C. Cir. 1985), was "of dubious probative value" because it did not show that the river at issue there was navigable, the evidence here, which is substantively unchallenged by the Kansas Commission, provides substantial evidence of the Integrated Marketplace benefits.

The Kansas Commission also challenges the calculation of the Reserve Sharing benefits metric (*see* chart *supra* p. 10) as "unexplained and unsupported." Br. at 39-40. The Kansas Commission did not raise that argument in its petition for rehearing to the Commission (R. 111, JA 455-76) and, therefore, has waived its opportunity to raise it on appeal. *E.g.*, *Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 739–40 (D.C. Cir. 2012) ("We must, of course, decline any invitation to exceed the jurisdiction conferred upon the court by statute; here, the relevant

constraint limits our review to the grounds for objection 'set forth specifically' in the petitioner's request for Commission rehearing. 16 U.S.C. § 825*l* (a)."); *Xcel Energy Servs. Inc. v. FERC*, 510 F.3d 314, 319 (D.C. Cir. 2007) (petitioner's "failure to raise the objection in an application for rehearing deprives us of jurisdiction under § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l* (b)").

In any case, the Kansas Commission's argument has no merit. As Mr. Monroe's testimony explained, if the Integrated System Parties do not join Southwest Power Pool, they will join MISO, and existing Southwest Power Pool members will have to carry increased reserves. R.2, Exh. SPP-3 at 11, JA 87. Southwest Power Pool determined the Reserve Sharing benefit by multiplying the increased reserves by the opportunity cost (i.e., Locational Marginal Price) lost by having to withhold those reserves from the market. *Id.* In addition, the $34,380,000 Reserve Sharing benefit calculation was conservative, as it assumed only 10 percent of hours would be affected by these lost revenues. *Id.*

There also is no merit to the Kansas Commission's contention, Br. 41-44, that the Commission needed to hold a trial-type evidentiary hearing regarding the integration's benefits. As the Kansas Commission acknowledges, Br. at 43-44, "'FERC must hold an evidentiary hearing only when a genuine issue of material fact exists, and even then, FERC need not conduct such a hearing if [the disputed issues] may be adequately resolved on the written record.'" *Minisink Residents for*

Envtl. Pres. & Safety v. FERC, 762 F.3d 97, 114 (D.C. Cir. 2014) (quoting *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994)) (internal citations and quotation marks omitted by Court; alteration in original). *See also Minisink*, 762 F.3d at 114 (the Court "review[s] the Commission's denial of a hearing request for abuse of discretion.").

The Commission ordered a trial-type hearing to address other Southwest Power Pool proposed Tariff changes not on appeal here because the Commission determined it could not resolve those matters on the written record. First Order at P 17, JA 418. Since the Commission determined that it was able to resolve the issue regarding the experts' benefits testimony on the written record, however, it reasonably declined to send that issue to hearing. Rehearing Order at PP 20-21, JA 482-83; *see also Exxon*, 182 F.3d at 47 ("a dispute among experts" is the "type of technical dispute amenable to resolution by resort to the written record").

B. FERC Reasonably Determined That Southwest Power Pool's Cost Allocation Method Was A Just And Reasonable And Not Unduly Discriminatory Integration Proposal

Southwest Power Pool's Federal Power Act section 205 filing proposed that the Integrated System Parties would continue to fund their legacy transmission system (i.e., their existing transmission facilities and planned transmission facilities with pre-integration need-by dates) and, likewise, existing Southwest Power Pool members would continue to fund Southwest Power Pool's legacy

transmission system (i.e., Southwest Power Pool's existing transmission facilities and planned transmission facilities with pre-integration need-by dates). R.2, Transmittal Letter at 20, 30-32, JA 42, 52-54. Regional cost sharing would apply to projects in both the Integrated System footprint and the current Southwest Power Pool footprint with post-integration need-by dates (October 1, 2015 and later). *Id.* at 31, JA 53.

The Commission approved Southwest Power Pool's proposal, finding it a just and reasonable and not unduly discriminatory transition proposal to integrate the two transmission systems. First Order at PP 72-76, JA 435-36; Rehearing Order at PP 35-41, JA 488-91; *see also* Rehearing Order at P 40, JA 491 (finding these proposed tariff changes "just and reasonable and necessary for the integration").

The Kansas Commission objects to this cost allocation because it differs from the cost allocation agreed to by previous Southwest Power Pool members when they integrated into the regional system. *See* Br. at 28-37 (citing, *e.g.*, the fact that the "Nebraska Entities" began paying their load ratio share of existing Southwest Power Pool regionally funded projects immediately upon joining the Southwest Power Pool). In the Kansas Commission's view, pre-existing Southwest Power Pool Base Plan transmission projects cannot be treated as

"legacy" projects under the new proposal, because they were not treated that way for pre-existing cost allocation purposes. *Id*. at 30-31.

As the Commission explained, however, there is no "one-size-fits-all" just and reasonable approach for integration. First Order at P 72, JA 435; Rehearing Order at P 39, JA 489. Rather, each integration proposal should be tailored to the specific circumstances surrounding that integration. Rehearing Order at P 39, JA 489. The Commission "expect[s] parties to a large-scale integration to negotiate the details of that integration" and "that a new entrant proposal will be the result of a collaborative effort." *Id*. at P 40, JA 490. New entrants and the regional organization are not limited to pre-existing cost allocations in negotiating a just and reasonable cost sharing proposal. *Id*. at P 39, JA 489. *See also*, *e.g*., *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 354 (D.C. Cir. 2014) (recognizing that an entity can integrate into a regional transmission organization under existing tariff provisions or under negotiated tariff provisions particular to that integration).

Thus, consistent with Order No. 2000, the Commission has accepted a range of just and reasonable cost allocation approaches to integrate facilities into regional transmission organizations. First Order at P 73, JA 435 (citing cases); Rehearing Order at P 39, JA 489 (citing cases). To find a proposal just and reasonable, the Commission requires that it respect both the principle of cost causation and the practical realities of the situation. First Order at P 72, JA 435.

The Commission reasonably found that Southwest Power Pool's proposal met those requirements, given the benefits of integration to the existing Southwest Power Pool members as discussed in the preceding section (First Order at PP 53, 75, JA 428, 436; Rehearing Order at P 21, JA 482-83), and the reciprocal and balanced nature of the proposed approach. *See* First Order at PP 75-76, JA 436; Rehearing Order at PP 37, 38, 41, JA 488-89, 491. Under the proposal, both existing Southwest Power Pool members and the Integrated System Parties will continue to be allocated costs for transmission projects approved through pre-integration transmission planning processes that did not take into account regional needs over the expanded post-integration Southwest Power Pool footprint. Rehearing Order at PP 37, 38, 41, JA 488-89, 491.

Contrary to the Kansas Commission's contention, Br. at 33-34, this license-plate rate cost allocation method, under which the pre-integration Integrated System region is treated as one zone and the pre-integration Southwest Power Pool region is treated as another zone for cost allocation purposes, is consistent with Commission precedent. Rehearing Order at P 41, JA 491. As the Commission explained, it has approved license-plate cost allocation methods for existing facilities because they reflect prior investment decisions and the fact that existing facilities were built principally to support load within the sub-region. *Id.* (citing *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,063 at P 3 (2007), *on reh'g*, 122

FERC ¶ 61,082 (2008), *aff'd in pertinent part sub nom. Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 473-74 (7th Cir. 2009) (affirming FERC's determination that it is appropriate to allocate the costs of existing facilities to those for whom the facilities were built)).

Moreover, contrary to the Kansas Commission's claim (Br. at 34), the Commission not only acknowledged *FirstEnergy*, 758 F.3d 346, but cited to it, and to *Southwest Power Pool*, Docket No. ER09-254 (Jan. 27, 2009) (unpublished letter order), and *Midwest Indep. Transm. Sys. Operator*, 139 FERC ¶ 61,056, *on reh'g*, 141 FERC ¶ 61,128, as examples of cases showing that the Commission has accepted a range of integration proposals by regional transmission organizations. First Order at P 73 & n.129, JA 435. In fact, the Commission pointed out, it has accepted different cost allocation proposals to integrate different entities into the same regional transmission organization. Rehearing Order at P 39, JA 489 (comparing *Midwest Indep. Transm. Sys. Operator*, 139 FERC ¶ 61,056 (accepting MISO's tariff revisions to transition Entergy into MISO over a five year period), with *Midwest Indep. Transm. Sys. Operator and Dairyland Power Coop.*, 131 FERC ¶ 61,187, *order on compliance*, 132 FERC ¶ 61,174 at P 9 (2010) (accepting MISO's proposal not to subject Dairyland Power Cooperative's planned or proposed projects to regional cost allocation and recovery)).

The Kansas Commission complains (Br. at 34 n.24) that the orders below did not address *South Carolina*, 762 F.3d 41, but the Kansas Commission cannot fault the Commission for failing to address a case that was not raised in the Kansas Commission's petition for rehearing (R.111, JA 454-76).[7] *See Ind. Util. Regulatory Comm'n*, 668 F.3d at 739–40; *Xcel Energy Servs.*, 510 F.3d at 319.

In any event, *South Carolina* supports the Commission's orders. As that case explains, "nothing requires the Commission to ensure full or perfect cost causation. Rather the cost causation principle requires that 'all approved rates *reflect to some degree* the costs actually caused by the customer who pays them.'" 762 F.3d at 88 (quoting *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992)) (emphasis added by Court). Moreover, *South Carolina* found that "'the Commission may rationally emphasize other, competing policies and approve measures that do not best match cost responsibility and causation.'" *Id.* (quoting *Carnegie Natural Gas Co. v. FERC*, 968 F.2d 1291, 1293-94 (D.C. Cir. 1992)); *see also Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 239-40 (D.C. Cir. 2013) (the Court "defer[s] to FERC's policy priorities" in reviewing its ratemaking determinations).

[7] Nor can the Kansas Commission complain that the Commission failed to apply criteria purportedly set out in *Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2000), Br. at 35 & n.26, when the Kansas Commission failed to raise that issue or Order to FERC in its request for rehearing (R.111, JA 454-76).

Approving Southwest Power Pool's proposal was also consistent with Commission policy and section 1232 of the Energy Policy Act of 2005, both of which promote public power membership in regional transmission organizations. Rehearing Order at P 35, JA 488; *id.* at P 19, JA 482 (Section 1232 of the Energy Policy Act of 2005 "provide[s] a statutory framework to encourage the transfer of control of transmission facilities to and participation by a federal power marketing authority in a[] [regional transmission organization]."); First Order at PP 48-50, JA 427; *see also* Order No. 2000 at 31,200-01; *Sw. Power Pool*, 125 FERC ¶ 61,239 at P 15; *TRANSLink*, 101 FERC ¶ 61,140 at P 26. As the Kansas Commission acknowledged in the proceeding below, the Commission stated in Order No. 2000 that it "would be flexible and would analyze proposals to include non-jurisdictional public power entities into [a regional transmission organization] on a 'case-by-case basis . . . .'" R.111, Kansas Commission Request for Rehearing at 19, JA 472 (quoting Order No. 2000 at 31,201).

Finally, the Kansas Commission asserts that the costs of transmission facilities planned by Basin Electric with a post-integration need-by date should not be subject to regional cost allocation. Br. at 26. However, Southwest Power Pool's Transmission Working Group study confirmed, and the Kansas Commission does not contest, that those facilities met needs identified in Southwest Power Pool's regional planning studies and that they had a post-

integration need-by date. First Order at PP 63, 74, JA 431, 435; Rehearing Order at P 38, JA 488; R.2, Exh. SPP-3 at 8-9, 17-18, JA 84-85, 93-94.

Moreover, those facilities will be subject to Southwest Power Pool's Regional Cost Allocation Review process, which will check for any inequities in Southwest Power Pool's regional cost allocation. First Order at P 74, JA 435 (citing R.2, Exh. SPP-3 at 18, JA 94); Rehearing Order at P 42 & n.95, JA 491. Accordingly, the Commission appropriately approved Southwest Power Pool's proposal that the costs of these Basin Electric transmission facilities, like the costs of Southwest Power Pool planned facilities with a post-integration need-by date, will be regionally allocated under Southwest Power Pool's Highway/Byway methodology. Rehearing Order at P 37, JA 488; First Order at P 74, JA 435.

CONCLUSION

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

Respectfully submitted,

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October 18, 2016

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 7,289 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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October 18, 2016

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

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

(i) a copy of the rule;

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

(iii) the proposed effective date of the rule.

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

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

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

"(g) REMAND.—In exercising authority under subsection (b)(1), the Commission may remand transmission rates to an unregulated transmitting utility for review and revision if necessary to meet the requirements of subsection (b).

"(h) OTHER REQUESTS.—The provision of transmission services under subsection (b) does not preclude a request for transmission services under section 211.

"(i) LIMITATION.—The Commission may not require a State or municipality to take action under this section that would violate a private activity bond rule for purposes of section 141 of the Internal Revenue Code of 1986.

"(j) TRANSFER OF CONTROL OF TRANSMITTING FACILITIES.—Nothing in this section authorizes the Commission to require an unregulated transmitting utility to transfer control or operational control of its transmitting facilities to a Transmission Organization that is designated to provide nondiscriminatory transmission access.".

42 USC 16431.

SEC. 1232. FEDERAL UTILITY PARTICIPATION IN TRANSMISSION ORGANIZATIONS.

(a) DEFINITIONS.—In this section:

(1) APPROPRIATE FEDERAL REGULATORY AUTHORITY.—The term "appropriate Federal regulatory authority" means—

(A) in the case of a Federal power marketing agency, the Secretary, except that the Secretary may designate the Administrator of a Federal power marketing agency to act as the appropriate Federal regulatory authority with respect to the transmission system of the Federal power marketing agency; and

(B) in the case of the Tennessee Valley Authority, the Board of Directors of the Tennessee Valley Authority.

(2) FEDERAL POWER MARKETING AGENCY.—The term "Federal power marketing agency" has the meaning given the term in section 3 of the Federal Power Act (16 U.S.C. 796).

(3) FEDERAL UTILITY.—The term "Federal utility" means—

(A) a Federal power marketing agency; or

(B) the Tennessee Valley Authority.

(4) TRANSMISSION ORGANIZATION.—The term "Transmission Organization" has the meaning given the term in section 3 of the Federal Power Act (16 U.S.C. 796).

(5) TRANSMISSION SYSTEM.—The term "transmission system" means an electric transmission facility owned, leased, or contracted for by the United States and operated by a Federal utility.

(b) TRANSFER.—The appropriate Federal regulatory authority may enter into a contract, agreement, or other arrangement transferring control and use of all or part of the transmission system of a Federal utility to a Transmission Organization.

(c) CONTENTS.—The contract, agreement, or arrangement shall include—

(1) performance standards for operation and use of the transmission system that the head of the Federal utility determines are necessary or appropriate, including standards that ensure—

(A) recovery of all of the costs and expenses of the Federal utility related to the transmission facilities that

are the subject of the contract, agreement, or other arrangement;

(B) consistency with existing contracts and third-party financing arrangements; and

(C) consistency with the statutory authorities, obligations, and limitations of the Federal utility;

(2) provisions for monitoring and oversight by the Federal utility of the Transmission Organization's terms and conditions of the contract, agreement, or other arrangement, including a provision for the resolution of disputes through arbitration or other means with the Transmission Organization or with other participants, notwithstanding the obligations and limitations of any other law regarding arbitration; and

(3) a provision that allows the Federal utility to withdraw from the Transmission Organization and terminate the contract, agreement, or other arrangement in accordance with its terms.

(d) COMMISSION.—Neither this section, actions taken pursuant to this section, nor any other transaction of a Federal utility participating in a Transmission Organization shall confer on the Commission jurisdiction or authority over—

(1) the electric generation assets, electric capacity, or energy of the Federal utility that the Federal utility is authorized by law to market; or

(2) the power sales activities of the Federal utility.

(e) EXISTING STATUTORY AND OTHER OBLIGATIONS.—

(1) SYSTEM OPERATION REQUIREMENTS.—No statutory provision requiring or authorizing a Federal utility to transmit electric power or to construct, operate, or maintain the transmission system of the Federal utility prohibits a transfer of control and use of the transmission system pursuant to, and subject to, the requirements of this section.

(2) OTHER OBLIGATIONS.—This subsection does not—

(A) suspend, or exempt any Federal utility from, any provision of Federal law in effect on the date of enactment of this Act, including any requirement or direction relating to the use of the transmission system of the Federal utility, environmental protection, fish and wildlife protection, flood control, navigation, water delivery, or recreation; or

(B) authorize abrogation of any contract or treaty obligation.

(3) CONFORMING AMENDMENT.—Section 311 of the Energy and Water Development Appropriations Act, 2001 (16 U.S.C. 824n) is repealed.

SEC. 1233. NATIVE LOAD SERVICE OBLIGATION.

(a) IN GENERAL.—Part II of the Federal Power Act (16 U.S.C. 824 et seq.) is amended by adding at the end the following:

"SEC. 217. NATIVE LOAD SERVICE OBLIGATION. 16 USC 824q.

"(a) DEFINITIONS.—In this section:

"(1) The term 'distribution utility' means an electric utility that has a service obligation to end-users or to a State utility or electric cooperative that, directly or indirectly, through one or more additional State utilities or electric cooperatives, provides electric service to end-users.

"(2) The term 'load-serving entity' means a distribution utility or an electric utility that has a service obligation.

The commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding) as are necessary to execute its functions. Expenditures by the commission shall be allowed and paid upon the presentation of itemized vouchers therefor, approved by the chairman of the commission or by such other member or officer as may be authorized by the commission for that purpose subject to applicable regulations under chapters 1 to 11 of title 40 and division C (except sections 3302, 3306(f), 3307(e), 3501(b), 3509, 3906, 4104, 4710, and 4711) of subtitle I of title 41.

(June 10, 1920, ch. 285, pt. I, §2, 41 Stat. 1063; June 23, 1930, ch. 572, §1, 46 Stat. 798; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, §212, 49 Stat. 847; Oct. 28, 1949, ch. 782, title XI, §1106(a), 63 Stat. 972; Oct. 31, 1951, ch. 654, §2(14), 65 Stat. 707.)

CODIFICATION

All appointments referred to in the first sentence are subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, §1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed Pub. L. 89–554, Sept. 6, 1966, §8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

In text, ''chapter 51 and subchapter III of chapter 53 of title 5'' substituted for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

In text, ''chapters 1 to 11 of title 40 and division C (except sections 3302, 3306(f), 3307(e), 3501(b), 3509, 3906, 4104, 4710, and 4711) of subtitle I of title 41'' substituted for ''the Federal Property and Administrative Services Act of 1949, as amended'' on authority of Pub. L. 107–217, § 5(c), Aug. 21, 2002, 116 Stat. 1303, which Act enacted Title 40, Public Buildings, Property, and Works, and Pub. L. 111–350, § 6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts.

AMENDMENTS

1951—Act Oct. 31, 1951, inserted reference to applicable regulations of the Federal Property and Administrative Services Act of 1949, as amended, at end of section.

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

1930—Act June 23, 1930, substituted provisions permitting the commission to appoint, prescribe the duties, and fix the salaries of, a secretary, a chief engineer, a general counsel, a solicitor, and a chief accountant, and to appoint such other officers and employees as are necessary in the execution of its functions and fix their salaries, and authorizing the detail of officers from the Corps of Engineers, or other branches of the United States Army, to serve the commission as engineer officers, or in any other capacity, in field work outside the seat of government, and the detail, assignment or transfer to the commission of engineers in or under the Departments of the Interior or Agriculture for work outside the seat of government for provisions which required the commission to appoint an executive secretary at a salary of $5,000 per year and prescribe his duties, and which permitted the detail of an officer from the United States Engineer Corps to serve the commission as engineer officer; and inserted provisions permitting the commission to make certain expendi-tures necessary in the execution of its functions, and allowing the payment of expenditures upon the presen-tation of itemized vouchers approved by authorized persons.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, §8, 80 Stat. 632, 655.

§ 793a. Repealed. Pub. L. 87–367, title I, §103(5), Oct. 4, 1961, 75 Stat. 787

Section, Pub. L. 86–626, title I, §101, July 12, 1960, 74 Stat. 430, authorized the Federal Power Commission to place four additional positions in grade 18, one in grade 17 and one in grade 16 of the General Schedule of the Classification Act of 1949.

§§ 794, 795. Omitted

CODIFICATION

Section 794, which required the work of the commission to be performed by and through the Departments of War, Interior, and Agriculture and their personnel, consisted of the second paragraph of section 2 of act June10, 1920, ch. 285, 41 Stat. 1063, which was omitted in the revision of said section 2 by act June 23, 1930, ch. 572, §1, 46 Stat. 798. The first and third paragraphs of said section 2 were formerly classified to sections 793 and 795 of this title.

Section 795, which related to expenses of the commission generally, consisted of the third paragraph of section2 of act June 10, 1920, ch. 285, 41 Stat. 1063. Such section 2 was amended generally by act June 23, 1930, ch. 572, §1, 46 Stat. 798, and is classified to section 793 of this title. The first and second paragraphs of said section 2 were formerly classified to sections 793 and 794 of this title.

§ 796. Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

(1) ''public lands'' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include ''reservations'', as hereinafter defined;

(2) ''reservations'' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) ''corporation'' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include ''municipalities'' as hereinafter defined;

(4) ''person'' means an individual or a corporation;

(5) ''licensee'' means any person, State, or municipality licensed under the provisions of section 797 of this title, and any assignee or successor in interest thereof;

(6) ''State'' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) ''municipality'' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

(8) ''navigable waters'' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

(9) ''municipal purposes'' means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) ''Government dam'' means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) ''project'' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) ''project works'' means the physical structures of a project;

(13) ''net investment'' in a project means the actual legitimate original cost thereof as defined and interpreted in the ''classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission'', plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term ''cost'' shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

(14) ''Commission'' and ''Commissioner'' means the Federal Power Commission, and a member thereof, respectively;

(15) ''State commission'' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;

(16) ''security'' means any note, stock, treasury stock, bond, debenture, or other evidence of interest in or indebtedness of a corporation subject to the provisions of this chapter;

(17)(A) ''small power production facility'' means a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which—

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and

(ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) ''primary energy source'' means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy—

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and

(ii) the minimum amounts of fuel required to alleviate or prevent—

(I) unanticipated equipment outages, and

(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) ''qualifying small power production facility'' means a small power production facility that the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe;

(D) ''qualifying small power producer'' means the owner or operator of a qualifying small power production facility;

(E) ''eligible solar, wind, waste or geothermal facility'' means a facility which pro-

duces electric energy solely by the use, as a primary energy source, of solar energy, wind energy, waste resources or geothermal resources; but only if—

(i) either of the following is submitted to the Commission not later than December 31, 1994:

(I) an application for certification of the facility as a qualifying small power production facility; or

(II) notice that the facility meets the requirements for qualification; and

(ii) construction of such facility commences not later than December 31, 1999, or, if not, reasonable diligence is exercised toward the completion of such facility taking into account all factors relevant to construction of the facility.[1]

(18)(A) ''cogeneration facility'' means a facility which produces—

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) ''qualifying cogeneration facility'' means a cogeneration facility that the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe;

(C) ''qualifying cogenerator'' means the owner or operator of a qualifying cogeneration facility;

(19) ''Federal power marketing agency'' means any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy;

(20) ''evidentiary hearings'' and ''evidentiary proceeding'' mean a proceeding conducted as provided in sections 554, 556, and 557 of title 5;

(21) ''State regulatory authority'' has the same meaning as the term ''State commission'', except that in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority (as defined in section 2602 of this title), such term means the Tennessee Valley Authority;

(22) ELECTRIC UTILITY.—(A) The term ''electric utility'' means a person or Federal or State agency (including an entity described in section 824(f) of this title) that sells electric energy.[1]

(B) The term ''electric utility'' includes the Tennessee Valley Authority and each Federal power marketing administration.[1]

(23) TRANSMITTING UTILITY.—The term ''transmitting utility'' means an entity (in-cluding an entity described in section 824(f) of this title) that owns, operates, or controls fa-cilities used for the transmission of electric energy—

(A) in interstate commerce;

(B) for the sale of electric energy at wholesale.[1]

(24) WHOLESALE TRANSMISSION SERVICES. — The term ''wholesale transmission services'' means the transmission of electric energy sold, or to be sold, at wholesale in interstate commerce.[1]

(25) EXEMPT WHOLESALE GENERATOR.—The term ''exempt wholesale generator'' shall have the meaning provided by section 79z–5a[2] of title 15.[1]

(26) ELECTRIC COOPERATIVE.—The term ''elec-tric cooperative'' means a cooperatively owned electric utility.[1]

(27) RTO.—The term ''Regional Transmission Organization'' or ''RTO'' means an entity of sufficient regional scope approved by the Commission—

(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

(B) to ensure nondiscriminatory access to the facilities.[1]

(28) ISO.—The term ''Independent System Operator'' or ''ISO'' means an entity approved by the Commission—

(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

(B) to ensure nondiscriminatory access to the facilities.[3]

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

(June 10, 1920, ch. 285, pt. I, §3, 41 Stat. 1063; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§201, 212, 49 Stat. 838, 847; Pub. L. 95–617, title II, §201, Nov. 9, 1978, 92 Stat. 3134; Pub. L. 96–294, title VI, §643(a)(1), June 30, 1980, 94 Stat. 770; Pub. L. 101–575, §3, Nov. 15, 1990, 104 Stat. 2834; Pub. L. 102–46, May 17, 1991, 105 Stat. 249; Pub. L. 102–486, title VII, §726, Oct. 24, 1992, 106 Stat. 2921; Pub. L. 109–58, title XII, §§1253(b), 1291(b), Aug. 8, 2005, 119 Stat. 970, 984.)

REFERENCES IN TEXT

Section 79z–5a of title 15, referred to in par. (25), was repealed by Pub. L. 109–58, title XII, §1263, Aug. 8, 2005, 119 Stat. 974.

AMENDMENTS

2005—Par. (17)(C). Pub. L. 109–58, §1253(b)(1), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: '''qualifying small power production facility' means a small power production facility—

''(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

''(ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);''. Par. (18)(B). Pub. L. 109–58, §1253(b)(2), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: '''qualifying cogeneration facility' means a cogeneration facility which—

''(i) the Commission determines, by rule, meets such requirements (including requirements respect-

[1] So in original. The period probably should be a semicolon.

[2] See References in Text note below.

[3] So in original. The period probably should be ''; and''.

ing minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

''(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);''.

Pars. (22), (23). Pub. L. 109–58, §1291(b)(1), added pars. (22) and (23) and struck out former pars. (22) and (23) which read as follows:

''(22) 'electric utility' means any person or State agency (including any municipality) which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.

''(23) TRANSMITTING UTILITY.—The term 'transmitting utility' means any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale.''

Pars. (26) to (29). Pub. L. 109–58, §1291(b)(2), added pars. (26) to (29).

1992—Par. (22). Pub. L. 102–486, §726(b), inserted ''(including any municipality)'' after ''State agency''.

Pars. (23) to (25). Pub. L. 102–486, §726(a), added pars. (23) to (25).

1991—Par. (17)(E). Pub. L. 102–46 struck out '', and which would otherwise not qualify as a small power production facility because of the power production capacity limitation contained in subparagraph (A)(ii)'' after ''geothermal resources'' in introductory provisions.

1990—Par. (17)(A). Pub. L. 101–575, §3(a), inserted ''a facility which is an eligible solar, wind, waste, or geothermal facility, or''.

Par. (17)(E). Pub. L. 101–575, §3(b), added subpar. (E).

1980—Par. (17)(A)(i). Pub. L. 96–294 added applicability to geothermal resources.

1978—Pars. (17) to (22). Pub. L. 95–617 added pars. (17) to (22).

1935—Act Aug. 26, 1935, §201, amended definitions of ''reservations'' and ''corporations'', and inserted definitions of ''person'', ''licensee'', ''commission'', ''commissioner'', ''State commission'' and ''security''.

FERC REGULATIONS

Pub. L. 101–575, §4, Nov. 15, 1990, 104 Stat. 2834, provided that: ''Unless the Federal Energy Regulatory Commission otherwise specifies, by rule after enactment of this Act [Nov. 15, 1990], any eligible solar, wind, waste, or geothermal facility (as defined in section 3(17)(E) of the Federal Power Act as amended by this Act [16 U.S.C. 796(17)(E)]), which is a qualifying small power production facility (as defined in subparagraph (C) of section 3(17) of the Federal Power Act as amend-ed by this Act)—

''(1) shall be considered a qualifying small power production facility for purposes of part 292 of title 18, Code of Federal Regulations, notwithstanding any size limitations contained in such part, and

''(2) shall not be subject to the size limitation contained in section 292.601(b) of such part.''

STATE AUTHORITIES; CONSTRUCTION

Pub. L. 102–486, title VII, §731, Oct. 24, 1992, 106 Stat. 2921, provided that: ''Nothing in this title [enacting sec-tions 824*l*, 824m, and 825*o*–1 of this title and former sec-tions 79z–5a and 79z–5b of Title 15, Commerce and Trade, and amending this section, sections 824, 824j, 824k, 825n, 825*o*, and 2621 of this title, and provisions formerly set out as a note under former section 79k of Title 15] or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protec-tion or the siting of facilities.''

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of Title 49, Transportation, and section 101 of Pub. L. 104–88, set out as a note under section 701 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of Title 49.

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licensees in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished Commission

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under

any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or 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

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

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

§ 825k. Publication and sale of reports

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

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

CODIFICATION

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

(b) Writs of mandamus

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

(c) Employment of attorneys

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

(d) Prohibitions on violators

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

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

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

(A) electric energy; or

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

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

CODIFICATION

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

State Corporation Commission of the State of Kansas **Docket Nos. ER14-2850 and ER14-2850**

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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 18th day of October 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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