

Nos. 11-3421, 11-3430, 11-3584, 11-3585, 11-3586, 11-3620,
11-3787, 11-3795, 11-3806, and 12-1027 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ILLINOIS COMMERCE COMMISSION, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

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GLOSSARY

2003 Rate Pancaking Order	<i>Midwest Indep. Transmission Sys. Operator, Inc.</i> , 104 FERC ¶ 61,105 (2003)
AMP	American Municipal Power, Inc.
Coalition	Collectively, Petitioners Illinois Commerce Commission, Wisconsin, Hoosier, Southern Illinois Power Cooperative, American Forest & Paper Association, Minnesota Large Industrial Group, Wisconsin Industrial Energy Group, Electricity Consumers Resource Council, Coalition of Midwest Transmission Customers, Illinois Energy Consumers, and AMP
Commission or FERC	Federal Energy Regulatory Commission
Duke	Petitioners Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc.
Efficiency Project	A transmission facility that qualifies, under the Midwest ISO tariff, for cost-sharing because of economic benefits, <i>see</i> MVP Order P 12, JA 1524
Export Group	Collectively, petitioners Midwest ISO, selected Midwest ISO transmission owners and Wisconsin
FirstEnergy	Petitioner FirstEnergy Service Company
Former Transmission Owners	Petitioners FirstEnergy and Duke, together
FPA	Federal Power Act
Hoosier	Petitioner Hoosier Energy Rural Electric Cooperative, Inc.
Interconnection Project	A transmission facility that would not be required but for a generator's interconnection request and that, under the Midwest ISO tariff, can qualify for cost sharing between the generator, sub-regions and region depending on the project construction date, <i>see</i> MVP Order P 11, JA 1524

JA	Joint Appendix
kV	Kilovolts
Michigan and Montana	Intervening petitioners Michigan Public Service Commission and Montana Public Service Commission
Michigan Customers	Petitioners MISO Northeast Transmission Customers, consisting of the Association of Businesses Advocating Tariff Equity, Consumers Energy Company, Detroit Edison Company, Michigan Attorney General Bill Schuette, Michigan Municipal Electric Association, and Michigan Public Power Agency
Midwest ISO	Midwest Independent Transmission System Operator, Inc., the Regional Transmission Organization responsible for administering access to transmission on behalf of its transmission-owning members, in all or part of 11 states and one Canadian province
Multi-Value Projects or MVPs	A transmission facility that, under the Midwest ISO tariff, meets minimum cost and voltage requirements, and satisfies at least one of three criteria demonstrating that it provides some or all of the benefits of reduced electricity costs, system reliability improvements, or the advancement of state or federal public policies, <i>see</i> MVP Order P 29, JA 1530
MVP Order	<i>Midwest Indep. Transmission Sys. Operator, Inc.</i> , 133 FERC ¶ 61,221 (Dec. 16, 2010), R.139, JA 1516
MVP Proposal	Midwest ISO Proposed Revisions to Open Access Transmission, Energy and Operating Reserve Markets Tariff, R.1 (filed July 15, 2010), JA 1

Order No. 890	<i>Preventing Undue Discrimination & Preference in Transmission Service</i> , Order No. 890, FERC Stats. & Regs. ¶ 31,241, <i>order on reh'g</i> , Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), <i>order on reh'g</i> , Order No. 890-B, 123 FERC ¶ 61,299 (2008), <i>order on reh'g</i> , Order No. 890-C, 126 FERC ¶ 61,228, <i>order on clarification</i> , Order No. 890-D, 129 FERC ¶ 61,126 (2009)
Order No. 2000	<i>Regional Transmission Organizations</i> , Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), <i>order on reh'g</i> , Order No. 2000-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), <i>appeal dismissed sub nom. Public Util. Dist. No. 1 v. FERC</i> , 272 F.3d 607 (D.C. Cir. 2001)
P	Paragraph number in a FERC order
PJM	PJM Interconnection, L.L.C., the Regional Transmission Organization responsible for administering access to transmission on behalf of its transmission-owning members, in 13 states in the mid-Atlantic and surrounding areas
R.	Record citation
Rehearing Order	<i>Midwest Indep. Transmission Sys. Operator, Inc.</i> , 137 FERC ¶ 61,074 (Oct. 21, 2011), R.211, JA 2153
Reliability Projects	A transmission facility that, under the Midwest ISO tariff, qualifies for cost-sharing because it resolves a reliability issue, <i>see</i> MVP Order P 10, JA 1523
RTO	Regional Transmission Organization
Schedule 39 Order	<i>Midwest Indep. Transmission Sys. Operator, Inc.</i> , 138 FERC ¶ 61,140 (2012)
Transmission Owners Agreement	The agreement, approved by FERC, among various transmission owners to organize Midwest ISO
Wisconsin	Petitioner Public Service Commission of Wisconsin

COUNTER-STATEMENT OF JURISDICTION

The jurisdictional statements in the joint briefs of petitioners are not complete and correct. *See* Cir. R. 28(b).

This is a consolidated appeal of two final orders of the Federal Energy Regulatory Commission (“Commission” or “FERC”). *Midwest Indep.*

Transmission Sys. Operator, Inc., 133 FERC ¶ 61,221 (Dec. 16, 2010) (“MVP Order”), R.139, JA 1516, *order on reh’g*, 137 FERC ¶ 61,074 (Oct. 21, 2011) (“Rehearing Order”), R.211, JA 2153. The Commission, acting pursuant to section 205 of the Federal Power Act (“FPA”), 16 U.S.C. § 824d, approved a rate design for Midwest Independent Transmission System Operator, Inc. (“Midwest ISO”). Among other things, the rate design provides for a region-wide allocation of costs for a new category of transmission projects (“Multi-Value Projects” or “MVP”) that benefit the entire Midwest ISO region.

Ten petitions for review were timely filed with this Court or with the United States Court of Appeals for the District of Columbia Circuit within 60 days of the issuance of the Rehearing Order. FPA § 313, 16 U.S.C. § 825(b). The Judicial Panel on Multidistrict Litigation consolidated these appeals in this Court. *See* 28 U.S.C. § 2112(a)(3).

This Court has jurisdiction to decide these petitions for review pursuant to section 313 of the FPA, 16 U.S.C. § 824(b), with two exceptions. First, this Court lacks jurisdiction to consider petitioners’ arguments

concerning transmission reservations, *see infra* at p. 68, because no petitioner raised those arguments to the Commission on rehearing. FPA § 313(b), 16 U.S.C. § 825I(b) (“[n]o objection . . . shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing”). *See, e.g., Indiana Util. Regulatory Comm’n v. FERC*, 668 F.3d 735, 738-39 (D.C. Cir. 2012).

Second, another group of petitioners falls short of the Article III standing and ripeness prerequisites necessary to confer jurisdiction on this Court. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As detailed *infra* at p. 85, two former members of Midwest ISO challenge whether the ISO may properly allocate to them costs for Multi-Value Projects. The MVP Orders, however, did not decide this issue, but rather deferred it to later proceedings, now ongoing before the agency.

STATEMENT OF ISSUES

1. Did the Commission reasonably approve a new rate design, allocating the costs for certain projects across the Midwest ISO region, where those projects have demonstrated region-wide benefits?

2. As these regional transmission projects lower electricity prices by reducing grid congestion and power production costs, did the Commission reasonably approve allocating project costs to grid customers through a usage

charge based upon their proportionate share of total Midwest ISO electricity sales?

3. Did the Commission reasonably deny a proposal to impose the Midwest ISO usage charge on customers in an adjoining regional transmission organization, where the Commission previously found unreasonable rate compounding in such border transactions and there was no substantial evidence of changed circumstances?

4. Assuming jurisdiction, did the Commission reasonably defer questions of individual transmission owner cost responsibility for the usage charge to other, now-ongoing proceedings?

STATEMENT OF THE CASE

In the challenged orders, the Commission approved a region-wide allocation of costs for a new category of transmission projects, Multi-Value Projects, that benefit the entire Midwest ISO region. A coalition of petitioners including two state utility commissions, industrial customers, electric cooperatives, and a representative for municipalities (collectively, “Coalition”) generally challenge the Commission’s evidentiary, precedential, and jurisdictional basis for the cost allocation decision.

Petitioners MISO Northeast Transmission Customers, located in the Lower Peninsula of Michigan (“Michigan Customers”), argue for: (1) a separate planning and cost allocation zone for their portion of Michigan; and

(2) allocation of Multi-Value Project costs to generators. Utility petitioners that exited the Midwest ISO in 2011 contest any application of these charges to them. Midwest ISO and its transmission owners, together with the Public Service Commission of Wisconsin (“Wisconsin”), appeal the decision not to reinstate rate compounding along the seam between Midwest ISO and a neighboring regional transmission operator, PJM Interconnection, LLC (“PJM”).

The Commission resolves transmission cost allocation disputes by weighing whether the proposal provides incentives to expand the grid, whether there is general support from states and market participants, and whether the proposal fairly assigns costs. Because the first two of these factors are not in dispute in this appeal, this brief primarily focuses on the fair assignment of costs.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. *See* 16 U.S.C. §§ 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002). “Rates may be examined by the Commission, upon complaint or on its

own initiative, when a new or altered tariff or contract is filed or after a rate goes into effect.” *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm’n*, 130 S. Ct. 693, 698 (2010) (citing FPA sections 206, 16 U.S.C. § 824e(a), and 205, 16 U.S.C. § 824d(e)). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA §§ 205(a), (b), (e), 16 U.S.C. §§ 824d(a), (b), (e). (The pertinent statutory provisions are contained in the Addendum to this brief.)

In furtherance of its statutory responsibilities, the Commission has encouraged competition and reliability improvements in the wholesale market for electric power through provision of non-discriminatory, efficient access to transmission over broader geographic areas and the creation of regional transmission organizations (“RTOs”).¹ *See Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-37 (2008); *see also Public Serv. Comm’n of Ky. v. FERC*, 397 F.3d 1004, 1006 (D.C. Cir. 2005) (explaining that an RTO “combines multiple power grids into a single transmission system”). These independent regional entities operate (but do

¹ *See Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), *appeal dismissed sub nom. Public Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

not own) the transmission grid to provide access for all “at rates established in a single, unbundled, grid-wide tariff.” *NRG Power Mktg*, 130 S. Ct. at 697 n.1 (quotation omitted); *see also Illinois Commerce Comm’n v. FERC*, 576 F.3d 470, 473 (7th Cir. 2009) (describing RTO grid ownership and operation).

To ensure all generators have equal access to the transmission grid, the Commission created a standard interconnection agreement and a default cost allocation.² Under this default cost allocation, generators pay the costs of connecting their facility to the grid and transmission owning utilities (ultimately) pay for all other necessary grid upgrades. *National Ass’n*, 475 F.3d at 1284. Because independent transmission operators, including RTOs, do not own competing generators, the Commission grants these entities greater flexibility to craft regionally appropriate interconnection rules which can include directly assigning all of the grid upgrade costs to generators. Order No. 2003 PP 822-27; *see also Public Serv. Comm’n of Wis. v. FERC*, 545 F.3d 1058, 1063 (D.C. Cir. 2008) (describing how some RTOs, but not Midwest ISO, directly assign generators all costs).

² *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh’g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh’g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff’d sub nom. National Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

More recently, the Commission sought to promote competition and reverse a nationwide decline in transmission investment by specifying coordinated, open and transparent transmission planning requirements.³ As part of those reforms, the Commission clarified the three factors it would consider in weighing the reasonableness of cost allocations for new transmission facilities: (1) whether the rate design meets cost causation principles; (2) whether it “provides adequate incentives to construct new transmission;” and (3) whether it “is generally supported by state authorities and participants across the region.” Order No. 890 P 559.

II. History Of Midwest ISO

Midwest ISO is an independent, nonprofit regional transmission organization. *Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 245 (D.C. Cir. 2007). It currently operates 49,670 miles of transmission lines in 11 states. It has over 130 members representing transmission owners, municipalities, cooperatives, power marketers, and independent power producers (i.e., generators). It also administers a large and complex energy market with over 350 market participants who serve almost 40 million

³ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

people. See Midwest ISO [Corporate Fact Sheet](https://www.midwestiso.org/Library/Repository/Communication%20Material/Corporate/Corporate%20Fact%20Sheet.pdf), <https://www.midwestiso.org/Library/Repository/Communication%20Material/Corporate/Corporate%20Fact%20Sheet.pdf>.

Midwest ISO “serves an extremely large footprint that [had not] had a history of regional transmission planning or cost allocation.” *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,209, P 69 (2007). As might be expected when a large, diverse group of members and market participants fundamentally change the way they do business, disagreement over cost allocation issues has accompanied each step of Midwest ISO’s development. See *Public Serv. Comm’n*, 545 F.3d at 1066-67 (affirming regional allocation for reliability project costs over objections, *inter alia*, that policy is inconsistent with cost causation principle); *Wisconsin Pub. Power*, 493 F.3d at 245-46 (affirming cost allocations in day-ahead and real-time competitive wholesale power markets); *East Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1301 (D.C. Cir. 2007) (affirming that transmission owners could pass certain administrative costs, previously allocated to them, on to customers); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1372 (D.C. Cir. 2004) (affirming allocation of administrative cost to transmission owners based on transmission usage).

A. Early Transmission Cost Allocation

When Midwest ISO first started operation in 2002, “all customers [paid] a single rate to use the entire [Midwest ISO] transmission system, based on the volume of power the customer carried on the system.” *Midwest ISO Transmission Owners*, 373 F.3d at 1365. Because this transmission access charge recovers “the cost of transmission facilities in the service area in which the loads are located,” (that is, the pricing zone), each load essentially pays for the transmission facilities that it brought to Midwest ISO. *Midwest Indep. Transmission Sys. Operator*, 84 FERC ¶ 61,231, 62,140 (1998).

By design, most generators connected to Midwest ISO’s system that sold their power to purchasers on the system did not pay transmission access charges. *See Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122, 1125-26 (D.C. Cir. 2011) (“for a sale to any purchaser throughout the Midwest ISO, the transmission rate will be simply the price for the purchaser’s zone”). Generators, however, paid the costs of connecting their generating facility to the grid and, until 2004, depending on their non-standard agreement with member transmission owners, some may have also paid for the costs of any grid upgrades needed to support their interconnection. *See National Ass’n*, 475 F.3d at 1284; *but see Western Mass. Elec. Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999) (upholding FERC policy to assign grid upgrade costs

caused by an interconnecting generator “to all customers on [the utility’s] integrated transmission grid”).

In 2004, Midwest ISO adopted the Commission’s default rule on interconnection costs and proposed to reimburse the costs that generators paid for grid upgrades. *See Public Serv. Comm’n*, 545 F.3d at 1060. The Commission accepted the controversial proposal, but encouraged the ISO and its stakeholders to continue efforts to develop a permanent pricing policy based on the general “principle of payment for upgrades by those that cause and benefit from the upgrades.” *Id.* at 1059 (citation omitted). This led to the formation of a dedicated stakeholder group to consider transmission cost allocation issues, and, ultimately, to the redesigned transmission cost allocation at issue in this appeal.

B. Transmission Planning And Development Of Energy Markets

2005 marked significant changes to Midwest ISO’s obligations and the operation of its grid. Acting on recommendations from its cost allocation stakeholder group, Midwest ISO adopted its first regional cost allocation for transmission projects needed for reliability. *Public Serv. Comm’n*, 545 F.3d at 1060-61. Midwest ISO also conducted its first of many planning efforts for identifying and evaluating new transmission projects and published its first annual Transmission Expansion Plan. *Id.* at 1060; *see also id.* at 1066 n.15 (describing transmission planning process).

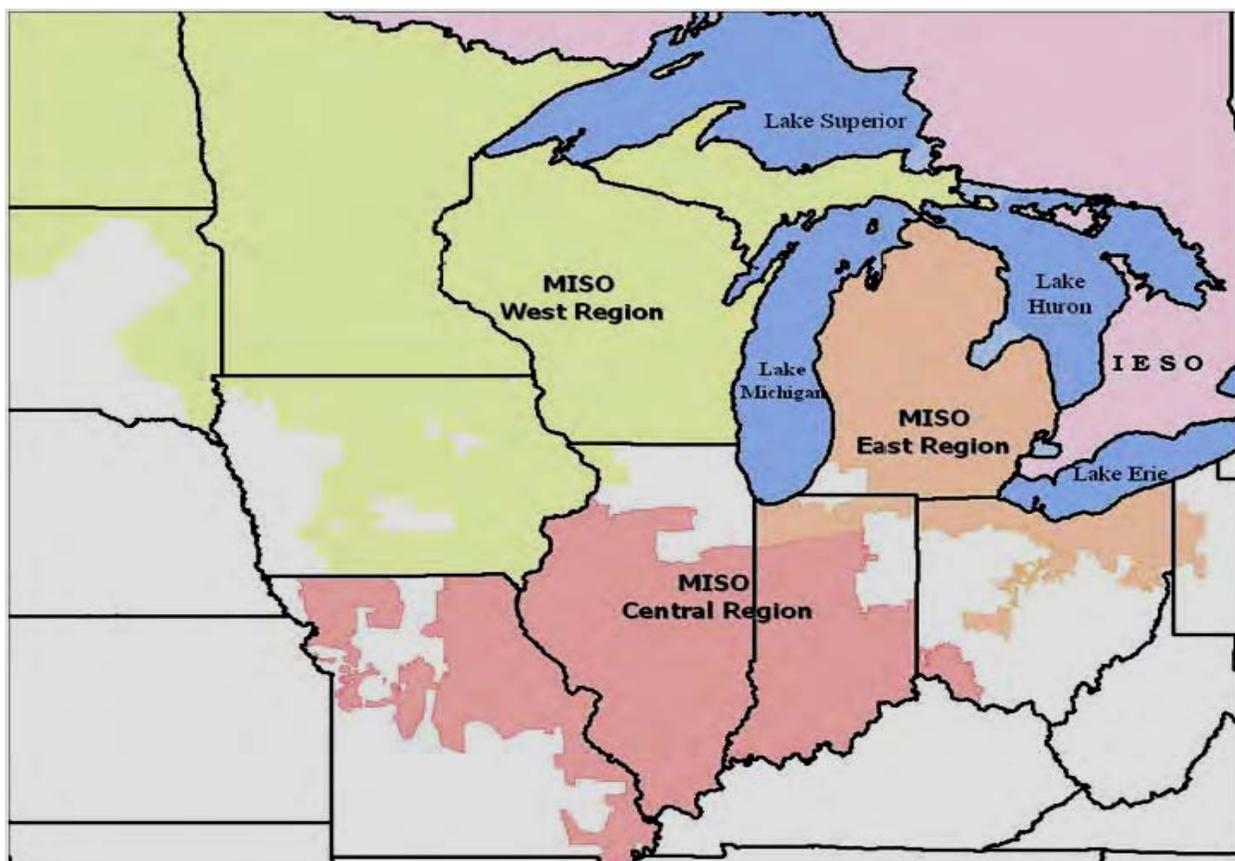
Also in 2005, Midwest ISO implemented bid-based markets for commodity sales of electricity. *Wisconsin Pub. Power*, 493 F.3d at 250. When purchasing energy in these markets, transmission customers continue to pay the transmission access charge, and the costs of congestion are incorporated into the price of energy. *Id.* Customers paying access charges are allocated rights to receive congestion revenues. *See id.* at 251 (describing financial instruments used to hedge against congestion costs); *see also Morgan Stanley*, 554 U.S. at 537 (same). That leaves us with the current payment structure for wholesale customers: load-serving entities that buy energy from Midwest ISO's markets pay charges for transmission access and transmission congestion plus the price of the energy commodity, and, in turn, they receive some congestion revenues. *See Wisconsin Pub. Power*, 493 F.3d at 251.

C. Existing Regional Cost Allocation

For new transmission projects added after the 2005 Transmission Expansion Plan, Midwest ISO divides the costs of certain Reliability Projects between the region and sub-regions. *Public Serv. Comm'n*, 545 F.3d at 1060-61. If projects are approved through the Transmission Expansion Plan, have a voltage level at or above 345 kilovolts ("kV"), and cost at least \$5 million, then twenty percent of the costs are allocated region-wide. *Id.* The remaining costs are assessed to pricing zones within a sub-region depending on the reliability benefit to that sub-region. *Id.*; *see also* MVP Order P 10 & n.19

(describing load outage distribution analysis), JA 1523-24. For lower voltage projects, Midwest ISO allocates all costs to the three sub-regions, shown in Figure 1, based on the outage distribution analysis. MVP Order P 10, JA 1524.

Figure 1: Midwest ISO Planning Sub-Regions



Source: Midwest ISO [2010 Transmission Expansion Plan](#), 17.

The costs of Efficiency Projects (345 kV and above with qualifying economic benefits) are allocated twenty percent to the region and eighty percent to pricing zones within sub-regions based on the projected economic benefits for each sub-region. MVP Order P 13, JA 1525; *see also* Midwest ISO

Proposed Revisions to Open Access Transmission, Energy and Operating Reserve Markets Tariff, 5-6 (filed July 15, 2010) (“MVP Proposal”), JA 5-6.

Midwest ISO also regionally assigns ten percent of the costs of higher voltage projects (345 kV and above) built because of a generator’s interconnection request (“Interconnection Projects”). MVP Order P 1 n.6, JA 1579. Until 2009, Midwest ISO collected forty percent of these project costs from sub-regions and the remaining fifty percent from the interconnecting generator. *See id.* PP 10-11, 311, JA 1523-24, 1628. The costs of projects with lower voltages were split equally between the sub-region and the interconnecting generator with no regional allocation. *Id.* Generators seeking to share their transmission costs had to show a contractual or other obligation to provide their power to customers in Midwest ISO. *Id.* P 11, JA 1524.

D. Interim Allocation Method

A majority of states in the Midwest ISO region have developed goals or mandates to increase the amount of renewable energy that their electricity customers use. *See* Rehearing Order P 146, JA 2230-31. By 2009, a large amount of wind energy, needed to meet this renewable power demand, waited in Midwest ISO’s interconnection queue. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060, P 11 (2009), *reh’g pending*. For six member utilities, the amount of this new generation exceeded the utilities’

total customer demand – in one case by more than twelvefold. *Id.* PP 11, 41. This meant that the wind energy necessarily would serve load elsewhere on Midwest ISO’s system. Expecting to shoulder an overwhelming share of the transmission costs to connect this generation, two utilities declared their intent to exit Midwest ISO. *See id.* P 7. Withdrawal of these entities (and others like them) threatened Midwest ISO’s ability to provide regional benefits, including those from “two zones containing rich wind resources,” to all of its members. *Id.* P 39.

In response, on July 10, 2009, Midwest ISO temporarily changed the way it allocates these transmission costs, eliminating the sub-regional allocation. *Id.*, Ordering Para. A. Interconnecting generators would bear nearly all of the costs of their network upgrades. *Id.* P 8. For higher voltage facilities, Midwest ISO continued to allocate 10 percent to the region. *Id.*

Recognizing that the temporary allocations could lead to an inefficient transmission grid, the Commission directed Midwest ISO to replace the interim proposal with a comprehensive allocation redesign. *Id.* P 70. For this purpose, the Commission instructed the stakeholder group to take a “comprehensive look at new transmission upgrade cost allocation in light of possible major ‘superhighway’ transmission projects to facilitate regional or inter-regional movement of large quantities of power from remote areas.” *Id.* P 57; Rehearing Order P 198, JA 2258.

E. Cost Allocation Redesign Proposal

For 19 months, stakeholders and state utility commissions engaged in parallel processes to develop and evaluate comprehensive solutions that would meet these goals. MVP Order PP 18-19, JA 1526; Rehearing Order P 6, JA 2168. The Midwest ISO's advisory committee of stakeholders considered and voted on three different proposals put forward by Midwest ISO, a state commission task force, and a group of transmission owners. MVP Order P 21, JA 1527; *see also* MVP Proposal at 10-11, JA 10-11. After considering input on all of these proposals, on July 15, 2010, Midwest ISO filed its MVP Proposal with the Commission.

Midwest ISO proposed a package of reforms that (1) retains the cost allocations for Reliability Projects and Efficiency Projects; (2) makes permanent the temporary allocation of most of the Interconnection Project costs to interconnecting generators (but allows for some cost sharing among cohorts of generators); and (3) allocates the costs for a new category of facilities, MVPs, on a regional basis to all customers taking energy off the transmission grid. *See* MVP Order PP 9-17, 40, JA 1523-26, 1535.

The foremost element of this package is the regional allocation for Multi-Value Projects. A Multi-Value Project must meet one of three criteria demonstrating that it brings some or all of the benefits of reduced electricity costs, system reliability improvements, or the advancement of state or federal

public policies. *Id.* P 29, JA 1530. Under Criterion 1, a project must: (1) be developed through Midwest ISO's transmission expansion plan to meet an energy policy mandate that favors a specific type of generation; and (2) enable the transmission grid to more reliably or economically deliver that type of generation. *Id.* Criterion 2 requires that a project provide multiple types of economic value across multiple pricing zones and have a benefit-cost ratio of 1.0 or higher. *Id.* A project qualifying under Criterion 3 must resolve a projected reliability violation, provide economic value in more than one pricing zone, and have costs less than its quantifiable benefits. *Id.*

Transmission facilities will not qualify as Multi-Value Projects unless they meet minimum cost (\$20 million) and voltage (100 kV) requirements. Rehearing Order P 10, JA 2162. Projects also must proceed through all of the stages of Midwest ISO's transmission planning process, including stakeholder review, and ultimately receive approval from Midwest ISO's governing board. *Id.* Finally, projects are ineligible for regional cost sharing if they are driven solely by a transmission service or generator interconnection request. *See* MVP Order P 259, JA 1613.

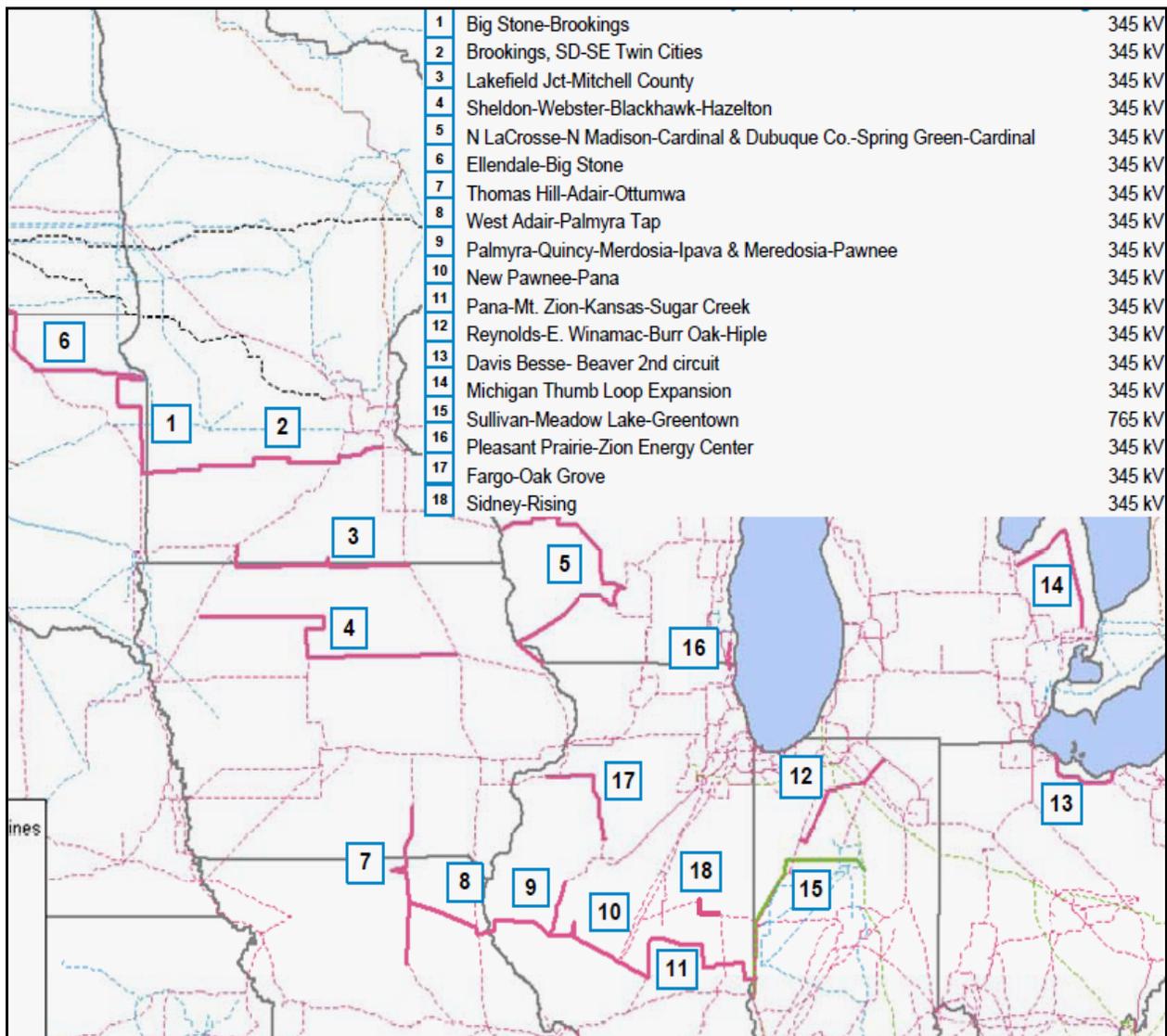
F. Starter Projects And Quantified Benefits

In collaboration with states and other stakeholders, Midwest ISO developed a transmission plan to meet energy policy mandates that were driving up the demand for wind energy. Midwest ISO, [Regional Generation](#)

[Outlet Study](#) (Nov. 19, 2010). This plan recognized that the best wind resources in the Midwest ISO region (located primarily in the West Sub-Region) are remote from densely populated and industrial areas with the highest electricity usage. *See id.* at 18. By contrast, local wind resources, those closest to loads, have higher capital costs per unit of electricity produced. *Id.* Midwest ISO found that the delivered price of electricity (the commodity price plus the transportation cost) for a system that exclusively relied on either type of wind energy would be the most expensive for the region. *Id.* Therefore, the states and Midwest ISO balanced local, capital-intensive wind energy with remote, efficient wind energy to identify “a set of least-cost wind zones that help to reduce the delivered . . . cost needed to meet renewable energy requirements” over the next 20 years. *Id.* at 1. These wind zones, dispersed throughout Midwest ISO’s footprint, informed a reliable and efficient transmission plan for delivery of that energy. MVP Proposal, Tab G, Test. of Jennifer Curran, 20-21, R.3, JA 427-28; *see also* [Regional Generation Outlet Study](#) at 13, Fig. 1.3-2 (showing transmission lines and circles representing least-cost wind zones).

To illustrate and measure, where possible, the potential benefits from the Multi-Value Projects, Midwest ISO selected a group of starter projects, shown in Figure 2 below, that may qualify under its MVP Proposal for construction in the next ten years. *See* MVP Proposal, Att. J, JA 508.

Figure 2. Multi-Value Project Starter Projects



Source: [Midwest ISO Technical Studies Task Force, 2011 Candidate MVP Portfolio](#), 39 (Mar. 24, 2011), *cited in* Rehearing Order P 145 n.314, JA 2230; *see also* [Regional Generation Outlet Study](#), Figure 8-1: Proposed Midwest ISO Candidate Multi-Value Project Portfolio, 97 (same).

The Regional Generation Outlet Study informed the selection of many, but not all, of the MVP starter projects. Additionally, Midwest ISO included projects identified through several other recent studies that examined: (1)

transmission congestion problems; (2) reliability needs; and (3) generator interconnection needs. MVP Order P 33, JA 1532. As Figure 2 shows, the starter projects are located in every state in Midwest ISO except Montana and Kentucky.

Midwest ISO uses a complicated and stakeholder-vetted model to simulate Midwest ISO's electrical markets and, in this case, compare prices on its grid with and without the starter projects under five scenarios. *See* MVP Proposal, Tab F, Test. of John Lawhorn, 4-13, R.3, JA 392-401. Midwest ISO's model estimated that the starter projects will produce between \$297 million and \$1.3 billion in savings from enabling low-cost generators to displace higher-cost generators ("production cost savings"). *Id.* at 13, JA 401. In addition, it showed \$68 million to \$104 million in savings from reducing transmission line losses and, thereby, avoiding new generation investment. *Id.* at 15, JA 403. The model results demonstrated that "[e]ach Midwest ISO Planning [Sub-]Region has positive . . . savings potential under nearly all scenarios" and that these savings are "generally evenly divided through the regions." *Id.* at 13, JA 401.

Because the starter projects will allow freer flow of power across the region, they will allow customers with diverse energy usage patterns to share reserve resources. *See* Curran Test. at 26, JA 433. Midwest ISO estimates the value of this "load diversity" at between \$217 million and \$271 million

annually. *Id.* (citing Midwest ISO Value Proposition study); *see id.* at 25 (stating that annual planning reserve value of MVPs could be as high as \$500 million; referencing 2009 and 2010 Loss Of Load Expectation studies), JA 432. Midwest ISO found the cumulative quantifiable economic benefits for 2015 were between \$582 million and \$798 million, offsetting the starter projects' estimated annual costs of \$675 million. *Id.* at 26, JA 433; *see also* MVP Order PP 34-38 (summarizing benefits and costs), JA 1533-34.

III. Challenged FERC Orders

In the challenged orders, the Commission approved Midwest ISO's cost allocation redesign as just and reasonable, finding that it: (1) will provide incentives for needed transmission expansion, MVP Order PP 3, 48, 193-94, JA 1520, 1537, 1588-89; Rehearing Order PP 116, 132, 139, 214, JA 2211, 2222, 2227, 2265; (2) is generally supported by states and market participants, MVP Order P 204, JA 2261; Rehearing Order PP 116, 174, 182, JA 2211, 2246, 2251; and (3) fairly assigns costs among Midwest ISO market participants, *see, e.g.*, MVP Order P 3, JA 1520.

As most relevant here, the Commission found several aspects of the redesign that led it to conclude that Multi-Value Projects will provide regional benefits consistent with a regional allocation of costs. *Id.* P 200, JA 1592. The three criteria and other minimum qualifications for projects are structured properly to identify projects with broad regional benefits. *See id.*

PP 208, 213, 215, 216, JA 1595, 1597, 1597, 1598. Once individual projects are identified as potential MVPs, they are further evaluated as part of a portfolio to ensure that the ISO selects optimal regional solutions. *Id.* P 221, JA 1600. This portfolio process also helps ensure that benefits and costs are “spread broadly through the Midwest ISO region.” *Id.* P 202, JA 1592; Rehearing Order P 171, JA 2244. Finally, the existing Transmission Expansion Planning stakeholder process will provide for transparent consideration of studies, data, and views regarding benefits that accrue from individual projects and whether those benefits justify regional cost allocation. MVP Order PP 194, 203, JA 1588, 1593. Midwest ISO’s dispute resolution process and the Commission’s complaint procedures are available to those that disagree with the outcomes of this collaborative process. *Id.* P 203, JA 1593.

To supplement the data that stakeholders receive and to provide information on which to judge the ongoing reasonableness of the rate design, the Commission directed Midwest ISO to review, every three years, the “costs and benefits resulting from MVPs, including their distribution across the Midwest ISO region.” Rehearing Order P 190, JA 2255. It also directed the filing of annual reports on the selection of Multi-Value Projects and the achievements and shortcomings of the process. MVP Order P 244, JA 1609. These two reports along with the annual Transmission Expansion Plan will

provide “adequate knowledge of and opportunity to challenge the selection of projects and the associated cost allocation.” *Id.*

Examining the estimated economic benefits for the illustrative starter projects and a study measuring local and regional use of grid facilities, the Commission found quantitative evidence to support its determination that the rate design would select projects whose benefits are distributed roughly commensurate with their costs. *See id.* PP 227-38, JA 1603-06.

The Commission rejected a call to assign Multi-Value Project costs to interconnecting generators. Rehearing Order P 210, JA 2263. It determined that the rate redesign struck the appropriate balance in allocating the costs of those network upgrades that provide broad benefits, across the footprint, to all customers and allocating the cost of network upgrades caused solely by an interconnection request to the interconnecting generator. *Id.*; *see* MVP Order P 240, JA 1607.

The Commission also approved the proposal to charge for Multi-Value Project costs based on each customer’s energy withdrawals from the Midwest ISO grid. MVP Order PP 383, 385, JA 1652, 1653. This usage charge also applies to customers located on adjoining grids, except that the Commission rejected the proposal to assess this particular charge to customers located in PJM. *Id.* PP 439-40, JA 1676. The Commission previously determined that the configurations of Midwest ISO and PJM, and their shared border, cause

unjust and unreasonable rate compounding for border-crossing transactions. Rehearing Order PP 288-92, JA 2303-06. Here, the Commission found inadequate evidence of changed circumstances to justify the proposed usage charge, but invited Midwest ISO to submit a new proposal to allocate costs to customers within PJM in a manner consistent with precedent. *Id.* P 292, JA 2306.

Finally, the Commission accepted modified tariff language, conforming it to existing obligations in the Transmission Owners Agreement, which generally holds withdrawing transmission owners responsible for all costs incurred while a member. MVP Order PP 470-71, JA 1689; Rehearing Order P 323, JA 2320. But the MVP Proposal did not include a methodology for assessing MVP costs to withdrawing owners and the Commission declined to rule on whether, or to what, extent withdrawing members, and FirstEnergy Service Company (“FirstEnergy”) and Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc. (“Duke”) in particular, might be responsible for such costs. MVP Order P 472, JA 1690. Midwest ISO subsequently proposed to implement MVP cost recovery from withdrawing transmission owners, and the Commission is considering that proposal and FirstEnergy’s and Duke’s cost responsibility, if any, in those ongoing proceedings. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,140 (2012) (establishing

hearing addressing former transmission owners' responsibility for MVP costs).

SUMMARY OF ARGUMENT

The MVP Proposal is a package of reforms that institutes a balanced allocation of costs for different types of transmission projects to different beneficiaries. It represents broad state and stakeholder agreement, offers necessary incentives to efficiently expand the transmission grid, and fairly allocates costs to those that benefit from grid expansion. The Commission may allocate facility costs broadly where, as here, there is evidence of a broad class of beneficiaries.

The MVP criteria require that Multi-Value Projects support an energy policy goal, provide reliability benefits or show quantifiable benefits in excess of costs reaching multiple customer zones. One qualifying criterion requires both quantifiable benefits by customer zone and tangible, but less quantifiable, reliability benefits. Projects expected to qualify under the first criterion were planned to link remote and local wind resources to meet, in the most cost effective manner, state goals for renewable energy.

Substantial evidence demonstrates that the facilities qualifying as MVPs will support regional transactions most of the time. Additionally, the starter projects, which are likely to be the first projects qualifying as Multi-Value Projects, have several types of quantified benefits spread almost evenly

among Midwest ISO's sub-regions. Midwest ISO properly supported its proposal by explaining the results of its market modeling and relying on publicly-available or stakeholder-vetted studies. In approving the MVP Proposal, the Commission reasonably concluded that the assignment of costs on a regional basis is well supported by tangible and quantifiable evidence of broad regional benefits that will accrue across Midwest ISO's footprint.

Likewise, finding that these benefits would flow to customers and that generators would shoulder the costs of grid facilities required to connect them to the MVPs and other grid facilities, the Commission properly determined that the package of reforms appropriately balances cost responsibilities between generators and customers.

Additionally, the Commission found unwarranted Michigan Customers' concern that they would receive no benefits from MVPs outside of Michigan. It properly denied their request to form a separate pricing and planning zone as counter to the goals and integrated grid operations of the RTO. Similarly, the Commission properly determined that customers located outside Michigan would benefit from an MVP located in that state because it would bring inexpensive and plentiful wind energy into the rest of Midwest ISO. The Commission properly exercised its discretion in declining to order an evidentiary hearing on the benefits that customers will receive from MVPs.

The Commission reasonably approved allocating MVP costs to grid customers through a usage charge based on “utilities’ share of total electricity sales in [the RTO’s] region,” *Illinois Commerce Comm’n*, 576 F.3d at 477. This allocation method reflects that benefits will change over time as the economics of generation change, new resources are added to the system and the grid evolves. The usage charge also matches how Midwest ISO plans and operates its transmission system. Additionally, the Commission reasonably declined to apply this usage charge to transactions crossing into PJM, the neighboring RTO of the mid-Atlantic, because of ongoing rate compounding concerns, finding insufficient evidence of changed circumstances.

The Commission properly exercised its jurisdiction over transmission cost allocation in this case. Its actions did not impermissibly intrude on state renewable energy standards or state power to reject or approve transmission or generator construction.

The Commission also reasonably declined to address, in this proceeding, the MVP cost responsibilities of transmission owners leaving Midwest ISO. The tariff change approved in the proceeding below was ministerial and any determination of individual cost responsibility is outside the scope of the proceeding, leaving the Court without jurisdiction to address challenges to individual cost responsibility in this appeal.

ARGUMENT

I. Standard Of Review

Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), the Court reviews agency orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See, e.g., Michael v. FDIC*, 687 F.3d 337, 348 (7th Cir. 2012). “Under this standard, the court’s review is narrow; a court may not set aside an agency decision that articulates grounds indicating a rational connection between the facts and the agency’s action.” *Schneider Nat’l, Inc. v. ICC*, 948 F.2d 338, 343 (7th Cir. 1991) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Commission’s factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825I(b); *see Northern Ind. Pub. Serv. Co. v. FERC*, 782 F.2d 730, 739-40 (7th Cir. 1986) (the Court considers whether actions are “supported by substantial evidence,” and “whether the Commission has given reasoned consideration to . . . balancing the needs of the industry with the relevant public interests”) (quotation omitted). “Substantial evidence is such relevant evidence a reasonable person would deem adequate to support the ultimate conclusion.” *Michael*, 687 F.3d at 348. In making its determination, the Court is not permitted to “decide the facts anew, reweigh the evidence, or to substitute [its] own judgment” for

that of the agency. *Jancik v. HUD*, 44 F.3d 553, 556 (7th Cir. 1995) (quotation omitted).

Under the Federal Power Act, “Congress has entrusted the regulation of the . . . industry to the informed judgment of the Commission, and therefore a presumption of validity attaches to each exercise of the Commission’s expertise.” *Village of Bethany v. FERC*, 276 F.3d 934, 940 (7th Cir. 2002) (quoting *Northern Ind. Pub. Serv.*, 782 F.2d at 739) (internal quotation marks omitted). Deference to FERC’s decisions regarding rate issues is particularly appropriate, because of “the breadth and complexity of the Commission’s responsibilities.” *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968). “The statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions.” *Morgan Stanley*, 554 U.S. at 532.

II. The Commission Reasonably Approved Regional Cost Allocation For Multi-Value Projects.

A. Cost Causation Requires That Benefits Match Costs To Some Degree, But Not With Exacting Precision.

In applying the statutory mandate that rates be just and reasonable, the courts and the Commission have required regulated entities to allocate their costs according to the cost causation principle. “[T]raditionally, [this] required that all approved rates reflect to some degree the costs actually

caused by the customer who must pay them.” *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992). In the last two decades, however, the principle has been extended to “those who . . . ultimately benefit” from the incurrence of the costs. *Id.* at 1301; *see, e.g., Midwest ISO Transmission Owners*, 373 F.3d at 1369 (cost causation considers “burdens imposed or benefits drawn”).

In the transmission context, “[t]o the extent that a utility benefits from the cost of new facilities, it may be said to have ‘caused’ a part of those costs to be incurred, as without the expectation of its contributions the facilities might not have been built, or might have been delayed.” *Illinois Commerce Comm’n*, 576 F.3d at 476. Here, but for the regional cost allocation, Multi-Value Projects might never be built. This might occur, for example, because the cost burden on certain member utilities under the prior cost allocation regime causes them to withdraw from Midwest ISO. *See* MVP Order P 239, JA 1606. Thus, in disputes over transmission costs, the Commission determines whether a “proposal fairly assigns costs among participants, including those who cause them to be incurred and those who otherwise benefit from them.” Order No. 890 P 559.

Coalition argues that, in order to broadly allocate MVP costs, FERC must *quantify* the benefit for *each participant* and compare that with the costs each is likely to incur. *See* Br. 20-23; *see, e.g.,* Br. 22 (FERC cannot

“allocate costs without any individualized assessment of cost causers or beneficiaries” and “the core question is how much benefit and to whom”). Coalition points to this Court’s decision in *Illinois Commerce Commission*, see Br. 22, in which this Court held that the Commission could “presume that new transmission lines benefit the entire network by reducing the likelihood or severity of outages,” 576 F.3d at 477 (citing *Western Massachusetts*, 165 F.3d at 927), but the Commission could not “use the presumption to avoid the duty of ‘comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party.’” *Id.* (quoting *Midwest ISO Transmission Owners*, 373 F.3d at 1368).

As the Commission found, however, *Illinois Commerce Commission* does not require even a utility-by-utility analysis of benefits, much less an analysis for each of the 350 market participants that withdraw energy from Midwest ISO’s grid. See Rehearing Order P 121, JA 2214. Nor does this Court require quantification in all circumstances. In fact, *Illinois Commerce Commission* explicitly allows the Commission to approve a regional cost allocation, even “if it cannot quantify the benefits,” so long as it articulates a “plausible reason to believe that the benefits are at least roughly commensurate with those utilities’ share of total electricity sales in [the] region.” 576 F.3d at 477. Likewise, the Court directed the Commission to conduct the same cost causation analysis that it had in *Midwest ISO*

Transmission Owners and *Western Massachusetts*. See Rehearing Order P 121 (citing *Illinois Commerce Comm’n*, 576 F.3d at 477), JA 2214. In neither of those two cases did the Commission quantify the benefits for each individual entity assessed costs.

Though the court in *Midwest ISO Transmission Owners* expressed the cost causation requirement as a duty to “compar[e] the costs assessed against a party to the burdens imposed or benefits drawn by that party,” 373 F.3d at 1369, its decision upheld FERC’s regional cost allocation without any individual comparisons. *Id.* at 1370-71; see also Rehearing Order P 121 (same), JA 2214. Coalition concedes that, at least for administrative costs, the Commission need not conduct an analysis of benefits received by each party. Br. 20-21. Coalition, however, argues that transmission costs require a more individualized analysis given that “transmission facilities benefit principally those who use them to transmit electricity.” Br. 21. *Western Massachusetts*, the other case that the Seventh Circuit instructed FERC to follow, answers this assertion.

There, the Commission allocated to all network customers the costs of a transmission project, almost identical to the grid expansion at issue here, that allowed a generator to transmit its electricity across one utility’s grid for sale to a neighboring utility in the power pool. 165 F.3d at 923. Even though the project was necessary only because of the generator’s request, *id.* at 925,

the Commission based this broad allocation on (1) a presumption that new transmission lines benefit the entire network; and (2) a study of flows on the system that showed other grid customers would use the upgraded facilities. *See* Rehearing Order P 122 (citing *Western Massachusetts*, 165 F.3d at 927), JA 2215. But this study did not show that each customer on the grid would, or even could, make use of the facilities once they were built; rather, it showed that “customers other than [the generator] will make use of and benefit from the grid upgrades,” in those few times when the power flowing from the generator is “lower than expected.” *Western Massachusetts*, 165 F.3d at 927; *see also Western Massachusetts Elec. Co.*, 64 FERC ¶ 63,028, 65,128 (1993) (judge found that although FERC trial staff “suggests that some benefit to the system may have resulted, [its witness] was unable to identify any specific added system benefits accruing to either [Western Massachusetts Electric Company] or to its transmission customers”). The court required neither a showing that each grid customer would benefit from the facilities nor how much the group of network customers would benefit. *See* Rehearing Order P 122, JA 2215.

Illinois Commerce Commission faulted FERC not for a lack of individualized analysis, but for FERC’s failure to show any evidence of regional benefits. Rehearing Order P 123 (citing *Illinois Commerce Comm’n*,

576 F.3d at 477), JA 2216. In the FPA section 206(a), 16 U.S.C. § 824e(a), rate investigation involved in *Illinois Commerce Commission*, PJM did not advocate a change to its rate design for new transmission costs, and it did not submit testimony at the administrative hearing. *See PJM Interconnection, L.L.C.*, 116 FERC ¶ 63,007 (2006). PJM suggested the regional cost allocation at issue on appeal, without any supporting studies or testimony, in its initial post-hearing brief. In fact, no party proposed, defended, or proffered testimony in support of PJM's suggestion.

For this reason, the Commission's regional allocation was supported by generalities – not the specific and substantial evidence advanced by Midwest ISO here. *See Illinois Commerce Comm'n*, 576 F.3d at 474-75 (finding FERC provided “no data No specifics concerning difficulties in assessing benefits No particulars . . . concerning the contribution that very high-voltage facilities are likely to make to . . . reliability Not even the roughest estimate of likely benefits”). The Court also was unable to give weight to a Commission finding of regional consensus because, unlike here, MVP Order P 204, JA 1593, there was no general support among market participants for PJM's allocation. *Illinois Commerce Comm'n*, 576 F.3d at 475. Thus, contrary to Coalition's assertion, Br. 23, *Illinois Commerce Commission* did not determine that allocating the costs of high voltage

projects on a regional basis is unjust and unreasonable. *See* Br. 23. Rather, the Court “intimate[d] no view” on the ultimate cost allocation decision. 576 F.3d at 478.

B. The MVP Criteria Identify Projects That Will Create Tangible Regional Benefits.

Coalition argues that projects with limited regional benefits will qualify under the Multi-Value Project criteria. Br. 17. To the contrary, the tariff criteria and planning process are designed to identify projects that will create regional benefits.

The MVP criteria identify those projects that benefit the whole region by advancing state and federal energy policies, reducing customer energy prices, limiting line losses, reducing new generator investments, and increasing reliability. MVP Proposal at 13-14, JA 13-14. Only projects that bring at least two of these benefits, and thereby meet one of the criteria, can progress to the next stage of consideration in the transmission planning process. *See* MVP Order P 33, JA 1532. Further, each criterion requires that “the scope of the project benefits reach more than one pricing zone.” Rehearing Order P 360, JA 2334.

The tariff requires more than a mere assertion that the project will bring a particular benefit. Midwest ISO must compare costs and benefits, for some projects at the level of the pricing zone, before bringing a project (and

its benefit analysis) to the stakeholders for their review and input. *Id.* P 181 & n.380, JA 2250-51; *see also id.* P 357 (tariff changed to clarify that MVP designation is part of the transmission planning process), JA 2332. This approach of identifying projects that serve a regional function, followed by a transparent vetting of the analysis of benefits in the stakeholder process, ensures that MVPs will benefit the region as a whole. *Id.* P 180, JA 2250.

- 1. Criterion 1 Properly Identifies Transmission Meeting Regional Objectives Of Bringing Local And Remote Wind Energy To Market.**

Criterion 1 qualifies Multi-Value Projects that are regionally planned, meet an energy policy goal, and deliver that energy in a more reliable and economic manner. MVP Order P 29, JA 1530. All but one of Midwest ISO states now have established policy initiatives supporting renewable or clean energy generation resources. Rehearing Order P 146 (noting twelve of thirteen states have policies), JA 2230. This criterion was developed to resolve wind energy access problems, as evidenced by 64,500 megawatts of wind energy waiting in the interconnection queue, and the major upgrades needed to meet the regional renewable energy objectives. *See* [Regional Generation Outlet Study](#) at 23.

Agreeing that ad hoc interconnection is not an “efficient means for building a cost effective transmission system” over the next decade, states have been actively planning for this future through the Regional Generation

Outlet Study. *Id.* Projects planned through the study provide the most efficient way to meet the demand for wind power created by state renewable energy standards. *Id.*; MVP Order P 208, JA 1595. The projects will not bring only remote wind to market as Coalition suggests, Br. 2, 13, but will also connect wind generators to local loads. [Regional Generation Outlet Study](#) at 18.

In approving Criterion 1, the Commission balanced cost allocation principles with this general state support for a proposal that ensures sufficient infrastructure to transport wind energy to the states' customers. Rehearing Order P 139, JA 2226. It found that "there will be purchases of renewable energy by many states from sources in other areas of Midwest ISO, including from west to east." MVP Order P 234, JA 1605. It reasonably concluded that Multi-Value Projects qualifying under Criterion 1 would produce tangible benefits in creating a more efficient platform to address regional energy goals and, accordingly, their costs should be allocated to everyone in the region. *Id.* P 208, JA 1595.

Coalition argues that the Commission ignored differences in the renewable energy standards in different states, pointing to the example of the only approved MVP, the Michigan Thumb Project (number 14 on Figure 2, *supra* p. 18). Br. 17-18, 20, 21. While Coalition is right that the Michigan

Thumb Project qualified as a Multi-Value Project under Criterion 1 (and thus required no benefit quantification in its selection), the Commission reasonably determined that the Project will benefit customers across the entire region. *See* Rehearing Order P 148, JA 2231.

Customers outside of Michigan can use the Michigan Thumb Project to meet their renewable energy standards, as the project is three times larger than what Michigan utilities require to meet their in-state renewable energy standard. *Id.* P 148, JA 2231; MVP Order P 173 & n.218, JA 1580. Even states like Illinois, that are limited by statute to renewable energy from adjoining states, Coalition Br. 5-6, can purchase from generators attached to the Thumb Project. *See* ILL. ADMIN. CODE tit. 83, § 455.110(g) (defining, for renewable energy standards, the six states that “adjoin” Illinois, including Michigan).

Those customers, like Hoosier Energy Rural Electric Cooperative, Inc. (“Hoosier”), that have no requirement to purchase renewable energy, Coalition Br. 25-26, will benefit from better grid reliability, lower line losses, and increased access to more and lower-cost energy sources. *See* Rehearing Order PP 144, 148, JA 2229, 2231; MVP Order P 222 (customers “inside of and outside of Michigan will receive . . . broad regional benefits”), JA 1601; *see also id.* P 439, JA 1676; Protest of Hoosier and Southern Illinois Power Cooperative, Att. 4 at 3, R.72 (filed Sept. 10, 2010) (“Hoosier Protest”)

(showing production cost savings from the Michigan Thumb Project for the Central Sub-Region of between \$98 million to \$732 million), JA 1132.

2. Criteria 2 And 3 Reasonably Afford Regional Cost Allocation To Projects That Provide Regional Benefits.

The link of Criteria 2 and 3 to cost causation is straightforward: Midwest ISO must quantify benefits across multiple pricing zones in order to regionally allocate the MVP costs. MVP Order P 29, JA 1530. Coalition argues that these criteria are too broad because they will include facilities with limited benefits. Br. 17. It further asserts that, like *Illinois Commerce Commission*, the Commission has failed to provide sufficient evidence of regional benefits. Br. 29 (citing 576 F.3d at 474, 476).

To the contrary, the Commission approved these criteria, as a package of reforms, because the ISO is required to quantify the economic benefits of the lines and to show that projects that qualify as Multi-Value Projects will have broad regional benefits. MVP Order PP 213-215, JA 1597-98. Moreover, Midwest ISO supported its MVP Proposal with a load usage study similar to that employed in *Western Massachusetts*. See 165 F.3d at 927.

This transmission usage study showed that (1) loads and exports are by far the greatest users of the type of facility that would qualify as a Multi-Value Project and (2) the users transport power on a regional basis. See MVP Order P 53 (citing Curran Test. at 28, JA 435 (finding 80 percent of the use of

higher voltage facilities is regional)), JA 1538; *see also* MVP Proposal at 3, JA 3. The Commission reasonably concluded that this type of power flow analysis, in conjunction with other evidence of tangible and quantified benefits, supports a finding that Multi-Value Projects qualified through any of the tariff criteria will provide wide-spread regional benefits. MVP Order P 238, JA 1606; Rehearing Order P 129, JA 2219; *see also Western Massachusetts*, 165 F.3d at 927 (“loadflow analysis [showed] reasons why the upgrades would provide a benefit to all users of the transmission grid and not just [generator],” that is, “other grid customers will be making use of the upgraded grid facilities”).

C. The MVP Process Provides Protections Against No Or Trivial Benefits.

As described, the MVP tariff criteria properly screen projects to identify those that have regional benefits. Contrary to Coalition’s claim, Br. 18-20, other provisions add considerable protections to ensure that the costs of Multi-Value Projects that are first incorporated into the Transmission Expansion Plan, and eventually built, are allocated commensurate with benefits, now and continuing into the future.

The Commission requires a transmission planning process that is coordinated, open, and transparent. Order No. 890 P 440. Consistent with

this requirement, Midwest ISO shares with stakeholders the benefit-to-cost ratio for the portfolio of MVPs and any analysis that it conducted to qualify individual projects. Rehearing Order P 142, JA 2227. Stakeholders then have an opportunity to evaluate all of the candidate projects and determine whether the projects meet cost causation principles in the first instance. *Id.* If there is a lack of unity as to costs and benefits, an individual stakeholder can seek remedies through Midwest ISO's dispute resolution process or through the Commission's complaint procedures under section 206 of the FPA, 16 U.S.C. § 824e. MVP Order P 203, JA 1593. This stakeholder process helps ensure that approved Multi-Value Projects benefit everyone over time.

Similarly, the requirement to evaluate Multi-Value Projects in a portfolio, akin to the selection of the starter projects discussed *supra* at pp. 17-19, provides assurance of a distribution of projects throughout the footprint with benefits broadly shared. *See id.* P 202, JA 1592. A portfolio approach is consistent with the way that Midwest ISO plans its system – considering many potential problems and their solutions in a single Transmission Expansion Plan. *See* Rehearing Order P 126, JA 2218. Just as integrated planning benefits different customers differently at different times, the portfolio ensures that all will realize benefits from Multi-Value Projects, albeit not necessarily at the same time. *See id.* In sum, the portfolio

approach will “ensure[] that MVPs will be developed throughout the Midwest ISO region,” *id.* P 171, JA 2245, and “maximize the number of system users who will share in [the global benefits].” MVP Order P 221, JA 1600.

Finally, to assure that the MVP rate design does not produce unreasonable results, and to supplement the checks and balances of the stakeholder process and the portfolio approach, the Commission directed Midwest ISO to file annual reports on MVP selection and a more thorough review of the MVP process at least every three years that will:

monitor the costs and benefits of the cumulative effects of all approved MVPs [and] perform analyses of relevant economic factors (e.g., load forecasts, fuel prices, and environmental costs), quantify the economic benefits of MVPs (e.g., production cost savings, capacity losses savings, decreased planning reserve margins, and avoided projects), and examine the qualitative impacts of MVPs (e.g., public policy benefits).

Rehearing Order P 191, JA 2255. FERC is committed to ongoing oversight of the process to ensure that the MVP criteria appropriately identify a portfolio of projects with clear regional benefits and scope. If warranted, it will adjust MVP allocations if costs are not roughly in line with benefits. *Id.* P 190, JA 2255.

D. The Starter Project Analysis Provides Substantial Evidence That MVPs Will Bring Region-wide Benefits.

1. Starter Projects Show Benefits At Least Roughly Commensurate With Costs.

Midwest ISO selected a group of then 16 starter projects to measure the benefits to the region from Multi-Value Projects. MVP Order P 33, JA 1532. It found that these projects would qualify under the MVP tariff criteria and judged that they would win approval from stakeholders in the transmission planning process. *Id.* The starter projects showed significant measurable benefits in three categories: (1) lower production costs (including “load savings”); (2) lower transmission line losses; and (3) savings from lower reserve requirements. *Id.* P 34, JA 1533.

Midwest ISO’s main method for quantifying starter project benefits is its production cost model that “simulate[s] electrical markets.” Lawhorn Test. at 4, JA 392. This intricate market simulator is constantly used by Midwest ISO to plan its system and test changes to its operating procedures. *Id.* at 4-6, JA 392-94. The inputs of “detailed generation, fuel, demand and energy, transmission, and system configuration data” are “reviewed through appropriate stakeholder . . . groups.” *Id.* at 6, JA 394. Like all models, Midwest ISO’s market simulator allows it to test different scenarios against the base case or status quo. *See id.* at 10, JA 398. To evaluate the starter

projects, Midwest ISO used five scenarios developed through state regulatory and stakeholder groups. *Id.* at 10-12 (describing scenarios), JA 398-400.

The market simulator and other studies showed that the starter projects will produce annual quantifiable benefits, under all five scenarios, that are roughly equal to or exceed the annual costs of the projects. MVP Order P 229 (detailing quantities by category of benefit and citing supporting testimony), JA 1603; *see* Rehearing Order P 127 (same), JA 2218; *supra* pp. 19-20 (same). In particular, the model showed that the largest category of savings, lower energy prices from lower production costs and freer flow of energy across uncongested transmission lines, would accrue to each sub-region under nearly all scenarios and is “generally evenly divided through the regions.” Lawhorn Test. at 13, JA 401; *see* Curran Test. at 23 (same), JA 430. From this, the Commission reasonably concluded that Midwest ISO had met its burden of showing that the MVP “benefits will be widely experienced” by energy customers. MVP Order P 236, JA 1605; *id.* PP 229-32 (same and citing Curran and Lawhorn testimony), JA 1603-04; *cf. Illinois Commerce Comm’n*, 576 F.3d at 476 (discussing “generalized system benefits” as insufficient and requiring greater specificity).

This is insufficient, Coalition argues, to show that customers in the region will receive enough benefit from the Multi-Value Projects to justify the costs. Br. 33-36. Entirely ignoring Midwest ISO’s estimate of benefits of up to

\$271 million for lower reserve requirements, *see* MVP Order P 229, JA 1603, Coalition concludes that savings from reduced congestion and lower generator prices should not be counted and that a line loss savings of \$68 million is “not large enough to justify” the \$675 million costs for Multi-Value Projects, Br. 36.

The gist of Coalition’s complaint is that Midwest ISO did not quantify each of the benefits to each pricing zone (or sometimes state) for each transmission line considered in the group of starter projects. *See, e.g.*, Br. 34-35. As explained *supra* at pp. 30-33, the courts, including this one, do not require that level of precision. *See Illinois Commerce Comm’n*, 576 F.3d at 477 (benefits need not be calculated “to the last million or ten million or perhaps hundred million dollars”); *Public Serv. Comm’n*, 545 F.3d at 1067 (although “alternative might well be more precise, [the court] cannot reject FERC’s reasonable . . . criterion because it may not ‘allocate costs with exacting precision’” (quoting *Midwest ISO Transmission Owners*, 373 F.3d at 1369)). Moreover, taking into account those savings that Coalition does not dismiss out-of-hand (losses and reserves), Midwest ISO has shown quantifiable economic benefits that equal half of the annual cost of the Multi-Value Projects. *See* MVP Order P 229, JA 1603. This is more than enough when Midwest ISO has also demonstrated significant but unquantifiable benefits from meeting energy policy goals and increased reliability. *Illinois*

Commerce Comm'n, 576 F.3d at 477 (finding that if FERC “cannot quantify the benefits” it may approve an allocation based on a plausible reasoning that benefits are commensurate with costs; it may also presume benefits to the entire network from reliability improvements).

Those production cost savings that Coalition dismisses out-of-hand lend even greater support to a regional allocation of costs. *See* MVP Order P 230 (predicting annual production costs savings of up to \$1.3 billion), JA 1604. Although Coalition discusses production cost and load cost savings as two types of benefits, Br. 33-35, the reduction in energy prices is a single benefit. MVP Order P 29 (“reduction of production costs and the associated reduction of [prices] resulting from . . . transmission congestion relief . . . are not additive”), JA 1531. In the Midwest ISO market, a reduction in the production costs of generators will translate to lower energy prices. Midwest ISO assures this by enforcing a cap on generators’ bids so that they represent marginal costs (i.e., their “cost of fuel, emission, variable operations and maintenance,” Lawhorn Test. at 13, JA 401). *Wisconsin Pub. Power*, 493 F.3d at 251 (describing mitigation program). These protections ensure that customers will receive the benefit from lower production costs.

Coalition speculates that some individual customers will experience higher prices as a result of the Multi-Value Projects. Br. 33-34. The Commission acknowledged that a customer in a congested area that has

cheap energy sufficient to meet its needs might pay higher energy prices when a Multi-Value Project first opens its area to competition. Rehearing Order P 160, JA 2239. However, energy markets and the grid change. *Id.* Those that have locked in cheap power because of limited export capacity may see prices rise in the short term, but they may realize long-term benefits from better access to even cheaper power from lower production costs in the future. *See id.* P 127, JA 2218. If this does not happen, and the “additional quantitative and qualitative benefits” of the Multi-Value Projects do not offset the harm, *id.*, the individual customer may use Midwest ISO’s dispute resolution process as well as FERC’s complaint procedures to seek a remedy. *Id.* PP 157, 191, JA 2238, 2255; MVP Order PP 203, 226, JA 1593, 1602.

2. The Midwest ISO Studies Were Publicly Available And Vetted By Stakeholders.

Coalition faults Midwest ISO for summarizing instead of filing, with its MVP Proposal, the hundreds of pages of studies and the data inputs into the market simulator that it relied upon in identifying or quantifying the benefits of the starter projects. *See* Br. 30-33. As shown in the MVP Orders, these studies were publicly available or made available at earlier times to stakeholders for vetting as part of the planning processes. *See* MVP Order P 210 n.270 (citing publicly-available [Regional Generation Outlet Study](#)), JA 1595; Rehearing Order P 145 n.314 (citing publicly-available [2010](#)

Transmission Expansion Plan and March 2011 Technical Studies Task Force 2011 Candidate MVP Portfolio report), JA 2230; *see also* Lawhorn Test. at 8-10 (explaining sources and review of inputs to market simulator), JA 396-98; Curran Test. at 25 (citing publicly-available 2009 and 2010 Loss Of Load Expectation reports), JA 432; *id.* at 26 (citing and providing link to Midwest ISO's Value Proposition), JA 433.

Indeed, stakeholders had the opportunity to (and did) evaluate and challenge the inputs, assumptions, and results of the studies upon which the Commission relied to find regional benefits. *See, e.g.*, MVP Order P 144 (protestors “question load growth estimates and other inputs into the expected benefits studies”), JA 1570; Rehearing Order P 43 & n.88 (questioning assumptions of Midwest ISO's transmission usage study), JA 2175-76; Coalition Br. 31 (“none of the five scenarios [in Witness Lawhorn's model] used to examine the economic benefits . . . took into account improvements in energy efficiency”). The Commission determined that objections to the inputs and assumptions of the studies were without basis and that Midwest ISO selected reasonable inputs for its studies. *See, e.g.*, MVP Order P 234 (“forecasts . . . were provided by load-serving entities for use in resource adequacy studies”), JA 1604; *id.* PP 237-38, JA 1606.

For these reasons, the Commission properly determined that Midwest ISO's studies, especially its predictive market model, provided ample

evidence to support the regional benefits of the types of projects expected to qualify as Multi-Value Projects. Rehearing Order P 165, JA 2242; *see also Northern Ind. Pub Serv.*, 782 F.2d at 740 (finding substantial evidence supports FERC’s approval of cost allocation); *Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323, 329 (7th Cir. 1983) (affording “great deference” to agency decision to rely on predictive modeling) (citing cases).

At bottom, Coalition’s wide-ranging evidentiary concerns are supported by a single objection, Br. 32, that was before the Commission on rehearing:⁴ one market participant did not receive requested data showing the impact on its individual energy prices from the Michigan Thumb Project. Hoosier Protest, Atts. 2 & 4 (email requesting data and Midwest ISO’s response showing distribution of benefits under five scenarios by sub-region), JA 1126, 1130-32. Coalition’s objection is without merit.

Although “FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no [or trivial] benefits,” *Illinois Commerce Comm’n*, 576 F.3d at 476, the Commission (or the advocate of the rate design) is not required to predict energy prices under five different scenarios for all 350 market participants in

⁴ Coalition did not raise on rehearing to FERC its concerns regarding the conflicting results of two earlier studies, Br. 30-31, and thus these objections are jurisdictionally barred. 16 U.S.C. § 825I(b); *see infra* p. 68.

the ISO for the next 20 years in order to allocate costs to those market participants. *See* Rehearing Order PP 121-23, JA 2214-16. This level of “exacting precision” is not required, *Midwest ISO Transmission Owners*, 373 F.3d at 1369, especially for an entity whose energy withdrawals represent, at most, one tenth of one percent of the total withdrawals from the grid. Hoosier Protest, Ex. MJB-5, JA 1123.

Further, Coalition points to nothing in the record that supports its repeated assertion that the ISO calculates the economic impact, by utility zone, for each line evaluated as a Multi-Value Project. Br. 10, 32. Indeed, Midwest ISO will “estimat[e] the allocation of projected benefits and costs to each pricing zone” for only a small subset of potential Multi-Value Projects. Curran Test. at 35, JA 442. It does this for projects that might qualify under Criterion 2 or 3 (and presumably do not qualify under Criterion 1) but only after those projects first pass the cost-benefit test or show an ability to resolve a reliability violation. *See id.* at 35, 37, JA 442, 444.

Because the Michigan Thumb Project qualified as a Multi-Value Project after a showing that it would meet energy policy goals, MVP Order P 95, JA 1553, it required only a comparison of costs and benefits but not a quantification. Rehearing Order P 142, JA 2227. Thus, FERC correctly determined that the ISO properly responded to Hoosier’s request for data on the project. *Id.* P 129, JA 2219. Midwest ISO need not share all of its

intermediate analysis used in qualifying a project. *Id.* Rather, it must share relevant data on analysis of its MVP portfolio and its total plan benefit-to-cost ratio and seek stakeholder input on that analysis through its transparent planning process. *Id.*

E. Michigan Will Receive MVP Benefits Commensurate With MVP Costs And A Separate Zone Is, Therefore, Unwarranted.

On appeal, Michigan Customers advocate for a new planning and cost allocation zone apart from the rest of Midwest ISO. Br. 14-16. Below, in requesting a separate Michigan zone, they argued that they were not requesting any “alteration in the Midwest ISO’s scope” or a related change in the way Midwest ISO plans its system. Answer of Michigan Customers at 3-4, R.108 (filed Oct. 12, 2010), JA 1353-54. In rejecting their request, the Commission reasonably found these two ideas incompatible. Rehearing Order P 150, JA 2234. A separate planning process for Michigan would necessarily “threaten Midwest ISO’s scope” and “is inconsistent with Midwest ISO’s operation and planning.” *Id.* It would also undermine one of the goals of transmission planning – a more integrated grid. *See* MVP Order P 236, JA 1605.

Indeed, Michigan already suffers serious and measurable harm from its lack of integration with the rest of Midwest ISO. Because Michigan has fewer grid connections with the ISO, it experiences “high levels of congestion,

resulting in higher . . . energy prices.” Rehearing Order P 149 & n.322 (citing *2010 State of the Market Report* by Midwest ISO independent market monitor and noting that import constraints in the Lower Peninsula caused congestion for “nearly all of 2010”), JA 2232-33. In fact, Michigan’s energy prices are the highest in the region. *Id.* P 149 n.323 (citing U.S. Energy Information Administration’s Annual Energy Outlook 2011), JA 2233. The persistent congestion also causes the Lower Peninsula to incur significant extra costs for daily operating reserves so that it can respond to moment-to-moment fluctuations in demand and maintain proper power frequency. *Id.* P 149 & nn.324-25 (comparing prices for operating reserves in other zones), JA 2233-34. This congestion is so severe that it causes some of the highest amounts of curtailment of wind energy on the Midwest ISO grid. *See* Lawhorn Test. at 14, JA 402.

Planning for transmission in Midwest ISO without considering the needs of Michigan would exacerbate those problems. Conversely here, the Commission found that the new rate design strengthens the connections between Michigan and the rest of Midwest ISO. Rehearing Order P 149, JA 2232. To the extent that the Lower Peninsula is “unique” in its links with Midwest ISO, Michigan Customers Br. 15, the Commission determined, in particular, that the Michigan Thumb Project would make it less so by strengthening and increasing those links. Rehearing Order P 148, JA 2231.

It also predicted that approval of MVPs, other than the Thumb Project, would “address the existing lack of transmission capacity within and/or around Michigan and improve Michigan’s ability to import power from regions with lower prices.” *Id.* P 149, JA 2232. Michigan and the East Sub-Region (of which the Lower Peninsula makes up much of the area, *see* Figure 1, *supra* p. 12) will see substantial benefits from the starter projects in the form of lower energy prices, lower operating reserve costs, stronger connections with the rest of Midwest ISO, and a more stable, reliable system. *Id.* PP 148-49, JA 2231-32. Indeed, the East Sub-Region will see the greatest reduction in energy prices resulting from the starter projects of any of the sub-regions. *Id.* P 149 & n.326 (citing [Midwest ISO Technical Studies Task Force, 2011 Candidate MVP Portfolio](#), 58-59 (Apr. 25 2011) (by 2021, production cost reductions from starter projects will range from \$996 million to \$2.04 billion in aggregate; East Sub-Region is expected to receive between \$400 million and \$950 million of these benefits)), JA 2234.

On appeal, Michigan Customers do not dispute this evidence that shows significant MVP benefits will flow to Michigan. *See* Br. 14-16. Rather, they simply reiterate their view, supported by one page of an attachment to their expert’s testimony, that Michigan will suffer harm if it is not a separate planning and pricing zone. Br. 15-16 (citing Attachment A to Affidavit of Andrew Dotterweich at 10, JA 1312); *see also Black v. Educ. Credit Mgmt.*

Corp., 459 F.3d 796, 803 (7th Cir. 2006) (“issue [not] develop[ed] in his initial brief on appeal . . . is waived”) (citing *Hart v. Transit Mgmt. of Racine, Inc.*, 426 F.3d 863, 867 (7th Cir. 2005)). To the extent this citation offers contrary evidence, the Court has acknowledged that in “particularly complicated rate design proceedings” such as these, evidence is bound to be contradictory. *Northern Ind. Pub. Serv.*, 782 F.2d at 743. The Commission’s job is “to reach a result that is consistent with the evidence on which it relies,” as it has done here. *Id.*

F. There Was No Need For An Evidentiary Hearing On Projected MVP Benefits For Michigan.

Michigan Customers contend the Commission was required to conduct an evidentiary, trial-type hearing on this alleged contradictory evidence so that they could challenge: (1) whether Midwest ISO had shown any potential benefits from the MVPs for Michigan Customers; and (2) whether the connections between the Lower Peninsula and the rest of Midwest ISO would limit receipt of these benefits. Br. 17-18; *see* Br. of Intervening Petitioners Michigan Public Service Commission and Montana Public Service Commission (“Michigan and Montana”) 7 (same). The Commission need not set these issues for formal hearing because, as just discussed, it properly resolved them in the MVP Orders. *See, e.g.*, Rehearing Order PP 148-49, JA 2231-34.

Although FERC's statute grants it the power to approve or modify rate applications "upon a hearing," 16 U.S.C. § 824d(e), it need not conduct a formal hearing on objections in every case. *Gulf States Utils. Co. v. Fed. Power Comm'n*, 411 U.S. 747, 762 (1973) ("So strict a rule would unduly limit the discretion the Commission must have in order to mold its procedures to the exigencies of the particular case. . . ."); *see also People of State of Ill. v. Nuclear Regulatory Comm'n*, 591 F.2d 12, 15 (7th Cir. 1979) (citing *Gulf States* and quoting same); *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 128 (D.C. Cir. 1982) (FERC's choice to "conduct a formal evidentiary hearing . . . is generally discretionary").

Michigan Customers in fact affirm that FERC is required to conduct an evidentiary hearing only when there are disputed issues of material fact, and even then, it need not hold such a hearing if the issues can be resolved on the written record. Br. 16-17 (citing *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993), and *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994)); *see* Michigan and Montana Br. 5-6 (same). *Cajun* provides that "mere allegations of disputed fact are insufficient to mandate a hearing; a petitioner must make an adequate proffer of evidence to support them." 28 F.3d at 177.

Michigan Customers did not meet this threshold burden. In their request for rehearing to the Commission they did not explain the areas of

disagreement between their experts and Midwest ISO's experts. *See* Rehearing Request at 19-20, R.148, JA 1882-83. There, they simply reference attached testimony without further explanation of their experts' findings or identification of which findings presented factual disputes. *Id.* Thus they did not sufficiently identify the disputed facts, much less proffer evidence in support of their allegations. *Cajun*, 28 F.3d at 177-79 (detailing the argument made by petitioner regarding disputed factual issues).

In any event, the Commission was able to resolve the disputed issues that they now identify on appeal. The Commission agreed with Michigan Customers that the Lower Peninsula had limited connections to other areas in Midwest ISO's grid. Rehearing Order P 148, JA 2231. It found, however, that Multi-Value Projects would increase those connections and reduce congestion on the existing transmission lines between the areas, *id.*, with customers in the Lower Peninsula realizing significant benefits. *Id.* P 149, JA 2232. Because the Commission was able to resolve these and Michigan Customers' other challenges on the written record, *id.* P 340, JA 2327, it appropriately found no need for an evidentiary hearing on the issues.

Moreau, 982 F.2d at 568 ("FERC need not conduct such a hearing if [disputed issues] may be adequately resolved on the written record"); *see also, e.g., Central Me. Power Co. v. FERC*, 252 F.3d 34, 46-47 (1st Cir. 2001) (same);

Sierra Ass'n for Env't v. FERC, 744 F.2d 661, 664 (9th Cir. 1984) (finding no hearing required when party failed to point to specific disputed facts).

G. Generators Will Pay A Fair Share Of Transmission Costs Under The Package Proposed By Midwest ISO.

Under the rate redesign approved in the MVP Orders, generators will pay a substantial portion of the costs of additions to the Midwest ISO grid. MVP Order PP 240 & n.301, 265, JA 1607, 1616; *see also id.* P 321 (“two thirds of the transmission projects do not meet the [MVP] cost threshold”), JA 1630. The allocation of MVP costs to loads and export transactions is balanced by the direct assignment of nearly all of the costs of Interconnection Projects to specific generators. *Id.* P 240, JA 1607.

Petitioners want them to pay an even greater share of those costs. Michigan Customers Br. 12-14; Coalition Br. 35-36. This is unwarranted. *See Public Serv. Comm'n*, 545 F.3d at 1067 (“That its provisions are not what the petitioners would have chosen does not undermine FERC’s approval of [Midwest ISO’s cost allocation policy].”). The Commission reasonably determined that the MVP Proposal properly allocates projects with regional benefits to the region and transmission lines that serve a more local function to interconnecting generators. Rehearing Order P 210, JA 2263.

The Commission considered the MVP Proposal as a package of reforms, evaluating the reasonableness of allocations for Multi-Value Projects,

Reliability Projects, Efficiency Projects, and Interconnection Projects as a single cost allocation regime. *See, e.g., id.* PP 210 & n.424, 213, JA 2263, 2264; MVP Order P 3, JA 1520. In its analysis, the Commission properly balanced the effect of the package on generators and loads (sellers and buyers) with the benefits that the different types of facilities will bring to each sector. *See* MVP Order PP 239-40, JA 1606-07; Rehearing Order PP 201, 211, 213, JA 2260, 2264, 2264; *see also Village of Bethany*, 276 F.3d at 943 (holding that FERC properly balanced “hardship to the small customers against the efficiency interests of the remaining customers” in implementing policy to allocate limited pipeline capacity to the highest bidder).

In a corollary finding, the Commission reasonably determined that the MVP Proposal provides proper incentives for generators to locate close to Multi-Value Projects to avoid the direct assignment of the costs of transmission upgrades. MVP Order P 240 & n.301, JA 1607; Rehearing Order P 210, JA 2263. But Michigan Customers argue that it is unfair to relieve generators of any of the costs of connecting to the grid. *See* Br. 8, 13.

To be sure, many of the 64,500 megawatts of wind generators that were in line for interconnections in 2010 will see reductions, some quite significant, in their interconnection costs. *See, e.g.,* MVP Order P 267 (noting overall reduction in costs to these generators), JA 1616; *see also supra* pp. 9, 13-14 (explaining costs charged to generators). But petitioners ignore that efficient

planning of these network upgrades, in lieu of piecemeal review of each individual generator's request, results in lower total costs of connecting the wind generators. *See* Rehearing Order P 212, JA 2264; *see also* [2010 Transmission Expansion Plan](#) at 252 (“stakeholders determined the [interconnection queue] process would not be an efficient means for building a cost-effective transmission system over the next 5–10 year period or in the foreseeable future”). This in turn “encourages projects to move forward efficiently” bringing customers considerable savings in lower energy prices. Rehearing Order P 212, JA 2264; *see also id.* P 127 (energy price reductions), JA 2218; MVP Order P 229 (same), JA 1603. Furthermore, the record here shows that charging generators and importers for MVP costs causes distortions in the energy market. *See* MVP Order P 32, JA 1532; MVP Proposal, Tab D, Testimony of Todd Ramey 7-8 (citing to report by independent consultant that found four kinds of impacts if generators are assigned MVP costs), JA 359-60.

As support for shifting costs away from loads, Michigan Customers argue, without citation, that the Commission deviates from its long-standing policy and precedent in allocating costs to interconnecting generators. Br. 12-14. Michigan Customers' argument is without basis and this Court should not entertain their unsupported allegations. *White Eagle Coop. Ass'n v. Conner*, 553 F.3d 467, 476 (7th Cir. 2009) (“it is not the province of the courts to

complete litigants' thoughts for them, and [the Court] will not address this undeveloped argument"); *accord Domtar Me. Corp. v. FERC*, 347 F.3d 304, 312 (D.C. Cir. 2003) (declining to entertain argument in which petitioner "argue[d] to FERC that its rulings are inconsistent . . . [y]et it did not point to [FERC precedent] in making this argument").

In any case, the Commission's approval of the MVP Proposal was consistent both with its policy regarding generators' obligations to pay for interconnections and with past practice in Midwest ISO. *See generally supra* pp. 9-10, 13 (describing costs paid by generators before rate redesign). FERC policy requires that transmission providers pay for the costs of network upgrades needed to connect a new generator to the grid. *National Ass'n*, 475 F.3d at 1284. Midwest ISO elected to apply these default rules in early 2004. *Public Serv. Comm'n*, 545 F.3d at 1060. Thus, per Midwest ISO's past practice, member utilities and their customers – not interconnecting generators – pay all the costs of these transmission projects.

Therefore, over objections by both customers and generators that the allocation was inconsistent with cost causation and Commission policy, *see* MVP Order PP 271-74, JA 1617-18, the Commission reasonably concluded that both would shoulder a reasonable share of costs under the MVP Proposal consistent with "the burdens imposed or benefits received." *Midwest ISO Transmission Owners*, 373 F.3d at 1369.

III. The Commission Properly Exercised Its Jurisdiction Over Transmission Cost Allocation And Did Not Impermissibly Intrude On State Powers.

Petitioners claim that the Commission does not have jurisdiction under the FPA to approve the allocation because the MVP Proposal: (1) overrides states' authority to site and approve construction of transmission lines, Coalition Br. 48-51; (2) undermines states' authority to determine the amount and type of generation needed in their jurisdictions, *id.* at 14, 27-28; Michigan Customers Br. 23; and (3) imposes a "national renewable portfolio standard . . . unlawfully overrid[ing] the express determination of . . . Michigan" to rely on in-state resources to meet its renewable energy standard, Michigan Customers Br. 10. Because the MVP Orders do not direct any of these things, these claims are without merit.

In approving cost allocations for transmission lines in the interconnected grid, the Commission acted within its exclusive statutory authority over rates for transmissions in interstate commerce, Rehearing Order P 194, JA 2257, and its "broad authority to address issues regarding transmission planning," including the power to approve innovative solutions such as portfolio planning. *Id.* P 196 (citing Order No. 890 P 422), JA 2258; *see also* FPA §§ 201(a), 16 U.S.C. § 824(a), and 205, 16 U.S.C. § 824d(a). The MVP Proposal additionally is consistent with "a focus by Congress and the Commission on promoting reliability[, 16 U.S.C. § 824o(b),] and transmission

infrastructure development,” 16 U.S.C. § 824s(b). Rehearing Order P 194 (citing MVP Order P 190 n.247, JA 1586), JA 2257.

Citing FPA section 201(a), 16 U.S.C. § 824(a), Michigan Customers argue that the MVP Orders establish a national renewable energy standard that unlawfully preempts Michigan’s standard. Br. 9-10, 22-25. The challenged orders do no such thing. They simply approve a method for identifying and approving projects with regional benefits and allocating the costs of those projects accordingly. *See* Rehearing Order P 194, JA 2257; MVP Order PP 190, 193, JA 1586, 1588. That the MVP Proposal may have an incidental effect on the location and development of renewable generation, *see* Br. 10, does not lessen the Commission’s exclusive jurisdiction over such a proposal given that it is a functional approach to transmission planning and implementation and allocates the costs of transmission used in interstate commerce. Rehearing Order P 194, JA 2257; *see New York*, 535 U.S. at 19-20 (finding agency can preempt state law if it is acting within the scope of its delegated authority); *see id.* at 21 (“the precise reserved state powers language in § 201(a) [is] a mere policy declaration that cannot nullify a clear and specific grant of jurisdiction” over transmission (quotation omitted)); *see also Connecticut Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 484 (D.C. Cir. 2009) (it is “irrelevant that . . . charges were ‘designed as an incentive’

. . . so long as the charges affected transmission rates otherwise within the Commission’s jurisdiction” (citations omitted)).

Coalition contends that the Commission lacks authority to compel a state to approve construction of new transmission projects or dictate the type and quantity of generator resources used in the state, citing *Prinz v. United States*, 521 U.S. 898 (1997), *New York v. United States*, 505 U.S. 144, 188 (1992). Coalition Br. 28, 52. *Prinz* and *New York* are inapposite as they concern federal action imposing mandatory action on state officials in carrying out a federal program. *See Prinz*, 521 U.S. at 904 (Congress commandeered state sheriffs to determine the lawfulness of gun sales); *New York*, 505 U.S. at 175-76 (Congress required states either to enact legislation regarding disposal of radioactive waste in accord with congressional direction or to implement an administrative solution).

Here, the Commission’s orders do not compel approval by the states or their officials of any of the transmission lines or of generators’ facilities. *Cf. Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 367 F.3d 650, 662 (7th Cir. 2004) (as long as governor may “willfully ignore” federal requirement the law does not violate Tenth Amendment). To the contrary, the Commission relies upon state commission siting decisions and rate approvals to provide additional protection against excessive costs and overinvestment in transmission. MVP Order P 242,

JA 1608. Nor do the challenged orders diminish the states' involvement in deciding whether transmission lines are built. Rather, because of the Commission's rules requiring open and transparent transmission planning, states can play a substantial role in selecting, in the first place, the facilities that receive regional cost allocation. *Id.* P 212, JA 1596.

Coalition further argues that recent precedent suggests that “Tenth Amendment considerations may extend . . . to federal action that ‘indirectly coerces a State to adopt a federal regulatory system as its own.’” Br. 52 (citing *National Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012)). This case is also unavailing. The Court’s reference to coercion is in connection with how “Congress may use its spending power to create incentives for States to act in accordance with federal policies.” *National Fed’n*, 132 S. Ct. at 2602. Here, FERC has no spending power. Moreover, in a Tenth Amendment case, “it cannot be constitutionally determinative that the federal regulation is likely to . . . coerce the States into assuming a regulatory role by affecting their freedom to make decisions. . . .” *FERC v. Mississippi*, 456 U.S. 742, 766 (1982) (quotation omitted). Furthermore, any incentives created in the MVP Orders are incidental to the Commission’s regulation of transmission rates, and thus consistent with the FPA’s balance between federal and state authority. *See Connecticut Dep’t*, 569 F.3d at 481-82 (finding “no direct regulation of generation facilities in violation of [FPA] section 201” from

FERC's regulation of markets that may provide incentives for states to site more generators); *National Ass'n*, 475 F.3d at 1280 (FERC's exercise of its "indisputable authority . . . may, of course, impinge as a practical matter on the behavior of non-jurisdictional" entities).

IV. The Commission Properly Found That A Usage Charge Is Reasonable.

Buyers in the Midwest ISO electricity market will pay a share of the MVP costs based on the amount of energy (in megawatt-hours) they take off the transmission system, i.e., a usage charge. *See* MVP Order P 28, JA 1530. (As discussed *infra* at p. 72, buyers located in PJM will not pay this charge.) The Commission reasonably approved this usage charge because it matches how the benefits of these projects are distributed throughout the year and over the life of the projects. *Id.* P 383, JA 1652; Rehearing Order P 261, JA 2290. It also reflects the difference in the way Midwest ISO plans its transmission system as compared with how its utility members once planned their systems. *See* Rehearing Order P 256 & n.518, JA 2287. And Commission precedent allows the use of allocators other than peak demand allocators, especially in the RTO context. MVP Order PP 384-85 & n.440 (citing RTO cases), JA 1652-53; Rehearing Order P 260 & n.527 (citing same and explaining the circumstances in which FERC has "accepted usage charges to recover the costs of transmission facilities"), JA 2290. Moreover, a usage charge is consistent with this Court's precedent that supports an

allocator based on “utilities’ share of total electricity sales in [the RTO’s] region.” *Illinois Commerce Comm’n*, 576 F.3d at 477.

A. The Usage Charge Properly Reflects How Benefits of Multi-Value Projects Are Distributed To Beneficiaries.

Coalition asserts that the usage charge is unreasonable because, in its view, the expected peak demand causes the need for transmission system expansion, not energy use. Br. 37. The Commission, however, reasonably determined that the usage-based cost allocation methodology was consistent with cost causation because a significant portion of MVP benefits likely will accrue during off-peak demand periods. MVP Order P 383, JA 1652; Rehearing Order P 253, JA 2286.

The benefits of Multi-Value Projects are not associated only, or even predominately, with peak demand. *See* MVP Order P 383, JA 1652; Rehearing Order P 254, JA 2286. Rather, most benefits of Multi-Value Projects are distributed relative to a customer’s combined use of Midwest ISO’s regional energy market and grid. *See* Rehearing Order PP 253-254, JA 2286. Observation of Midwest ISO’s energy market operations shows that “the benefits of market-wide economic dispatch are often more significant during off-peak hours, because fewer generation resources are required and more opportunity exists to use generation in one region to serve load in another.” MVP Order P 383 (quoting Curran Test. at 12-13, JA 419-20),

JA 1653; Rehearing Order P 253 (same), JA 2286. Through the transfer of energy on a regional basis, regional transmission infrastructure is the key that enables market-wide dispatch. Curran Test. at 13, JA 420.

Multi-Value Projects also allow utilities to satisfy state renewable energy standards which require that renewable energy constitute a certain percentage of a utility's total electricity sales, not its peak demand. MVP Order P 383, JA 1652; *see, e.g.*, MINN. STAT. § 216B.1691 subd. 2a(a) (requiring 12 to 25 “percent[] of the electric utility’s total retail electric sales” to be from renewable energy); 20 ILL. COMP. STAT. 3855/1-75(c)(2) (“the required procurement of . . . renewable energy . . . shall be measured as a percentage of the actual amount of electricity (megawatt-hours) supplied by the electric utility”). Multi-Value Projects that are built primarily to integrate wind energy into Midwest ISO’s system will benefit buyers of renewable energy in proportion to the energy that they withdraw from the grid. *See* Rehearing Order P 258, JA 2288. Because most state renewable energy requirements are measured against total utility energy usage, it is reasonable that the costs of Multi-Value Projects are allocated on the same basis. *See id.*

“[A] load’s relative use of the regional transmission system during all hours of the year is indicative of the degree to which it benefits from MVP facilities.” *Id.* P 257, JA 2288. As discussed *supra* p. 45, the largest

quantifiable economic benefit from the starter projects is production cost savings which translates into lower energy prices for those withdrawing energy from the market. Thus, the usage charge is consistent with cost causation because those that “reap the resulting benefits” of lower energy costs pay for the projects that facilitate those lower costs. *National Ass’n*, 475 F.3d at 1285; *see also* MVP Order P 383 (explaining that “economic benefits (e.g., reducing productions costs) . . . occur throughout the year”), JA 1652. By contrast, those who do not withdraw energy from the market do not enjoy economic or policy-driven benefits and do not pay for the Multi-Value Projects. *See* Rehearing Order P 258 (“load that rarely uses the Midwest ISO system . . . accrues fewer MVP benefits”), JA 2289.

B. Midwest ISO’s System Is Planned And Operated For Around-The-Clock Usage.

Coalition likewise errs in arguing that peak demand is “the only factor that affects planning, design, expansion or operation of a transmission system.” Br. 14. Examining Midwest ISO’s transmission planning process, the Commission found to the contrary. Rehearing Order P 256, JA 2287.

Unlike smaller, traditional utilities that plan their systems and allocate costs based on 12 hours of peak system usage during the year, Midwest ISO models off-peak and shoulder period usage in addition to peak power flows when it plans for reliable operation of its regional transmission system. *Id.*

P 256 & n.518 (citing [2010 Transmission Expansion Plan, App. E1](#), § R1.3.2), JA 2287. As for its operations, Midwest ISO changes the dispatch of generation every five minutes in order to respond to transmission system constraints and maintain frequency and reliability. *Id.* P 125 n.272 (citing Curran Test. at 13 (Midwest ISO redispatches in real-time markets 105,120 times per year), JA 420), JA 2217. As this Court has done before, it should reject petitioners’ assertion that the usage-based charge “violates [the] basic premise of cost-based rate design” by failing to use a fixed cost, peak demand allocator. Coalition Br. 39; *Northern Ind. Pub. Serv.*, 782 F.2d at 741; (rejecting claim that “any rate design that does not allocate and recover fixed costs on the basis of peak . . . demand is unlawful”).

Coalition further asserts that Midwest ISO plans its system exclusively based on transmission reservations, that is, “the maximum amount of system capacity a customer may demand at any one instant.” Br. 40. For consistency with cost causation and to prevent gaming, it advocates that those that cause the Multi-Value Projects, i.e., those with transmission reservations, should pay the costs. Br. 40-46.

Coalition’s transmission reservation theory should not be considered by the Court because it was never argued to the Commission on rehearing. Under section 313(b) of the FPA, 16 U.S.C. § 825/(b), no objection to the Commission’s orders is properly subject to judicial review unless it has “been

urged before the Commission in the application for rehearing.” The statute also requires that the rehearing “set forth specifically the ground or grounds upon which such application is based.” 16 U.S.C. § 825I(a). Failure to object or to object “with specificity” on rehearing is a jurisdictional bar. *Indiana Util. Regulatory Comm’n*, 668 F.3d at 738-739; *Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006). This directive “enables the Commission to correct its own errors, which might obviate judicial review, or to explain why in its expert judgment the party’s objection is not well taken, which facilitates judicial review.” *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (citations omitted).

Even if the Court reaches the argument, however, it is substantively flawed. As explained, Midwest ISO plans its transmission system using forecasts of energy flows during non-peak as well as peak periods. Rehearing Order P 256 & n.518, JA 2286. Moreover, with the advent of Midwest ISO’s energy markets in which the use of transmission capacity “is allocated to those who value it most instead of being physically rationed,” *Wisconsin Pub. Power*, 493 F.3d at 251, transmission reservations are no longer prevalent. Midwest ISO’s market structure (with flow-based pricing) allows power to flow over transmission within its borders without the need to first reserve that right. *See supra* p. 11. A transmission reservation holder, therefore, cannot game the usage allocator, as Coalition describes, because it cannot “tie

up a large swath of the transmission system’s capacity.” Br. 46. In fact, a rights holder would not benefit from the Multi-Value Projects without using their reservation to flow power. MVP Order P 386, JA 1653. Delivered energy is better than reserved transmission capacity at indicating the benefits of Multi-Value Projects, and, therefore, allocating MVP costs to parties based on their use of the system, rather than their reservations, accords with cost causation principles. *Id.*; see Rehearing Order PP 257-58, 261, JA 2288-89, 2290; see also *Northern Ind. Pub. Serv.*, 782 F.2d at 742 (rejecting request for demand allocator because of evidence that pipeline investment no longer serves solely to maintain capacity for reservations).

C. The Commission Reasonably Found No Discrimination Against High Load Factor Customers.

In Coalition’s view, because high load factor customers use the system more “efficiently,” the usage charge causes high load factor customers to subsidize low load factor customers. Br. 44-46; see *Village of Bethany*, 276 F.3d at 938 (explaining load factors). Because the usage charge accurately reflects the use a customer makes of the MVPs and how the system is planned and operated, see *supra* at p. 67, the Commission rejected Coalition’s argument that it results in undue discrimination or subsidization by high load-factor customers. Rehearing Order P 259, JA 2289; see also MVP Order P 386 (rejecting view that “usage charge would unfairly impact high load-

factor customers”), JA 1653; *Northern Ind. Pub. Serv.*, 782 F.2d at 742 (rejecting high load factor customer’s claim of discrimination because FERC’s “allocation procedure . . . accurately reflect[s] demands a customer places on the system”).

The Commission further found that arguments regarding high load factor customers’ more “efficient” use of the system failed to demonstrate that the MVP rate is unreasonable. Rehearing Order P 259, JA 2289. While Coalition contends that their “efficiency” makes it cost less to serve high load factor customers, Br. 44, the specific issue here is the allocation of the costs of Multi-Value Projects. *See Northern Ind. Pub. Serv.*, 782 F.2d at 741-42 (upholding usage allocator as consistent with cost causation principles). The Commission specifically concluded that all load benefited from MVPs as they use the system, and therefore “it is appropriate that they be allocated the corresponding costs in proportion to their relative use of the transmission system.” MVP Order P 385, JA 1653. Additionally, a usage charge for MVP costs “balance[s] the allocation of transmission costs within Midwest ISO between the usage-based and demand-based methods.” *Id.* P 357, JA 1642. As a result, the different types of transmission rates on the system will be “felt differently by high load and low load factor customers.” *Northern Ind. Pub. Serv.*, 782 F.2d at 735. While alternate cost allocation methodologies also could allocate MVP costs in a manner consistent with cost causation, the

issue here is whether the MVP Proposal is reasonable. MVP Order P 384, JA 1652. Having found the MVP Proposal just and reasonable and in accord with cost causation principles, the Commission need not consider alternative rate methodologies. *Id.*; Rehearing Order P 261, JA 2290; *see also Northern Ind. Pub. Serv.*, 782 F.2d at 742 & n.25 (allocation that meets some, but not all, goals of rate design is reasonable).

V. The Commission Reasonably Rejected The Proposal To Allocate MVP Costs To Export Transactions To PJM.

In 2003, the Commission found that regional through and out rates between Midwest ISO and PJM result in unjust and unreasonable rate compounding or “pancaking” between the two RTOs. *Midwest Indep. Transmission Sys. Operator, Inc.*, 104 FERC ¶ 61,105 (2003) (“2003 Rate Pancaking Order”). Although the Commission had not required elimination of rate pancaking between RTOs elsewhere, the Commission found the circumstances presented by the seam between Midwest ISO and PJM “unprecedented.” Rehearing Order P 291 (citing 2003 Rate Pancaking Order PP 29-30), JA 2305. Notwithstanding this prior determination, in this case Midwest ISO proposed to allocate MVP costs across this border, to customers in PJM, in the same manner as it allocates costs to customers within Midwest ISO. MVP Order P 398, JA 1658; MVP Proposal at 24-25, JA 24-25. The Commission rejected this proposal, reasoning that this would re-institute

the unjust and unreasonable cross-border rates, and associated rate pancaking, that the Commission had previously found unjust and unreasonable. MVP Order P 440, JA 1676.

Before the Commission, and now before this Court, Midwest ISO, with the support of Midwest ISO transmission owners and Wisconsin (collectively, “Export Group”), dispute this finding. But the Export Group has not demonstrated sufficient changed circumstances to warrant a Commission finding that reinstating pancaked rates between Midwest ISO and PJM would be just and reasonable. *See* Rehearing Order P 288, JA 2303.

In the 2003 Rate Pancaking Order, the Commission assessed the configurations of Midwest ISO and PJM based on Order No. 2000 mandates. Rehearing Order P 289 (citing 2003 Rate Pancaking Order P 29), JA 2304. Order No. 2000 established minimum characteristics and functions for RTOs. *See* Order No. 2000, 89 FERC ¶ 61,285, at 30,993-95. Among other things, it required RTOs to eliminate rate pancaking within a region of appropriate scope and configuration. *Id.* at 31,046, 31,079-85. “Rate pancaking occurs when a transmission customer is charged separate access charges for each utility service territory the customer’s contract path crosses.” *Id.* at 31,173. At that time, the Commission described the requirement to eliminate rate pancaking within a region of appropriate scope and configuration as “a central goal of the Commission’s RTO policy because rate pancaking restricts

the amount of generation that can be economically delivered to any customer, thereby frustrating the realization of competitive and efficient bulk power markets.” 2003 Rate Pancaking Order P 29. Under this requirement, “the Commission will consider the extent to which an RTO would encompass one contiguous area, encompass a highly interconnected portion of the grid, and recognize trading patterns.” Rehearing Order P 289, JA 2304.

Applying these standards, the Commission, in the 2003 Rate Pancaking Order, found rate pancaking between Midwest ISO and PJM unjust and unreasonable. *Id.* (citing 2003 Rate Pancaking Order PP 33-34), JA 2304. The Commission determined that the choices of certain transmission owners to join either Midwest ISO or PJM resulted “in an elongated and highly irregular seam” between Midwest ISO and PJM. MVP Order P 396, JA 1657. This seam isolated portions of Midwest ISO, specifically Wisconsin and Michigan, from the remainder of the RTO and “divide[d] highly interconnected transmission systems across which substantial trade takes place.” *Id.* The Commission instituted an investigation of rates for service through or out of one RTO to serve load in the other RTO, i.e., the pancaked rates. *Id.* After a hearing, the Commission found such rates to be unjust and unreasonable, and directed that they be eliminated as a condition to the Commission’s approval of the proposed RTO choices and configuration. *Id.*

P 440 (citing 2003 Rate Pancaking Order P 35), JA 1676; *see also id.* P 396, JA 1657.

At that time, the Commission also directed the two RTOs to “propose, consistent with [their] existing Joint Operating Agreement, a method to allocate between the RTOs the costs of new transmission facilities that are built in one RTO but provide benefits to customers in the other RTO (cross border facilities).” MVP Order P 397, JA 1658. Consistent with this directive, the RTOs proposed, and the Commission approved, allocation methods for two types of cross border projects under the Joint Operating Agreement. *Id.* (citing orders approving cross border allocation methods).

For Multi-Value Projects, Midwest ISO chose a different path, treating exports to PJM the same as all other Midwest ISO transactions, including exports to other RTOs across borders that satisfy Order No. 2000 standards. In the MVP Orders, the Commission rejected this proposal, finding that Midwest ISO had failed to persuade the Commission that reinstating pancaked rates between Midwest ISO and PJM would be just and reasonable. Rehearing Order P 288, JA 2303. Notwithstanding the Commission’s central reliance, in both MVP Orders, on the continued presence of rate pancaking and the requirements of Order No. 2000, the Export Group has not demonstrated – and makes little effort to demonstrate – that rate pancaking will not occur under the proposed export charge.

The Export Group asserts that there have been changes in the RTOs' scope and configuration since 2003, but they fail to explain whether or how such changes may alter the Commission's detailed findings under the Order No. 2000 standards. The Commission recognizes that "some changes" have occurred in the scope and configuration of Midwest ISO. MVP Order P 440, JA 1676. The Export Group points out, Br. 30-31, that two RTO affiliations have changed since the 2003 rate pancaking orders (Illinois Power Company joined Midwest ISO and FirstEnergy left Midwest ISO). They claim that these changes, with two utilities joining RTOs with which they share more connections, "must have significance." Br. 31. But they do not address the nature of that significance, as the Commission did in the 2003 Rate Pancaking Order and in the MVP Order, in terms of the Order No. 2000 standards. *See* Rehearing Order P 289 ("no party has provided substantial evidence comprehensively addressing the factors identified in Order No. 2000, nor have they otherwise supported their claim that the Commission's scope and configuration findings regarding the irregular [RTO] seam no longer are justified"), JA 2304. The Commission first made this finding in the MVP Order, in effect inviting additional support for the proposal, but the parties failed to respond with additional support under the Order No. 2000 standards. MVP Order P 440, JA 1676.

Instead, the Export Group, Br. 29-30, places undue emphasis on the decision not to pursue a joint and common market encompassing both Midwest ISO and PJM. As stressed in the MVP Orders, each RTOs' failure to satisfy the Order No. 2000 scope and configuration factors formed the foundation for the Commission's 2003 elimination of rate pancaking. The Commission discussed the possible development of a common market, but actually rejected a request to delay elimination of rate pancaking pending implementation of a common market. 2003 Rate Pancaking Order P 39 n.57 (holding that the through and out rates "violate Order No. 2000 and are unjust and unreasonable. This is true regardless of whether the common market has become operational.").

Likewise, changes in regulatory priorities, including passage of the Energy Policy Act of 2005 and state renewable portfolio standards, do not justify abandoning the mandates of Order No. 2000. *See* Rehearing Order P 289, JA 2304. The "relevant requirements of Order No. 2000 remain applicable" despite changes in policy. *Id.* As noted above, Order No. 2000 emphasized that the elimination of rate pancaking is necessary to ensure competitive and efficient power markets, and the Commission reasonably determined that these requirements are no less effective in light of changing federal and state policies. *Id.*

The Commission also rejected Export Group's efforts to distinguish pancaked rates for MVPs from the pancaked rates previously eliminated based upon the types of transmission projects considered (new vs. existing), transmission-planning processes employed (regional vs. local), or benefits generated (cross-border vs. local). Br. 26-29. The Commission found that none of these arguments address the issue of the scope and configuration of PJM and Midwest ISO, nor do they demonstrate that the design of the proposed MVP cost allocation methodology would not involve pancaked rates between Midwest ISO and PJM. Rehearing Order P 290, JA 2305.

The Export Group charges the Commission, Br. 16, with using rate pancaking concerns to "trump" cost causation principles. The Export Group is wrong, and their argument ignores the distinction between customers located in PJM and customers located in other RTOs adjoining Midwest ISO. As the Commission explained, assessing MVP costs to export transactions "other than those to PJM" is necessary to avoid conferring on those customers "an undue advantage by benefiting from . . . MVPs without having any cost responsibility, contrary to cost causation principles." MVP Order P 443, JA 1677. But only customers in PJM, and not other neighboring RTOs, are subject to the "unprecedented" circumstances and compounded rates created by the highly integrated PJM and Midwest ISO seam. Rehearing Order P 291 (citing 2003 Rate Pancaking Order PP 29-30), JA 2306. For this reason, the

Commission disagreed that rejecting rate compounding here “conflicts with cost causation principles, endorses free ridership by PJM members or condones unduly preferential treatment for PJM loads.” *Id.* P 292, JA 2306.

Finally, while the Commission rejected *this* proposed methodology for allocating MVP costs to exports to PJM, it did not foreclose – and all but invited – a future proposal to allocate costs in a manner consistent with both the rate pancaking prohibition and cost causation principles. Rehearing Order P 292, JA 2306; *see also* MVP Order P 442, JA 1677. The MVP Orders repeatedly acknowledge that the Commission previously required the RTOs to develop cost allocation methodologies for projects with cross border benefits. MVP Order P 397, JA 1658; *id.* P 442, JA 1677; Rehearing Order P 292, JA 2306. Following that directive, and negotiations among the parties, the Commission approved such methodologies for other types of cross border projects that served the “purpose of . . . assign[ing] costs to each RTO based on each RTO’s relative contribution to the need for a cross-border facility.” *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,084, P 22 (2008) (approving cost allocation method for cross border facilities built for reliability purposes), *cited in* MVP Order P 397, JA 1658.

Midwest ISO does not claim that it cannot develop such a methodology for MVPs. Thus the Commission stated that Midwest ISO may seek “to allocate MVP costs to PJM loads (e.g., through a filing under section 205 of

the FPA) in a manner that does not involve an impermissible resumption of pancaked rates and is in accordance with cost causation principles.”

Rehearing Order P 292, JA 2306. Because Midwest ISO has done this successfully for other cross border projects, the Commission’s suggestion that it could develop a just and reasonable allocation methodology for another type of cross border project is, contrary to the Export Group’s hyperbole, Br. 34, neither an insult nor an injury.

VI. Assuming Jurisdiction, The Commission Reasonably Approved A Conforming Change To The Midwest ISO Tariff, And Deferred Other Issues To Other Proceedings.

Duke and FirstEnergy (together, “Former Transmission Owners”), supported by American Municipal Power, Inc. (“AMP”), raise numerous issues concerning the responsibility of transmission owners that withdraw from Midwest ISO for Multi-Value Project costs incurred while a member. The Commission, however, expressly declined in the MVP Orders to determine the responsibility of any withdrawing transmission owner, including Former Transmission Owners, for MVP costs. The Commission instead is addressing those issues in a separate, ongoing agency proceeding, in which Former Transmission Owners are obtaining full review of their concerns. Because the Commission did not reach these issues in the MVP Orders, Former Transmission Owners lack standing to pursue their claims in this appeal, and the dispute manifestly is unripe for this Court’s review. Even

assuming jurisdiction, the Commission acted well within its discretionary authority in ordering its proceedings to defer consideration of Former Transmission Owner's claims to a more appropriate proceeding.

A. Former Transmission Owners Challenge Statements In The MVP Orders Concerning *Potential* Responsibility For MVP Costs, When Their *Actual* Responsibility for Such Costs Is Being Litigated In Another Proceeding.

The Midwest ISO Transmission Owners Agreement, Article V.B, holds withdrawing transmission owners responsible for all financial obligations incurred prior to withdrawal. The Transmission Owners Agreement provides: "All financial obligations incurred and payments applicable to time periods prior to the effective date of such withdrawal [of a Transmission Owner] shall be honored by the Midwest ISO and the withdrawing owner." MVP Order P 470 n.558 (quoting Agreement), JA 1689. This language provides the basis for assessing withdrawing transmission owners with an exit fee. *See Louisville Gas & Electric Co., LLC*, 114 FERC ¶ 61,282, PP 52-60 (2006) (accepting an exit fee agreement submitted pursuant to Article V.B of the Agreement).

As Former Transmission Owners themselves state, in the MVP Orders, the Commission modified the Midwest ISO tariff to conform to the Agreement, "us[ing] essentially the same language." Br. 33. Tariff Attachment FF, section III.A.2.j, provides, with modifications shown, as follows:

A Party Transmission Owner that withdraws from the Midwest ISO as a Transmission Owner shall remain responsible for all financial obligations incurred pursuant to this Attachment FF while a Member of the Midwest ISO and payments applicable to time periods prior to the effective date of such withdrawal shall be honored by the Midwest ISO and the withdrawing Member.

See MVP Order P 453 n.528 (quoting MVP Proposal, Tab C, Tariff, Att. FF, First Revised Sheet No. 3480, JA 334), JA 1682.

Former Transmission Owners do not object to the tariff amendment itself – which simply conforms the tariff to the existing Transmission Owners Agreement. *See, e.g.*, Br. 34 (agreeing with the Commission, Rehearing Order P 323, JA 2320, that the change to the tariff creates no new obligation but “merely reiterates” the language in the Transmission Owners Agreement).

Rather, Former Transmission Owners object to the Commission’s statement in the MVP Orders that, under this tariff provision, “a [transmission owner] that withdraws from Midwest ISO would remain responsible for all financial obligations incurred with respect to the MVP tariff provisions while a member of Midwest ISO.” MVP Order P 471, JA 1689; *see also* Rehearing Order P 322 (“the withdrawal language in Attachment FF puts parties on notice that once cost responsibility for transmission system upgrades is established, withdrawing members will retain any costs incurred before their withdrawal date subject to a negotiated or contested exit agreement”), JA 2320. They contend that “FERC’s MVP

Orders thus threatened all departing Transmission Owners with potential exit fee liability for MVP costs,” which they contend is unlawful, particularly as to themselves given the timing of their withdrawal. Br. 34-35.

As Former Transmission Owners appear to recognize, all the Commission said in the MVP Orders was – *to the extent* that a transmission owner incurs liability under the MVP tariff provisions – that transmission owner would remain responsible for those amounts upon withdrawal. MVP Order P 471, JA 1689; Rehearing Order P 322, JA 2320. The Commission expressly declined to reach the issue of what costs any withdrawing transmission owner would incur. *See* MVP Order P 472, JA 1690; Rehearing Order P 300 (“the particular costs that a withdrawing member may face, [are] beyond the scope of this proceeding”), JA 2310. Specifically, the Commission declined to “prejudge” the Former Transmission Owners’ liability for MVP costs. Rehearing Order P 321, JA 2319.

The Former Transmission Owners do not, however, lack a forum for their concerns. In a separate, ongoing proceeding, following the Rehearing Order, Midwest ISO filed, for Commission review, a new Schedule 39 to its tariff, which implements MVP cost recovery from withdrawing transmission owners. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,140 (2012) (addressing December 29, 2011 Schedule 39 filing) (“Schedule 39 Order”). Schedule 39 reflects a usage rate applicable to withdrawing

transmission owners that includes a share of MVP costs approved prior to the effective date of the transmission owner's withdrawal. *Id.* P 14. The proposal also specifically identified and proposed MVPs with costs to be allocated to FirstEnergy and Duke. *Id.* PP 1, 15.

The Commission accepted the filing, effective January 1, 2012. *Id.* P 3. But as to FirstEnergy and Duke specifically, the Commission found that Midwest ISO "cannot automatically apply" Schedule 39 to them, because both FirstEnergy and Duke withdrew from Midwest ISO prior to the Schedule 39 effective date.⁵ *Id.* P 74. Accordingly, the Commission set a hearing "to determine whether [FirstEnergy] and Duke are responsible for MVP costs and, if so, the amount of, and methodology for calculating" such responsibility. *Id.* P 3. That hearing remains pending before a Commission administrative law judge. The Commission also dismissed a petition for declaratory order and denied a complaint filed by FirstEnergy, which had sought to preclude Midwest ISO from allocating any MVP costs, and specifically Michigan Thumb Project costs, to FirstEnergy. *Id.* PP 100-01. FirstEnergy and Duke requested rehearing of various findings in the Schedule 39 Order; those requests remain pending.

⁵ ATSI, FirstEnergy's transmission-owning affiliate, *id.* P 2 n.5, withdrew from the Midwest ISO effective May 31, 2011; Duke withdrew effective December 31, 2011. *Id.* P 1 n.4.

B. Former Transmission Owners Lack Standing To Pursue This Appeal, And The Dispute Is Unripe For Review.

Former Transmission Owners impermissibly ask this Court to intervene prematurely, to render an advisory opinion on a still hypothetical dispute. *Wisconsin Right to Life, Inc. v. Schober*, 366 F.3d 485, 488 (7th Cir. 2004). But because the MVP Orders did not rule on the responsibility of withdrawing transmission owners for MVP costs, Former Transmission Owners lack standing to pursue this appeal, and the dispute is unripe for this Court's decision. *See Smith v. Wis. Dep't of Agric., Trade & Consumer Prot.*, 23 F.3d 1134, 1141 (7th Cir. 1994); *see also Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975) ("The standing question thus bears close affinity to questions of ripeness-whether the harm asserted has matured sufficiently to warrant judicial intervention . . .").

Standing requires that Former Transmission Owners demonstrate an imminent injury-in-fact. *DH2, Inc. v. SEC*, 422 F.3d 591, 596 (7th Cir. 2005) (citing, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Ripeness requires that an issue be fit for judicial decision. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). In particular, courts have interpreted the Federal Power Act as allowing review of only a final agency action, one which "imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process." *Papago Tribal Util. Auth. v.*

FERC, 628 F.2d 235, 239 (D.C. Cir. 1980) (citing cases); *see also Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 614 (7th Cir. 2003) (finding agency action, even if presumed final, was nonetheless unripe) (citing *Bennett v. Spear*, 520 U.S. 154 (1997)).

The MVP Orders inflict no imminent injury on Former Transmission Owners, nor are they fit for review on the issue of the responsibility of withdrawing transmission owners, including Former Transmission Owners, for MVP charges. The MVP Orders expressly deferred this issue, and made no determination, final or otherwise, on what, if any, MVP cost responsibility Former Transmission Owners or others might retain. This does not satisfy Article III; Former Transmission Owners are not “immediately in danger of sustaining some direct injury.” *Wisconsin Right to Life*, 366 F.3d at 489 (quoting *Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 528 (7th Cir. 2001)).

At most, the MVP Orders put parties on notice of *potential* responsibility for MVP costs. Rehearing Order P 322, JA 2320. The Former Transmission Owners characterize this statement as a suggestion. Br. 35; *see also* AMP Br. 6 (claiming FERC is “strongly hinting”). But a suggestion, much like dictum, does not confer standing when “uncoupled from any injury in fact caused by the substance of FERC’s adjudicatory action.” *Wisconsin Pub. Power*, 493 F.3d at 268 (internal quotation marks omitted). As explained

in *Wisconsin Public Power*, “mere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation.” *Id.* at 268 (quoting *Sea-Land Serv., Inc. v. DOT*, 137 F.3d 640, 648 (D.C. Cir. 1998)). As this Court has put it, “[j]udgments are appealable; opinions are not.” *Chathas v. Local 134 Int’l Broth. of Elec. Workers*, 233 F.3d 508, 512 (7th Cir. 2000).

In contrast, the ongoing Schedule 39 proceeding provides an appropriate forum for adjudicating the Former Transmission Owners’ claims. The Former Transmission Owners have raised most, if not all, of the same arguments presented here. The Schedule 39 Order addresses the interpretation and application of tariff Attachment FF section III.A.2.j. So, for instance, that Order addresses the Former Transmission Owners’ claims concerning consistency with Commission precedent, Br. 44, 56, the filed rate doctrine, Br. 40, consent under the Transmission Owners Agreement, Br. 42, cost causation, Br. 50, and undue discrimination, Br. 52. *See* Schedule 39 Order PP 63 (consistency and cost causation), 64 (filed rate doctrine and consent), 69 (undue discrimination). Accordingly, that proceeding provides a “concrete setting” for the further factual development necessary to resolve their claims. *Abbott Labs.*, 387 U.S. at 149.

FirstEnergy and Duke have sought rehearing of Schedule 39 Order, including the Commission’s findings on these issues. Thus, it remains

possible that the Former Transmission Owners will receive the relief they seek – avoidance of MVP cost allocation. “The ripeness doctrine exists ‘to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.’” *Jennings v. Auto Meter Products, Inc.*, 495 F.3d 466, 477 (7th Cir. 2007) (quoting *Sprint Spectrum L.P. v. City of Carmel*, 361 F.3d 998, 1002 (7th Cir. 2004) (citation omitted)). Awaiting appropriate judicial review in the Schedule 39 proceeding, in the event that the Former Transmission Owners do not prevail in that proceeding, will serve these interests.

C. The Commission Acted Well Within Its Discretion To Defer The Former Transmission Owners’ Responsibility For MVP Costs To Other Proceedings.

Even if the Court determines that some or all of the Former Transmission Owners’ claims satisfy Article III prerequisites, the Commission reasonably deferred resolution of those claims until the appropriate proceeding. As the Commission explained, “the fee to be paid by [a] withdrawing member to Midwest ISO is a matter for [the] parties to negotiate, subject to Commission review.” Rehearing Order P 321, JA 2319. But those matters should be addressed “at the time an application to

withdraw is made,” and are beyond the scope of this generally applicable rate proceeding. MVP Order P 472, JA 1690; *see also* Rehearing Order P 321, JA 2319.

The Former Transmission Owners, Br. 56, and AMP, Br. 9, fail to acknowledge the prevailing law on this procedural decision: “An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures, and priorities.” *Mobil Oil Exploration & Producing Se. Inc. v. United Dist. Cos.*, 498 U.S. 211, 230 (1991) (citations omitted); *see also* *People of State of Ill.*, 591 F.2d at 15. The MVP Orders addressed a prospective, general tariff change, but reasonably declined to consider the applicability of the revised provision in the absence of a specific proposal from Midwest ISO to do so. In other words, the Commission had before it neither a proposal nor a record on which to address the numerous questions raised by the Former Transmission Owners, including whether and to what extent they retain MVP cost responsibility. Later, in the Schedule 39 Order, the Commission found a full hearing necessary to develop such a record. Accordingly, the Commission’s decision to defer resolution of these issues as outside the scope of the instant proceeding was both reasonable and well within its discretion. *See City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989) (“[s]ince agencies have great discretion to treat a problem partially, [the Court] would not strike down the [agency’s decision] if it were

a first step toward a complete solution, even if [the Court] thought [the agency] ‘should’ have covered both” issues in the same order) (footnote omitted).

CONCLUSION

For the foregoing reasons, the petitions for review should be denied, where not dismissed for lack of jurisdiction, and the Commission’s orders should be upheld in all respects.

Respectfully submitted,

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TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 13-point Century Schoolbook font, and complies with the type-volume limitation of Federal Rule of Appellate Procedure Rule 32(a)(7)(B) and this Court's order of October 10, 2012, in that the brief, including the glossary but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 20,738 words.

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January 15, 2013

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denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 703. Form and venue of proceeding

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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;

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

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

(5) If the Commission finds that the Secretary's final prescription would be inconsistent

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with re-

spect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

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

(d) “Sale of electric energy at wholesale” defined

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

(e) “Public utility” defined

The term “public utility” when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),¹ 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

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

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

(g) Books and records

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

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

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

2005—Subsec. (b)(2). Pub. L. 109-58, §1295(a)(1), substituted “Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title” for “The provisions of sections 824i, 824j, and 824k of this title” and “Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title” for “Compliance with any order of the Commission under the provisions of section 824i or 824j of this title”.

Subsec. (e). Pub. L. 109-58, §1295(a)(2), substituted “section 824e(e), 824e(f), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title” for “section 824i, 824j, or 824k of this title”.

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

for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and de-

livering 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 anti-competitive 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,

(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 anti-competitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

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

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

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

charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

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

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

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

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

The Energy Policy Act of 1992, referred to in subsec. (i)(2)(A)(III), (B)(i), is Pub. L. 102-486, Oct. 24, 1992, 106 Stat. 2776. For complete classification of this Act to the Code, see Short Title note set out under section 13201 of Title 42, The Public Health and Welfare and Tables.

AMENDMENTS

1992—Subsec. (a). Pub. L. 102-486, §722(1), added subsec. (a) and struck out former subsec. (a) which related to determinations by Commission.

Subsec. (b). Pub. L. 102-486, §722(1), struck out subsec. (b) which required applicants for orders to be ready, willing, and able to reimburse parties subject to such orders.

Subsec. (e). Pub. L. 102-486, §722(2), amended subsec. (e) generally. Prior to amendment, subsec. (e) related to utilization of interconnection or wheeling authority in lieu of other authority and limitation of Commission authority.

Subsecs. (g) to (k). Pub. L. 102-486, §722(3), added subsecs. (g) to (k).

STATE AUTHORITIES; CONSTRUCTION

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

§ 824l. Information requirements

(a) Requests for wholesale transmission services

Whenever any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale makes a good faith request to a transmitting utility to provide wholesale transmission services and requests specific rates and charges, and other terms and conditions, unless the transmitting utility agrees to provide such services at rates, charges, terms and conditions acceptable to such person, the transmitting utility shall, within 60 days of its receipt of the request, or other mutually agreed upon period, provide such person with a detailed written explanation, with specific reference to the facts and circumstances of the request, stating (1) the transmitting utility's basis for the proposed rates, charges, terms, and conditions for such services, and (2) its analysis of any physical or other constraints affecting the provision of such services.

(b) Transmission capacity and constraints

Not later than 1 year after October 24, 1992, the Commission shall promulgate a rule requiring that information be submitted annually to the Commission by transmitting utilities which is adequate to inform potential transmission customers, State regulatory authorities, and the public of potentially available transmission capacity and known constraints.

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

STATE AUTHORITIES; CONSTRUCTION

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

§ 824m. Sales by exempt wholesale generators

No rate or charge received by an exempt wholesale generator for the sale of electric energy shall be lawful under section 824d of this title if, after notice and opportunity for hearing, the Commission finds that such rate or charge results from the receipt of any undue preference or advantage from an electric utility which is an associate company or an affiliate of the exempt wholesale generator. For purposes of this section, the terms “associate company” and “affiliate” shall have the same meaning as provided in section 16451 of title 42.¹

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

REFERENCES IN TEXT

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

AMENDMENTS

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

EFFECTIVE DATE OF 2005 AMENDMENT

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

STATE AUTHORITIES; CONSTRUCTION

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

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

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

§ 824o. Electric reliability

(a) Definitions

For purposes of this section:

(1) The term “bulk-power system” means—

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

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

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

¹ See References in Text note below.

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

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

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

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

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

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

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

(b) Jurisdiction and applicability

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

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

(c) Certification

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

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

(2) has established rules that—

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

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

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

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

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

(d) Reliability standards

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

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

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

FERC RULEMAKING ON LONG-TERM TRANSMISSION RIGHTS IN ORGANIZED MARKETS

Pub. L. 109-58, title XII, §1233(b), Aug. 8, 2005, 119 Stat. 960, provided that: “Within 1 year after the date of enactment of this section [Aug. 8, 2005] and after notice and an opportunity for comment, the [Federal Energy Regulatory] Commission shall by rule or order, implement section 217(b)(4) of the Federal Power Act [16 U.S.C. 824q(b)(4)] in Transmission Organizations, as defined by that Act [16 U.S.C. 791a et seq.] with organized electricity markets.”

§ 824r. Protection of transmission contracts in the Pacific Northwest

(a) Definition of electric utility or person

In this section, the term “electric utility or person” means an electric utility or person that—

(1) as of August 8, 2005, holds firm transmission rights pursuant to contract or by reason of ownership of transmission facilities; and

(2) is located—

(A) in the Pacific Northwest, as that region is defined in section 839a of this title; or

(B) in that portion of a State included in the geographic area proposed for a regional transmission organization in Commission Docket Number RT01-35 on the date on which that docket was opened.

(b) Protection of transmission contracts

Nothing in this chapter confers on the Commission the authority to require an electric utility or person to convert to tradable or financial rights—

(1) firm transmission rights described in subsection (a) of this section; or

(2) firm transmission rights obtained by exercising contract or tariff rights associated with the firm transmission rights described in subsection (a) of this section.

(June 10, 1920, ch. 285, pt. II, §218, as added Pub. L. 109-58, title XII, §1235, Aug. 8, 2005, 119 Stat. 960.)

§ 824s. Transmission infrastructure investment

(a) Rulemaking requirement

Not later than 1 year after August 8, 2005, the Commission shall establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

(b) Contents

The rule shall—

(1) promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities;

(2) provide a return on equity that attracts new investment in transmission facilities (including related transmission technologies);

(3) encourage deployment of transmission technologies and other measures to increase

the capacity and efficiency of existing transmission facilities and improve the operation of the facilities; and

(4) allow recovery of—

(A) all prudently incurred costs necessary to comply with mandatory reliability standards issued pursuant to section 824o of this title; and

(B) all prudently incurred costs related to transmission infrastructure development pursuant to section 824p of this title.

(c) Incentives

In the rule issued under this section, the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization. The Commission shall ensure that any costs recoverable pursuant to this subsection may be recovered by such utility through the transmission rates charged by such utility or through the transmission rates charged by the Transmission Organization that provides transmission service to such utility.

(d) Just and reasonable rates

All rates approved under the rules adopted pursuant to this section, including any revisions to the rules, are subject to the requirements of sections 824d and 824e of this title that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.

(June 10, 1920, ch. 285, pt. II, §219, as added Pub. L. 109-58, title XII, §1241, Aug. 8, 2005, 119 Stat. 961.)

§ 824t. Electricity market transparency rules

(a) In general

(1) The Commission is directed to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.

(2) The Commission may prescribe such rules as the Commission determines necessary and appropriate to carry out the purposes of this section. The rules shall provide for the dissemination, on a timely basis, of information about the availability and prices of wholesale electric energy and transmission service to the Commission, State commissions, buyers and sellers of wholesale electric energy, users of transmission services, and the public.

(3) The Commission may—

(A) obtain the information described in paragraph (2) from any market participant; and

(B) rely on entities other than the Commission to receive and make public the information, subject to the disclosure rules in subsection (b) of this section.

(4) In carrying out this section, the Commission shall consider the degree of price transparency provided by existing price publishers and providers of trade processing services, and shall rely on such publishers and services to the maximum extent possible. The Commission may establish an electronic information system if it determines that existing price publications are

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.

§ 825l. 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

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2013, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted,

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