ORAL ARGUMENT NOT YET SCHEDULED

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

Nos. 15-1139 and 15-1141 (Consolidated)

EMERA MAINE, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Final Brief: May 20, 2016

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying docket are as stated in the Briefs of Petitioners.

B. Rulings Under Review

1. Order on Compliance Filings, *ISO New England Inc.*, FERC Docket Nos. ER13-93 & ER13-196, 143 FERC ¶ 61,150 (May 17, 2013), R. 53, JA 207; and

2. Order on Rehearing and Compliance, *ISO New England Inc.*, FERC Docket Nos. ER13-93 & ER13-196, 150 FERC ¶ 61,209 (Mar. 19, 2015), R. 101, JA 373.

C. Related Cases

This case has not previously been before this Court or any other court. Two cases related to No. 15-1139 are currently pending in this Court: *Oklahoma Gas & Electric Co. v. FERC*, No. 14-1281, and *American Transmission Systems, Inc. v. FERC*, Nos. 14-1085 & 14-1136, which have been fully briefed and were argued on May 4, 2016, before the same panel. Each case presents similar issues concerning the *Mobile-Sierra* doctrine, which, when applicable, presumes that certain contract rates and practices are just and reasonable. Similar issues concerning *Mobile-Sierra* also were presented before the Seventh Circuit in *MISO Transmission Owners v. FERC*, No. 14-2153, 2016 WL 1359898 (7th Cir. Apr. 6, 2016); the Commission submitted that decision to this Court on April 13, 2016, as supplemental authority under Federal Rule of Appellate Procedure 28(j).

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2004 Agreement Order	*ISO New England Inc.*, 106 FERC ¶ 61,280 (2004), approving creation of regional transmission organization
2004 Rehearing Order	*ISO New England Inc.*, 109 FERC ¶ 61,147 (2004)
Agreement	Transmission Operating Agreement governing transmission owners' participation in the regional organization in New England
Commission or FERC	Respondent Federal Energy Regulatory Commission
Compliance Order	Order on Compliance Filings, *ISO New England Inc.*, 143 FERC ¶ 61,150 (2013), R. 53, JA 207
ISO New England	ISO New England Inc. (commonly called ISO-NE), the independent system operator that operates the electrical grid in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont
JA	Joint Appendix
Order No. 1000	Commission rulemaking on regional transmission planning and cost allocation requirements, *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011)
Order No. 1000-A	*Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012)

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Order No. 1000-B	*Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012)
Owners Br.	Brief of Petitioners (Transmission Owners) in Case No. 15-1139
P	Paragraph in a FERC order
R.	Record item
Rehearing Order	Order on Rehearing and Compliance, *ISO New England Inc.*, 150 FERC ¶ 61,209 (2015), R. 101, JA 373
States	Petitioners in Case No. 15-1141: States Committee and state agencies from Connecticut, Massachusetts, New Hampshire, Rhode Island, and Vermont
States Br.	Brief of Petitioners in Case No. 15-1141
States Committee	New England States Committee on Electricity, Inc. (commonly called NESCOE), a regional state committee representing six northeastern States in regional electricity matters
Transmission Owners	Petitioners in Case No. 15-1139: Emera Maine; Central Maine Power Company; Maine Electric Power Company, Inc.; New England Power Company; Eversource Energy Service Company; The United Illuminating Company; Vermont Electric Power Company Inc.; Vermont Transco LLC; and their predecessor companies

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

COUNTER-STATEMENT OF JURISDICTION

To obtain judicial review of orders of the Federal Energy Regulatory Commission ("Commission" or "FERC"), petitioners must satisfy the requirements of both Article III of the United States Constitution and Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). *See*, *e.g.*, *Nat'l Comm. for the New River, Inc. v. FERC*, 433 F.3d 830, 832 (D.C. Cir. 2005); *see also N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011) (party is not

"aggrieved" within the meaning of FPA § 313(b) unless it can establish constitutional and prudential standing).

Petitioners in Case No. 15-1139, the Transmission Owners,[1] lack standing to challenge the Commission's finding that the *Mobile-Sierra* doctrine does not automatically apply to certain provisions of their transmission operating agreement with the regional network operator. *See* Owners Br. 22-33. As set forth more fully in Part I of the Argument, *infra*, Petitioners cannot show a cognizable injury because the Commission nevertheless applied the *Mobile-Sierra* standard of review, as a matter of discretion.

STATEMENT OF THE ISSUES

These appeals involve a filing submitted by ISO New England, Inc. ("ISO New England") and its transmission owners to comply with the regional transmission planning and cost allocation requirements established in the

[1] Petitioners in Case No. 15-1139, called "Transmission Owners" for purposes of this Brief, are: Emera Maine; Central Maine Power Company; Maine Electric Power Company, Inc.; New England Power Company; Eversource Energy Service Company; The United Illuminating Company; Vermont Electric Power Company Inc.; Vermont Transco LLC; and their predecessor companies. "Owners Br." refers to the Transmission Owners' opening brief.

Commission's Order No. 1000 rulemaking.[2] Two groups of petitioners challenge the Commission's orders on compliance.[3] The issues presented for review are:

(1) [In Case No. 15-1139] Assuming jurisdiction, whether the Commission reasonably found that Transmission Owners' right of first refusal provisions lacked characteristics necessary to require the *Mobile-Sierra* presumption that the provision is just and reasonable;

(2) [In Case No. 15-1139] Whether the Commission, having previously exercised its discretion to grant *Mobile-Sierra* treatment to the right of first refusal provisions, reasonably found that the presumption was overcome because the right of first refusal severely harms the public interest; and

(3) [In Case No. 15-1141] Whether the Commission acted reasonably, consistent with Order No. 1000, and within its statutory authority, in requiring that ISO New England have the authority and responsibility for evaluating and

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

[3] Petitioners in Case No. 15-1141 are the New England States Committee on Electricity, Inc. ("States Committee"), which represents representing six northeastern States in regional electricity matters, and state agencies from Connecticut, Massachusetts, New Hampshire, Rhode Island, and Vermont (collectively with the States Committee, "States"). "States Br." refers to the States' opening brief.

determining whether to select in the regional transmission plan, for purposes of cost allocation, potential transmission solutions to meet needs driven by public policy requirements.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes are contained in the attached Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Power Act

Section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). 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).

Section 206 of the FPA, 16 U.S.C. § 824e, authorizes the Commission to investigate whether existing rates are lawful. If the Commission, on its own initiative or on a third-party complaint, finds that an existing rate or charge is "unjust, unreasonable, unduly discriminatory or preferential," it must determine and set the just and reasonable rate. FPA § 206(a), 16 U.S.C. § 824e(a).

B. The *Mobile-Sierra* Doctrine

Section 205 of the Federal Power Act, 16 U.S.C. § 824d, provides two mechanisms for ratesetting. First, regulated utilities may file "compilations of their rate schedules, or 'tariffs,' with the Commission," and provide service "on the terms and prices there set forth." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 531 (2008) (citing FPA § 205(c), 16 U.S.C. § 824d(c)). The Federal Power Act "also permits utilities to set rates with individual electricity purchasers through bilateral contracts." *Morgan Stanley*, 554 U.S. at 531 (citing FPA §§ 205(c), (d), 16 U.S.C. §§ 824d(c), (d)). *See also id.* (Federal Power Act "'departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting.'") (quoting *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 479 (2002)); *New Eng. Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 366 (D.C. Cir. 2013) ("Along with the unilateral filing of tariffs, the FPA also allows suppliers to set rates with individual purchasers via bilateral contract . . . .").

The *Mobile-Sierra* doctrine addresses "the authority of the Commission to modify rates set bilaterally by contract rather than unilaterally by tariff." *Morgan Stanley*, 554 U.S. at 532.[4] *See, e.g.*, *NRG Power Mktg., LLC v. Me. Pub. Utils.*

[4] The doctrine derives from two Supreme Court cases that held that a contract rate cannot be superseded simply by filing a new tariff. *See FPC v. Sierra Pac.*

Comm'n, 558 U.S. 165, 176 (2010) (remanding the question whether the rates set in a capacity auction qualified as a "contract rate" to which the *Mobile-Sierra* presumption of reasonableness applied).

Under the *Mobile-Sierra* doctrine, the Commission "must presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just-and-reasonable' requirement imposed by law." *Morgan Stanley*, 554 U.S. at 530. This presumption is "grounded in the commonsense notion that '[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them.'" *Id.* at 545 (quoting *Verizon*, 535 U.S. at 479) (alteration by the Court). Thus, the *Mobile-Sierra* presumption rests on the premise that "the contract rates are the product of fair, arms-length negotiations." 554 U.S. at 554.

"The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest." *Morgan Stanley*, 554 U.S. at 530; *see also id.* at 545-46 (Commission may find contract rate not to be just and reasonable only when it "seriously harms the consuming public"). As the Supreme Court has

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Power Co., 350 U.S. 348, 353 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 342-44 (1956). *Sierra* also addressed the standard by which the Commission may evaluate whether a contract rate is just and reasonable. 350 U.S. at 354-55.

explained, this "public interest standard" is an "application" of the statutory just-and-reasonable standard to contract rates, not a different standard. *Id.* at 535; *accord NRG*, 558 U.S. at 169. "[T]he public interest standard defines 'what it means for a rate to satisfy the just-and-reasonable standard in the contract context.'" *NRG*, 558 U.S. at 174 (quoting *Morgan Stanley*, 554 U.S. at 546).

C. Pre-Order No. 1000 Right Of First Refusal Provisions In The Transmission Owners Agreement

The Commission's efforts to foster wholesale electricity competition over broader geographic areas in recent decades have led to the creation of independent system operators and regional transmission organizations. *See Morgan Stanley*, 554 U.S. at 536-37; *see also FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016). These independent regional entities operate the transmission grid on behalf of transmission-owning member utilities and are required to maintain system reliability. *See NRG*, 558 U.S. at 169 & n.1 (explaining responsibilities of regional system operators). ISO New England is the regional entity that operates the regional transmission system and administers bid-based energy markets across six northeastern States (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont). *See generally NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 796 (D.C. Cir. 2007).

In 2004, the Commission approved filings that established the regional organization in New England, including a Transmission Operating Agreement

("Agreement") governing transmission owners' participation. *ISO New England Inc.*, 106 FERC ¶ 61,280 ("2004 Agreement Order"), *on reh'g*, 109 FERC ¶ 61,147 (2004) ("2004 Rehearing Order"), *aff'd*, *Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006). The filing parties requested *Mobile-Sierra* protection for some provisions of the Agreement. 2004 Agreement Order P 126. Though the filing parties asserted a statutory right to claim *Mobile-Sierra* treatment for any provision they chose, the Commission disagreed, explaining that it must consider whether the proposed terms were just and reasonable with an eye toward the interests of "non-parties to the agreement or the operation of the market as a whole." 2004 Rehearing Order P 73.[5] Accordingly, the Commission considered, as to each of the provisions, "the necessary balance of interests" (*id.*) between "the needs of the Transmission Owners for contractual certainty with the interests properly represented by" a regional transmission organization, including customers, other market participants, and the overall market. 2004 Agreement Order P 128.

[5] On appeal, this Court upheld the Commission's decision to modify a provision regarding termination and withdrawal from the regional organization. 454 F.3d at 282-86. The parties had agreed that the *Mobile-Sierra* standard would govern FERC review of any termination, and argued that the Commission's initial approval of the Agreement also should be subject to that standard; the Commission, however, applied the just-and-reasonable standard to its approval and also required that standard for review of terminations. *Id.*

As relevant here, the filing parties requested *Mobile-Sierra* protection for provisions addressing the rights and obligations of transmission owners and ISO New England with respect to system planning and expansion (section 3.09 and Schedule 3.09(a) of the Agreement, JA 98-99, 100-03). *See* 2004 Rehearing Order P 77 n.50. The Commission granted such treatment, noting that section 3.09 provided direction to the parties to follow planning procedures in the regional tariff; "[a]s such, this provision will have no adverse impact on third parties or the New England market." *Id.* P 78.

D. The Order No. 1000 Regional Planning Rulemaking

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

In 1996, the Commission issued Order No. 888, a landmark rulemaking that directed public utilities to adopt open access non-discriminatory transmission tariffs.[6] Then, in 2007, the Commission issued its Order No. 890 rulemaking,[7]

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[6] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded*

which established certain measures to require transmission providers to establish open, transparent, and coordinated transmission planning processes. *See South Carolina*, 762 F.3d at 51.

After assessing the effectiveness of those measures, the Commission determined that additional reforms were necessary to ensure that rates for FERC-jurisdictional services would be, as required by the Federal Power Act, just and reasonable and not unduly discriminatory or preferential. *See id.* at 52. Accordingly, in July 2011, the Commission issued Order No. 1000. That rulemaking required transmission providers to participate in regional planning processes that, among other things, would evaluate more efficient or cost-effective solutions to transmission needs. *See* 762 F.3d at 52-53 (summarizing Order No. 1000 requirements). The rulemaking also required regional planning processes to include regional cost allocation methods for new transmission facilities selected in the regional plan for purposes of cost allocation that would satisfy certain

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Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part, Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) ("*Transmission Access*"), *aff'd, New York v. FERC*, 535 U.S. 1 (2002).

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

principles set forth by the Commission, which focused on cost causation, transparency, and regional flexibility. *See id.* at 53.

1. Regional Planning and Cost Allocation

A key definition, for purposes of Order No. 1000, is that of "transmission facilities selected in a regional transmission plan for purposes of cost allocation," which means transmission facilities that have been selected in the plan "because they are more efficient or cost-effective solutions to regional transmission needs." Order No. 1000 P 63. The distinction between a transmission facility that is included in a regional plan and one that is "selected in a regional transmission plan for purposes of cost allocation" is "an essential element" of the rule. *Id.* P 5. In particular, whether a facility is included in the plan with or without the designation "for purposes of cost allocation" establishes how the developer may allocate the facility's costs in FERC-approved rates if the facility is, in fact, built. Order No. 1000 P 66. Nothing in Order No. 1000, however, requires that a facility in a regional plan be built. *Id.*; *see id.* P 12 (the rulemaking "focused on the transmission planning process, and not on any substantive outcomes that may result from this process").

2. Rights of First Refusal

Of particular relevance to this case, the Commission, to improve identification of more efficient or cost-effective transmission solutions, directed

transmission providers "to remove provisions from Commission-jurisdictional tariffs and agreements that grant incumbent transmission providers a federal right of first refusal to construct transmission facilities selected in a regional transmission plan for purposes of cost allocation." Order No. 1000 P 253. *See also South Carolina*, 762 F.3d at 72 n.6 (an incumbent transmission provider is a utility that develops a transmission project within its own retail distribution territory, whereas a non-incumbent may be either a developer that does not have its own retail distribution territory or a provider proposing a project outside its own territory).

These rights of first refusal gave incumbents "the option to construct any new transmission facilities in their particular service areas, even if the proposal for new construction came from a third party," which discourages non-incumbent proposals. *South Carolina*, 762 F.3d at 72 (citing Order No. 1000 PP 256-57). The Commission was concerned that, "by deterring proposals from non-incumbents, rights of first refusal would impede the identification of some cost-efficient projects, resulting in the development of transmission facilities 'at a higher cost than necessary.'" 762 F.3d at 72 (citing Order No. 1000 PP 228-30); *see also* Order No. 1000 at P 7 (rights of first refusal "have the potential to undermine the identification and evaluation of a more efficient or cost-effective solution to regional transmission needs"). "Those higher costs would then be

passed on to customers, yielding rates that were not 'just and reasonable.'" 762 F.3d at 72. The Commission thus "rested its right of first refusal ban on competition theory, determining that rights of first refusal posed a barrier to entry that made the transmission market inefficient, that transmission facilities would therefore be developed at higher-than-necessary cost, and that those amplified costs would be passed on to transmission customers." *Id.* at 77.

Some parties argued during the Order No. 1000 rulemaking proceeding that their right of first refusal provisions were protected by the *Mobile-Sierra* doctrine. The Commission determined that it would address assertions that individual jurisdictional tariffs and agreements contain a federal right of first refusal protected by *Mobile-Sierra* in the transmission providers' individual compliance filings, rather than in the generic rulemaking proceeding. Order No. 1000 P 292; Order No. 1000-A PP 388-89; Order No. 1000-B P 40.

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

rates remain just and reasonable." *Id.* The court found the *Mobile-Sierra* arguments premature, since the Commission deferred consideration of that issue to individual compliance proceedings. *Id.* at 81.

3. Public Policy Requirements

Also relevant to this appeal, Order No. 1000 required regional transmission planning processes to consider transmission needs driven by reliability concerns, economic considerations, and public policy requirements. Order No. 1000 P 689. As to the last of these categories, the Commission required that public utility transmission providers develop procedures to identify transmission needs driven by federal, state, or local laws or regulations, and to evaluate potential solutions to meet those needs. *Id.* PP 2, 203-05. It further required that transmission providers have a means for allocating the costs of each type of transmission facility. Order No. 1000-A P 689. The Commission did not mandate consideration of the public policy requirements themselves; it simply required transmission providers to consider, in their regional planning processes, transmission needs driven by public policy, not only those driven by reliability and economic concerns. *Id.* P 318. *See also South Carolina*, 762 F.3d at 89-90.

To that end, the Commission required public utility transmission providers, in consultation with stakeholders and subject to Commission review on compliance, to establish procedures: (1) to identify transmission needs driven by

public policy requirements for which potential solutions will be evaluated; and (2) to evaluate potential solutions to meet those identified needs. Order No. 1000 PP 205-11; Order No. 1000-A PP 321, 334. The Commission's rulemaking allowed significant flexibility, directing transmission providers, working with their stakeholders, to implement the Commission's requirements and principles through processes tailored to different regional needs and characteristics. *See* Order No. 1000 at PP 14, 61-62.

II. THE COMMISSION PROCEEDINGS AND ORDERS

A. Compliance Filing

On October 25, 2012, ISO New England and a committee of transmission owners in the region submitted a compliance filing to implement the transmission planning and cost allocation requirements of Order No. 1000. R. 1, JA 2. Though the compliance filing addressed many aspects of the Order No. 1000 rulemaking, only two are pertinent to this appeal.

Right of First Refusal. The filing parties submitted two alternative proposals: one based on ISO New England's existing planning process; and one based on the Order No. 1000 requirement to remove all federal rights of first refusal. To support the first proposal, they raised arguments asserting *Mobile-Sierra* protection for the rights of first refusal in the Transmission Operating Agreement. *See* R. 1 at 18-22, JA 19-23. In particular, they contended that the

right of first refusal in section 3.09 and Schedule 3.09(a) of the Transmission Operating Agreement was protected by the *Mobile-Sierra* doctrine (R. 1 at 18-21), and that past results of the existing regional planning process demonstrated that those provisions had benefited the public (R. 1 at 21-22).

Public Policy-Driven Proposals. The filing parties proposed a separate transmission planning process to consider public policy-driven solutions. In that process, New England States Committee on Electricity, Inc. ("States Committee") would be primarily responsible for identifying state and federal public policies that may drive the need for transmission in the region, and for identifying those transmission needs. R. 1 at 50-51, JA 37-38. The States Committee would then ask ISO New England to conduct a study to identify high-level solutions, with rough estimates of costs and benefits. R. 1 at 52, JA 39. After receiving the Study, the States Committee could give ISO New England a list of solutions that the member States were interested in exploring through submission of competitive proposals (Stage One). *Id.* After receiving cost estimates for those proposals, the States Committee could submit a list of projects, if any, that one or more States would like to have further developed in Stage Two. R. 1 at 55-56, JA 42-43. At Stage Two, ISO New England would further study and develop the projects into engineering plans. R. 1 at 56, JA 43. At the end of Stage Two, the States Committee or any state regulators could direct ISO New England to put a project

in the regional transmission plan for purposes of cost allocation, with the states' chosen cost allocation. *Id.*

B. Compliance Order

On May 17, 2013, the Commission issued the Order on Compliance Filings, *ISO New England Inc.*, 143 FERC ¶ 61,150, R. 53, JA 207 ("Compliance Order"). The Commission rejected the claim that the rights of first refusal in the Transmission Operating Agreement were automatically entitled to *Mobile-Sierra* protection; nevertheless, the Commission applied the public interest standard because it had previously granted *Mobile-Sierra* treatment in the 2004 orders. *Id.* PP 160-72, JA 267-71; *see* Argument, Part III.A *infra*. The Commission then found that the right of first refusal provisions severely harm the public interest, overcoming the *Mobile-Sierra* presumption to abrogate those provisions. Compliance Order PP 11, 173-98, JA 214, 271-83; *see* Argument, Part III.B, *infra*. Therefore, the Commission accepted the second proposal, subject to certain modifications and a further compliance filing. Compliance Order P 11, JA 214.

The Commission also found that the proposed regional transmission planning process for evaluating and selecting projects to address transmission needs driven by public policy requirements did not comply with Order No. 1000. Compliance Order PP 67, 108, 116, 118-19, 313, JA 222, 239, 244-46, 294. Specifically, the Commission found that the proposal did not give ISO New

England the authority and responsibility (1) to evaluate all identified potential transmission solutions to transmission needs driven by public policy requirements and (2) to select, in the regional transmission plan for cost allocation purposes, the appropriate projects to address such needs. *Id.* PP 67, 108, 118-19, JA 222, 239, 245-46; *see* Argument, Part IV, *infra*. Accordingly, the Commission directed the filing parties to submit a compliance filing to modify the process for public policy-driven projects.

C. Rehearing Order

Several parties, including the States Committee and a committee of transmission owners (including Petitioners Transmission Owners), filed timely requests for rehearing or clarification. R. 56, JA 330 (States Committee); R. 55, JA 297 (Transmission Owners). ISO New England and its transmission owners submitted a compliance filing with the revisions directed by the Commission on November 15, 2013. R. 69, JA 354. On March 19, 2015, the Commission issued the Order on Rehearing and Compliance, *ISO New England Inc.*, 150 FERC ¶ 61,209, R. 101, JA 373 ("Rehearing Order"). For reasons discussed more fully in Part III of the Argument, *infra*, the Commission denied rehearing with respect to its *Mobile-Sierra* determinations. Rehearing Order PP 182-207, JA 429-41. The Commission also denied rehearing and affirmed its finding that the regional planning process must give ISO New England the responsibility to evaluate and

select public policy transmission projects in the regional plan for purposes of cost allocation, but granted the States Committee's request for clarification that ISO New England was not required to select a transmission solution for every public policy-driven transmission need. *Id.* PP 125-26, JA 400-01; *see also id.* PP 127-34, JA 401-06.

These appeals followed.

SUMMARY OF ARGUMENT

Right of First Refusal [Case No. 15-1139]

First, the Transmission Owners lack standing to challenge whether *Mobile-Sierra* protection automatically applies to provisions of the Transmission Operating Agreement that provide a federal right of first refusal to construct transmission facilities. The Commission granted *Mobile-Sierra* treatment to the relevant provisions of the Agreement as a matter of discretion, so the outcome is the same: the Commission applied the public interest standard to determine whether it could abrogate the right of first refusal. On this point, the Court's ruling in *New England Power Generators*, 707 F.3d at 69, is dispositive.

For that reason, the Commission's thorough analysis of whether *Mobile-Sierra* must apply is essentially dictum. In any event, the Commission reasonably found, on two alternative bases, that the provisions in the Agreement lacked certain characteristics required for default application of a *Mobile-Sierra* presumption.

First, the Federal Power Act permits ratesetting through either generally-applicable "schedules" or individually-negotiated "contracts," but, under Supreme Court precedent, the presumption of reasonableness applies only to the latter. Here, the Commission determined that the provisions at issue have the characteristics of a tariff of general applicability, as new transmission owners must accept the Agreement as-is, with limited room for negotiation. Second, the Commission reasonably found that the *Mobile-Sierra* presumption did not apply because the purported right of first refusal provisions were not the result of arm's-length bargaining. Transmission Owners have a common interest in protecting themselves from competition in transmission development.

The Commission further rejected the Transmission Owners' claim that the Commission had previously found the Agreement entitled to *Mobile-Sierra* protection. Rather, the Commission had exercised its discretion to choose to apply the public interest standard to future changes. Accordingly, the Commission applied that heightened standard of review to determine whether the right of first refusal can be abrogated in this case.

The Commission reasonably found that severe harm to the public interest overcomes the presumption of reasonableness and requires elimination of the federal right of first refusal in the Transmission Operating Agreement. First, the Commission concluded, consistent with precedent, that it could rely on findings it

made in the Order No. 1000 rulemaking. Specifically, the Commission had found that a significant expansion of the transmission grid over the next two decades, to respond to changes in the mix of generation resources, will affect transmission planning and investment, making the need for more efficient or cost-effective solutions, and the need to remove barriers to competitive development, more acute. Given that threat to the public interest and the Commission's evolving reforms of the industry, the Commission reasonably concluded that its findings in Order No. 1000 meet the public interest standard. New England-specific evidence, submitted to the Commission in the post-Order No. 1000, ISO New England compliance proceeding, confirms those findings. Furthermore, the Commission adequately demonstrated the manner in which the right of first refusal harms the public interest and the extent to which abrogation mitigates the harmful effect, because that anticompetitive right negates the very reform that the Commission, in the rulemaking, had found necessary to protect the public interest.

Public Policy Requirements [Case No. 15-1141]

The Commission appropriately rejected ISO New England's proposed regional transmission planning process for projects driven by public policy requirements. The proposal did not comply with the requirements of Order No. 1000 because it delegated away key steps in the planning process that the regional transmission provider must conduct.

Order No. 1000 requires public utility transmission providers to consider all potential solutions to identified transmission needs driven by public policy requirements. A transmission provider must evaluate whether any of those solutions more efficiently or cost-effectively meets those needs, and determine whether to select such solutions in the regional transmission plan for purposes of cost allocation. In the compliance proceeding, ISO New England proposed a process in which it did neither. Rather, the States Committee would identify potential public policy-driven solutions that it would like to have further evaluated, and would select projects to be included in the plan for cost-allocation purposes.

The Commission reasonably found that the proposal did not meet the Order No. 1000 requirements, which impose an affirmative obligation on transmission providers, like ISO New England, to evaluate and determine whether to select transmission projects in their plans for purposes of cost allocation. The Commission did not, as the States contend, mandate that the transmission provider select a project. The focus of the Commission's ruling was on which entity — the transmission provider or a delegee — would consider those solutions, not on what the outcome of that consideration would be.

Furthermore, the Commission acted within the bounds of its broad authority to regulate transmission planning, as well as transmission cost allocation. It did not require ISO New England to consider the public policy requirements

themselves, or any States' means of pursuing policy objections — or even the identification of policy-driven transmission needs, which the Commission approved leaving to the States Committee. The Commission simply reaffirmed the basic principle in Order No. 1000 that, in the regional planning process, the transmission provider must be the one to consider all potential transmission solutions to regional transmission needs, and to make the determination whether any given project should be included in the plan for cost allocation purposes. States continue to be able to exercise their traditional authority to develop public policy and to decide whether to allow the construction of identified transmission projects.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER WHETHER THE *MOBILE-SIERRA* DOCTRINE NECESSARILY APPLIES TO THE RIGHT OF FIRST REFUSAL [CASE NO. 15-1139]

There is no dispute that the Commission applied the *Mobile-Sierra* public interest standard to the right of first refusal in the Transmission Operating Agreement. Its conclusion that the harm to the public interest was sufficient to overcome the presumption of justness and reasonableness is properly before the Court. *See* Compliance Order PP 173-98, JA 271-83; Rehearing Order PP 190-207, JA 432-41; *infra* Part III.B. Whether the Commission erred in determining that *Mobile-Sierra* applied as a matter of discretion, rather than of legal mandate,

however, is not. The end result — application of the public interest standard — is the same.[8]

Transmission Owners must demonstrate that they have standing to raise each claim on appeal. *See Davis v. FEC*, 554 U.S. 724, 734 (2008); *see also City of Orrville v. FERC*, 147 F.3d 979, 985 (D.C. Cir. 1998) (aggrievement requirement distinguishes a "'direct stake'" from a "'mere interest'"); *Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1028 (D.C. Cir. 2012) ("'an interest in [a] problem'" does not constitute aggrievement) (quoting *Orrville*). Transmission Owners have not demonstrated standing to litigate whether the *Mobile-Sierra* presumption must apply (Owners Br. 22-33).

Nor could they, as this case is on all fours with this Court's decision in *New Eng. Power Generators Association, Inc. v. FERC*, 707 F.3d 364, 366 (D.C. Cir. 2013). In that proceeding, as here, the Commission had determined that certain rates were not automatically entitled to *Mobile-Sierra* treatment, but had nevertheless exercised its discretion to apply the public interest standard when reviewing the rates. *Id.* at 368. A group of suppliers sought review, contending that the rates were contract rates that *must* receive the *Mobile-Sierra* presumption.

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[8] That the Commission ultimately determined that the right of first refusal severely harms the public interest does not affect the jurisdictional analysis. The merits of the Commission's findings would be the same whether *Mobile-Sierra* applied by right or by discretion.

See id. at 366. The Court, however, found no cognizable injury, because the Commission had, in fact, applied that standard: "[Petitioner] may have preferred FERC's wholehearted endorsement of the . . . rates as contract rates, but its desired outcome — application of *Mobile-Sierra*'s public interest standard — has already been achieved." *Id.* at 369. *See also id.* ("[T]he precedent going forward — that *Mobile-Sierra* applies to the . . . rates — is precisely the outcome [petitioner] desires.").

Likewise, in the orders challenged here, the Commission determined that the right of first refusal provisions in the Transmission Owners Agreement were not automatically entitled to the *Mobile-Sierra* presumption (*see* Compliance Order PP 165-71, JA 268-71; Rehearing Order PP 183-87, JA 429-32), but that the Commission had previously exercised its discretion to grant *Mobile-Sierra* treatment to those provisions. *See* Compliance Order P 172, JA 271; Rehearing Order P 188, JA 432. Accordingly, the Commission went on to analyze the right of first refusal provisions under the public interest standard. *See* Compliance Order PP 173-98, JA 271-83; Rehearing Order PP 190-207, JA 432-41. Therefore, the Transmission Owners' "desired outcome — application of *Mobile-Sierra*'s public interest standard — has already been achieved" (*New England*, 707 F.3d at 369), and they cannot demonstrate a cognizable injury for Article III standing as to the *Mobile-Sierra* issue.

II. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The "scope of review under [that] standard is narrow." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (citation omitted). The relevant inquiry is whether the agency has "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (finding reasoned decisionmaking where Commission "weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice").

The Commission's interpretation of the Federal Power Act is entitled to *Chevron* deference. *Transmission Access*, 225 F.3d at 687; *South Carolina*, 762 F.3d at 54. Such deference applies even where the agency is construing the limits of its own statutory jurisdiction. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-73 (2013); *see also ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002) (affording deference to Commission jurisdictional "line-

drawing"); *cf. Cal. ex rel. Harris v. FERC*, 809 F.3d 491, 501 (9th Cir. 2015) (affording *Chevron* deference to Commission's determination whether *Mobile-Sierra* applies to certain contracts, because "the statutory language does not clearly spell out the application of the 'just and reasonable' standard"). This Court also "defer[s] to the Commission's interpretations of its own precedents." *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007); *accord South Carolina*, 762 F.3d at 91 ("we defer to the Commission's reasonable interpretation of" a prior rulemaking).

The Commission's policy assessments also are afforded "great deference." *Transmission Access*, 225 F.3d at 702. *See also South Carolina*, 762 F.3d at 55 ("the Commission must have considerable latitude in developing a methodology responsive to its regulatory challenge") (internal quotation marks and citations omitted); *New Eng. Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 293 (D.C. Cir. 2014) (court "properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions") (internal quotation marks and citation omitted).

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *La. Pub. Serv. Comm'n v. FERC*, 522

F.3d 378, 395 (D.C. Cir. 2008) (citation omitted); *accord South Carolina*, 762 F.3d at 54. If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *accord Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("[W]e do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision.").

III. THE COMMISSION'S DIRECTIVE TO REMOVE THE RIGHT OF FIRST REFUSAL PROVISIONS IS CONSISTENT WITH PRECEDENT AND SUPPORTED BY SUBSTANTIAL EVIDENCE [CASE NO. 15-1139]

In the Order No. 1000 rulemaking, the Commission declined to rule on an argument (raised by one of the Transmission Owners) that the right of first refusal in the ISO New England Transmission Operating Agreement was protected by *Mobile-Sierra*. *See* Order No. 1000 P 292. The Commission noted that it generally does not interpret individual contracts in generic rulemakings. *See id.*. Accordingly, it chose to defer the issue to ISO New England's compliance proceeding, where the parties could develop a fuller record on specific issues and arguments. *See id.*; Order No. 1000-A P 388-89; Order No. 1000-B P 40; *South Carolina*, 762 F.3d at 81 (orders in rulemaking "make clear that the Commission will hear . . . *Mobile-Sierra* arguments" in subsequent compliance proceedings). That decision was within the Commission's "broad discretion in determining how

best to handle related, yet discrete, issues in terms of procedures," such as to address a particular issue in a different proceeding that "would generate more appropriate information." *Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991), *quoted in South Carolina*, 762 F.3d at 81.

As set forth in Section I of the Argument, whether the *Mobile-Sierra* presumption *must* apply to the right of first refusal is not properly before the Court because the Commission applied that standard in any event. Nevertheless, consistent with its deferral in Order No. 1000 of *Mobile-Sierra* issues to the various compliance proceedings, the Commission addressed all of the Transmission Owners' *Mobile-Sierra* arguments in these orders. The Commission was able to consider "a more complete record including the viewpoints of other interested parties" (Compliance Order P 132, JA 253), with "all the arguments relating to this specific issue — *Mobile-Sierra* protection of the right of first refusal provisions — as well as the individual contract provisions and other related documents," such as the 2004 orders. Rehearing Order P 193, JA 433. Thus, the Commission's findings in this proceeding "were based on this more complete, and now sufficient, record." *Id.*

A. Assuming Jurisdiction, The Commission Reasonably Determined That The *Mobile-Sierra* Presumption Does Not Automatically Apply To The Right Of First Refusal Provisions

Assuming jurisdiction, the Commission reasonably determined that the purported right of first refusal provisions in the Transmission Operating Agreement (section 3.09 and Schedule 3.09(a)) lack the requisite characteristics to warrant automatic application of the *Mobile-Sierra* presumption of reasonableness. In *Morgan Stanley*, the Supreme Court recognized that, under the Federal Power Act, utilities may set rates either by unilaterally filing compilations of their rate schedules or "tariffs" with the Commission, or they may "set rates with individual electricity purchasers through bilateral contracts." 554 U.S. at 531 (citing FPA § 205(c), 16 U.S.C. § 824d(c)). In the latter instance, "[u]nder the *Mobile-Sierra* doctrine," FERC "must presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law," and can only modify the contract if it is required in the public interest. *Id.* at 530. The *Mobile-Sierra* presumption rests on the premise "that the contract rates are the product of fair, arms-length negotiations." *Id.* at 554.

Following *Morgan Stanley*, provisions in bilateral sales contracts freely negotiated at arm's-length would come within the presumption. Compliance Order P 164, JA 268. This case, however, poses the question of the applicability of such a presumption to a multi-lateral Transmission Operating Agreement, the terms of

which are applied to new transmission owners joining ISO New England on an "as-is" basis. *See id.* P 167, JA 269. Indeed, this Court has previously expressed doubt that *Mobile-Sierra* applies to this very Agreement, "particularly when that contract is a complex agreement establishing a new regional structure impacting all market participants." *Me. Pub. Utils. Comm'n*, 454 F.3d at 284 (finding that "[t]his hardly seems the situation *Mobile-Sierra* was designed to guard against").

Moreover, the particular type of provision at issue — a right of first refusal — has the effect of insulating the signatory incumbent transmission owners from competition from non-party, non-incumbent transmission developers, an interest that all the contracting transmission-owning parties share. *See* Compliance Order P 169, JA 270; Rehearing Order P 186, JA 431. This Court has upheld the Commission's conclusion that such provisions are anticompetitive and unjust and unreasonable. *See South Carolina*, 762 F.3d at 77.

Under these circumstances, in the challenged orders, the Commission reasonably determined that, "for two separate but reinforcing reasons," the *Mobile-Sierra* presumption of reasonableness did not apply to the Transmission Owners' purported right of first refusal provisions. Compliance Order P 165, JA 268-89. The Agreement has the characteristics of a prescription of general applicability, or tariff, rather than an individualized, negotiated contract, and, as a result, is not entitled to a *Mobile-Sierra* presumption of reasonableness. *See id.* PP 166-67,

JA 269; Rehearing Order P 185, JA 430. The Commission also reasonably found that the *Mobile-Sierra* presumption does not apply to the Agreement's purported right of first refusal provisions because transmission owners have a common interest in protecting themselves from competition, which precludes arm's-length bargaining. Compliance Order P 165, JA 268-69; Rehearing Order P 186, JA 430-31. *See Pierce v. SEC*, 786 F.3d 1027, 1034 (D.C. Cir. 2015) ("A reviewing court will uphold agency action resting on several independent grounds if any of those grounds validly supports the result.").

1. The Commission Reasonably Determined That The *Mobile-Sierra* Presumption Does Not Apply Because The Transmission Operating Agreement Is More Akin To A Generally-Applicable Tariff

The Commission reasonably determined that the provisions of the Transmission Operating Agreement that include a federal right of first refusal are prescriptions of general applicability rather than individually-negotiated rate provisions that are necessarily entitled to a *Mobile-Sierra* presumption. Compliance Order P 166, JA 269. Any new ISO New England transmission owner is required to accept the provision as-is, with limited room for negotiation. *Id.* P 167, JA 269; Rehearing Order P 185, JA 430.

As the Commission found, Supreme Court precedent on *Mobile-Sierra* requires that the Commission differentiate between "prescriptions of general applicability," like tariffs, and "contractually negotiated rates." Compliance Order

P 166, JA 269 (quoting *NRG*, 558 U.S. at 176). Under section 205(c) of the Federal Power Act, 16 U.S.C. § 824d(c), utilities may set rates by filing "compilations of their rate schedules, or 'tariffs,' with the Commission," or they may set rates "with individual electricity purchasers through bilateral contracts." *Morgan Stanley*, 554 U.S. at 531 (citing Federal Power Act § 205(c)). *See also, e.g.*, *NRG*, 558 U.S. at 171 (Federal Power Act "allows regulated utilities to set rates unilaterally by tariff; alternatively, sellers and buyers may agree on rates by contract"); *Mobile*, 350 U.S. at 339 (analogous provisions of the Natural Gas Act permit rates to be set either by uniform tariffs or by "individualized arrangements" between the utility and its customers). The *Mobile-Sierra* presumption of reasonableness applies only to "the authority of the Commission to modify rates set bilaterally by contract rather than unilaterally by tariff." *Morgan Stanley*, 554 U.S. at 532. *See also Verizon*, 535 U.S. at 478-79 (tariff schedules are reviewed under the ordinary just and reasonable standard, whereas negotiated contracts are subject to *Mobile-Sierra*).

Transmission Owners argue that *Mobile-Sierra* applies to "all lawful contracts." Owners Br. 26. The Commission reasonably found this view overly broad. Rehearing Order P 184, JA 430.

Under *Morgan Stanley*, the *Mobile-Sierra* presumption applies to "provisions in bilateral power sales contracts freely negotiated at arm's length

between sophisticated parties." Compliance Order P 164, JA 268 (citing *Morgan Stanley*, 554 U.S. at 530, 534). The Commission recognized, however, that the terms of other contracts are more "properly classified as tariff rates," such as an agreement whose terms will be incorporated into the service agreements of all present and future customers. Compliance Order P 164, JA 268 (citing cases). Even if a provision originates from individual negotiations, it is nevertheless a tariff rate when it is generally applied. *See, e.g.*, *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990) (recognizing that tariff rates may be "arrived at through negotiations between a carrier and an individual customer" and then made generally available to other customers); *Fla. E. Coast Ry. Co. v. CSX Transp., Inc.*, 42 F.3d 1125, 1130 n.5 (7th Cir. 1994) (finding that, although "published tariffs may have been determined initially by way of private negotiation," such rates are nonetheless tariff rates once they are published and generally applied).

The presence of a contractual relationship does not differentiate the categories of tariffs and contracts; both involve contractual relationships. As this Court has recognized, a tariff is "the contract which governs a pipeline's service to its customers." *ANR Pipeline Co. v. FERC*, 931 F.2d 88, 90 n.1 (D.C. Cir. 1991). *See also, e.g.*, *Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l, Inc.*, 294 F.3d 924, 926 (7th Cir. 2002) ("The tariff is an offer that the customer accepts by using the product.").

Tariffs differ from private contracts, therefore, not in the creation of a contractual relationship but, rather, because tariffs, unlike private contracts, "are not subject to alteration one customer (or one clause) at a time." *Metro East*, 294 F.3d at 926. A tariff is a "take-it-or-leave-it proposition" and thus not an "agreement" in the sense that it is reached by individual negotiation. *Id.* *See also Balt. & Ohio Chi. Terminal R.R. Co. v. Wis. Cent. Ltd.*, 154 F.3d 404, 406 (7th Cir. 1998) (distinguishing "tariffs, which are publicly announced take-it-or-leave-it form contracts," from "individually negotiated agreements"). In *United Gas Pipeline Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 115 & n.8 (1958), the Supreme Court held that *Mobile-Sierra* did not apply to so-called "tariff and service" contracts that did not contain an individually-negotiated rate, but rather "refer[red] to rate schedules of general applicability on file with the Commission."

Thus, the Commission reasonably concluded, following the Supreme Court guidance in *NRG*, that an agreement may be more akin to a "prescription[] of general applicability" than a "contractually negotiated rate[]." Compliance Order P 166, JA 269 (quoting *NRG*, 558 U.S. at 176). Transmission Owners argue that *NRG* does not authorize the Commission to make that distinction. Owners Br. 27-28. As *NRG* stated, however, FERC did not agree that the rates at issue were not contract rates at all, but rather "FERC agree[d] that the rates covered by the

settlement 'are not themselves contract rates to which the Commission was *required* to apply *Mobile-Sierra*.'" *NRG*, 558 U.S. at 176 (quoting FERC's brief). *See, e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127 P 117 (2014), *appeal pending*, *MISO Transmission Owners v. FERC*, No. 14-2153 (7th Cir.) ("We think it is clear from the context that when the Court [in *NRG*] referred to 'contract rates,' it was referring to rates to which the Commission is required to apply a *Mobile-Sierra* presumption. Specifically, the Court acknowledged the Commission's use of the term 'contract rates' in this way.").

On remand, the Commission expressly recognized that the New England capacity auctions at issue in *NRG* possessed contractual characteristics: sellers bidding into the auction are committed to supply at the auction-clearing price; and buyers purchasing in the auction are obligated to pay. *See Devon Power LLC*, 134 FERC ¶ 61,208 PP 22, 23, 25, *on reh'g*, 137 FERC ¶ 61,073 (2011). Nevertheless, the Commission found the auction results more akin to generally-applicable tariff rates than individually-negotiated contract rates because the results of the auctions — the clearing prices — "apply to all suppliers and purchasers of capacity within the ISO New England market," and the buyers and sellers do not contract individually with each other. *Devon Power*, 137 FERC ¶ 61,073 at PP 12-13. The Commission decided, however, in an exercise of its discretion, to apply the high *Mobile-Sierra* public interest standard to future challenges to those rates. *See id.* at

P 14. "[A]lthough these auctions will not result in contracts between buyers and sellers, we find that they nevertheless share with freely-negotiated contracts certain market-based features that tend to assure just and reasonable rates." *Id.* at P 19.

On appeal of this determination, this Court acknowledged the issue presented in classifying the auction rates as either generally-applicable tariff rates or individually-negotiated contract rates. This Court noted that, while "[u]ntil recently, only two types of rates were involved: tariff rates and contract rates," the "debut of capacity auctions poses a new challenge." *See New England Power Generators*, 707 F.3d at 366. Ultimately, however, this Court did not reach this issue. "Assuming, without deciding, that the auction rates [were] not contract rates," this Court found it was within the Commission's "considerable discretion" under the just and reasonable standard to adopt the high public interest application of that standard for the capacity auction rates. *Id.* at 370-71.

Accordingly — while not reaching the merits of the determination that auction rates were more akin to tariff rather than contract rates — both *NRG* and *New England Power Generators* recognized that an issue existed as to whether or not the auction rates at issue were contract rates to which *Mobile-Sierra* necessarily applied. *See*, *e.g.*, *Me. Pub. Utils. Comm'n v. FERC*, 625 F.3d 754, 759 (D.C. Cir. 2010) (remanding the *NRG* issues to the Commission, finding that "the Supreme Court's holding [in *NRG*] did not resolve this case, because as the

parties' positions before it made clear, there was still an open question about whether the auction rates resulting from the settlement agreement were the type of rates to which *Mobile-Sierra* applied.").

The Commission reasonably concluded here that the *Mobile-Sierra* presumption does not apply to the Transmission Operating Agreement's purported right of first refusal provisions because they are prescriptions of general applicability. Compliance Order P 166, JA 269 ("Where the language of an agreement establishes rules that delimit, qualify, or restrict the ability of any other potential competitor to engage in the subject activity, that language creates generally applicable requirements."). That conclusion was reinforced, in the Commission's view, by the fact that any transmission owner joining ISO New England "would have to accept these provisions as-is, with limited room for negotiation." *Id.* Amending the Agreement requires action by 65 percent of current participating transmission owners, a threshold that would "substantially inhibit[]" a new party's ability to negotiate a change. *Id.* & n.317 (citing Transmission Operating Agreement, § 11.04(a)(iii)(B)(1)). For that reason, new transmission owners are in a position that "differs fundamentally" from that of parties who can negotiate freely like buyers and sellers in a bilateral power sales contract. *Id. See also* Rehearing Order P 185 & n.325, JA 430 (same).

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

Alternatively, the Commission also found that the *Mobile-Sierra* presumption does not automatically apply to the Transmission Operating Agreement provisions that include a federal right of first refusal because those provisions arose in circumstances that do not provide the assurance of reasonableness on which the *Mobile-Sierra* presumption rests. Compliance Order P 168, JA 269. Specifically, the Commission concluded that any purported right of first refusal provision would result from the Transmission Owners' common interest rather than from arm's-length bargaining. Compliance Order PP 169-70, JA 270; Rehearing Order PP 183, 186, 198, JA 429, 431, 437.

While Transmission Owners claim that the arm's-length inquiry is a "newly minted prerequisite" for the *Mobile-Sierra* presumption (Owners Br. 26), it is in fact required under *Morgan Stanley*. As that case held, the *Mobile-Sierra* presumption rests on the premise "that contract rates are the product of fair, arms-length negotiations." 554 U.S. at 554, *cited in* Compliance Order P 168 n.318, JA 269. Since wholesale energy market buyers and sellers tend to be sophisticated businesses with equal bargaining power, the Supreme Court has explained, it can be expected that they will negotiate contracts containing just and reasonable rates, terms and conditions. 554 U.S. at 545 (citing *Verizon*, 535 U.S. at 479). *See also*

Me. Pub. Utils. Comm'n, 625 F.3d at 759 ("A freely-negotiated contract rate, the Court held in *Morgan Stanley*, was presumptive evidence that the rate was just and reasonable because it reflected market forces."); *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002) (finding *Mobile-Sierra* applied to a bilateral contract because it was "negotiated at arms length . . . and designed to provide both parties with long-term price certainty"); Compliance Order P 168 n.318, JA 269 ("Arm's-length bargaining serves an important role in confirming that the transaction price reflects fair market value.").

Transmission Owners claim that *Morgan Stanley* only recognizes an "exception" to *Mobile-Sierra* for contract formation defenses such as fraud and duress that "would render a contract invalid." Owners Br. 29. *Morgan Stanley* certainly did not find that the *Mobile-Sierra* presumption applies to every contract unless it is found to be void ab initio; if a contract is void ab initio there is no contract and therefore no *Mobile-Sierra* issue to address. Rather, *Morgan Stanley* addressed the circumstances under which "FERC should not apply the *Mobile-Sierra* presumption" in evaluating whether a contract rate is just and reasonable. *See* 554 U.S. at 547; *see also id.* at 554 (finding the *Mobile-Sierra* presumption "should not apply" where there is a causal connection between unlawful activity and the contract rate). The Court found that the Commission should not apply the *Mobile-Sierra* presumption where circumstances "'eliminate[] the premise on

which the *Mobile-Sierra* presumption rests: that the contract rates are the product of fair, arms-length negotiations.'" 554 U.S. at 554, *quoted in* Compliance Order P 168 n.318, JA 269. While certainly grounds for contract abrogation can undermine the assumption of fair, arm's-length negotiations, *see* 554 U.S. at 547 (e.g., fraud and duress), so can other circumstances of contract formation, such as a contract provision agreed upon between parties with common interests to exclude competition.

Here, however, the Transmission Operating Agreement is far removed from the paradigmatic example of bilateral rate-setting contracts between willing buyers and sellers. The Agreement rather is "a complex agreement establishing a new regional structure impacting all market participants," as to which this Court has expressed doubt that *Mobile-Sierra* applies. *See Me. Pub. Utils. Comm'n*, 454 F.3d at 284. Presented with this issue of first impression, the Commission reasonably considered whether the type of contract provision at issue, a right of first refusal provision, fairly could be viewed as the product of arm's-length negotiation. Finding that the right of first refusal provisions arose in a negotiation that "was primarily among parties [i.e., the participating transmission owners in ISO New England] with the same interest, namely, protecting themselves from competition in transmission development," the Commission concluded that the

negotiations "do not bear the hallmarks necessary for the *Mobile-Sierra* presumption." Compliance Order P 169, JA 270.

The Transmission Owners point out that ISO New England is a party to the Agreement (Owners Br. 30), and that the Commission did not attribute to the independent system operator that common interest in excluding competition. Compliance Order P 169, JA 270. (The Commission emphasized that it did not imply that the Agreement was negotiated in bad faith. *See id.* n.319, JA 270.) That conclusion does not, however, answer the question of whether "in seeking to advance their interests, the parties are situated in relation to each other in a way that allows one to make a specific assumption about the results of their negotiations." *Id.* P 169; Rehearing Order P 186 n.327, JA 431.

3. The Commission's Rationale Is Consistent With Its Prior Orders That Exercised Discretion To Grant *Mobile-Sierra* Treatment

The Transmission Owners argue that the Commission inappropriately "reversed" its decision in the 2004 Rehearing Order to apply the *Mobile-Sierra* standard to section 3.09 and Schedule 3.09(a) of the Agreement. Owners Br. 22, 25. To the contrary: the Commission "has never treated the [Agreement] as if it is entitled to *Mobile-Sierra* protection." Compliance Order P 171, JA 271.

In the 2004 proceeding, the Commission initially found that ISO New England and its transmission owners, who requested *Mobile-Sierra* treatment for

numerous provisions of the Agreement, had not "carried their burden" to show that their proposal "strikes the necessary balance of interests" to justify such protection. 2004 Agreement Order, 106 FERC ¶ 61,280 at P 126. The Commission explained that it must balance the rights and interests of the contracting parties, customers, market participants, and the regional market as a whole in determining whether to grant or deny *Mobile-Sierra* treatment for each provision. *Id.* P 28; 2004 Rehearing Order, 109 FERC ¶ 61,147 at P 73. Applying that balancing analysis, the Commission ultimately agreed to give *Mobile-Sierra* protection to the planning and expansion provisions, which include rights of first refusal, on the grounds that they would have "no adverse impact on third parties or the New England market." 2004 Rehearing Order, 109 FERC ¶ 61,147 at PP 73, 78, *quoted in* Compliance Order P 172, JA 271; *see supra* p.9.

This Court has specifically found such discretionary analysis to be within the Commission's authority. In *New England Power Generators*, the Court affirmed that, when the Commission reviews a proposed agreement under the ordinary just and reasonable standard, it has discretion to choose to review future changes to that agreement's provisions under the *Mobile-Sierra* public interest application of that standard. *See* 707 F.3d at 369-71, *cited in* Rehearing Order PP 183, 189, JA 429, 432.

Thus, the determination that the right of first refusal provisions are not contract rates entitled to *Mobile-Sierra* protection — while effectively dictum, in that the Commission in fact applied the public interest standard on other grounds — is consistent with the 2004 orders. Compliance Order P 171, JA 270-71. *See Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting) (courts do not "sit . . . to correct errors in dicta").

B. Applying The *Mobile-Sierra* Presumption, The Commission Reasonably Found That The Right Of First Refusal Severely Harms The Public Interest

Having determined that it would apply the public interest standard, the Commission turned to the question whether the right of first refusal provisions in the Transmission Operating Agreement "severely harm the public interest." Compliance Order P 172, JA 271. *See Morgan Stanley*, 554 U.S. at 551 (Commission can abrogate contracts in "extraordinary circumstances where the public will be severely harmed"), *cited in* Compliance Order P 172, JA 271. Though the presumption is a "heightened" standard (Compliance Order P 163, JA 268), it is not insurmountable. *See, e.g.*, *Transmission Access*, 225 F.3d at 710-12 (affirming FERC's public interest finding to modify contracts in connection with the Order No. 888 open access rulemaking); *Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 954-55 (D.C. Cir. 2005) (affirming FERC orders that modified contracts under public interest standard).

1. The Commission Appropriately Relied On Findings It Had Made In The Order No. 1000 Rulemaking

In considering that standard, the Commission properly relied on findings it had made in Order No. 1000 regarding the severe harm that federal rights of first refusal pose to the public interest. Indeed, the Commission could have made a *Mobile-Sierra* finding in the Order No. 1000 rulemaking to remove such provisions from all regional transmission owners' agreements. *See* Compliance Order P 174 & n.328, JA 272. That it elected not to do so at that time, and instead deferred *Mobile-Sierra* issues to individual compliance proceedings, does not preclude it from relying on findings it made in the rulemaking. Indeed, the Commission never cast doubt on its authority to make public interest findings in generic proceedings. Compliance Order P 174 n.328, JA 272. While generic *Mobile-Sierra* findings are "appropriate only in rare circumstances," this Court has found them permissible when Commission action "affect[s] an entire class of contracts in an identical manner." *Transmission Access*, 225 F.3d at 710, *quoted in* Compliance Order P 173, JA 271; *accord Arizona*, 397 F.3d at 955-56 ("The *Mobile-Sierra* doctrine permits generalized findings of public interest when intervening circumstances affect a class of contracts in the same manner."); *see also* Compliance Order P 173, JA 271 ("[T]he *Mobile-Sierra* doctrine does not bar the Commission from exercising its authority to abrogate contracts in a generic

proceeding, particularly in response to changed circumstances or in order to remedy serious harm to the public interest caused by anticompetitive provisions.").

At the very inception of *Mobile-Sierra*, the Supreme Court made clear that the doctrine "in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest." *Mobile*, 350 U.S. at 344; *see also id.* (the statute "thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other"); *Ne. Utils. Serv. Co. v. FERC*, 55 F.3d 686, 689 (1st Cir. 1995) (doctrine represents a "balance between private contractual rights and the regulatory power to modify contracts when necessary to protect the public interest"); *cf. Texaco Inc. v. FERC*, 148 F.3d 1091, 1098 (D.C. Cir. 1998) (parties "always contract in the shadow of the regulatory state, and they cannot presume that their contracts are immune to its inherent risks").

Also, in deciding whether the public interest standard is met, protection of third parties is paramount. *See*, *e.g.*, *NRG*, 558 U.S. at 175 ("the *Mobile-Sierra* doctrine does not overlook third-party interests; it is framed with a view to their protection"); *Ne. Utils. Serv. Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993) (the "most attractive case" for contract reformation pursuant to the *Mobile-Sierra* doctrine "is where the protection is intended to safeguard the interests of third

parties"); Compliance Order P 194, JA 282 (quoting *NRG* and *Northeast Utilities*); *see also Arizona*, 397 F.3d at 954-55 (upholding public interest finding based on threat to third parties).

When the Commission promulgates new regulations that affect existing contracts, the question is, more broadly, whether the Commission is properly exercising its "plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interests." *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968); Compliance Order P 175, JA 272-73. In that context, the doctrine requires that the Commission make a "particularized" showing of "the manner in which the contract harms the public interest and [] the extent to which abrogation or reformation mitigates the contract's deleterious effect." *Texaco*, 148 F.3d at 1097, *quoted in* Compliance Order P 175, JA 273. As we explain below, the Commission met that requirement here.

2. The Commission Reasonably Found, Consistent With Case Law, That Barriers To Competitive Transmission Development Threaten The Public Interest

The Order No. 1000 rulemaking was grounded in the Commission's prediction that the electric industry is entering "a longer-term period of investment in new transmission facilities," with corresponding costs estimated in some reports as likely to reach nearly $300 billion over the next 20 years. Order No. 1000 P 44 (citing industry reports). The Commission further found that the transmission grid

would require "[s]ignificant expansion" in any event, as environmental regulation and state standards for renewable energy "are driving significant changes in the mix of generation resources" that the existing transmission system was not built to accommodate. Order No. 1000 PP 26-29, 45. "In light of these changing circumstances," the Commission concluded that it must act to address deficiencies in transmission planning "'to ensure that more efficient or cost-effective investments are made as the industry addresses its challenges.'" Compliance Order P 186, JA 277 (quoting Order No. 1000 P 46). *See generally South Carolina*, 762 F.3d at 65-69 (upholding Order No. 1000 findings based on substantial evidence and agency expertise).

In the compliance proceeding, the Commission also found that New England-specific evidence confirmed that trajectory. ISO New England proffered evidence that, in the previous decade, it had placed $4.7 billion in new transmission facilities in service and had placed another $5.7 billion in future projects in its regional transmission plan. *See* Rehearing Order P 196, JA 435. The Commission also pointed to publicly available materials in which the States Committee had recognized the build-up in New England. *See id.* P 196 n.345, JA 435. The Commission viewed this data as "affirm[ing] the industry's — and particularly [ISO New England's] — entry into 'a longer-term period of investment in new transmission facilities.'" *Id.* P 197, JA 436. That regional, and

national, trend "demonstrates a changing circumstance in the marketplace, which continues to threaten the public interest by avoiding expected efficiencies and cost savings and makes the need to foster competitive practices more acute." *Id.*

It does not matter, as the Transmission Owners suggest (Owners Br. 47-48), that parties submitted the evidence intending to counter the Commission's generic findings in Order No. 1000. *Cf.*, *e.g.*, *Fla. Gas Transmission*, 604 F.3d at 645 ("If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings."). The Commission explained why it rejected the inference that, because new transmission facilities had been developed while rights of first refusal were in effect, those provisions did not harm the public interest: "To the contrary, the issue before the Commission is not whether the transmission development has previously occurred either because, or in spite, of the existence of the right-of-first-refusal provisions, but rather whether the continued existence of those provisions will harm the public interest." Rehearing Order P 197, JA 436. Indeed, this Court was likewise unpersuaded by similar arguments about past transmission development when it upheld the Commission's decision to eliminate rights of first refusal. *See South Carolina*, 762 F.3d at 77.

As to the particular effect of rights of first refusal on the necessary expansion of the grid, the Commission found in the rulemaking that competing developers have expressed interest in developing transmission facilities, but

"incumbents have no economic incentive to allow them to compete" for new projects. Order No. 1000 P 256. Because rights of first refusal "reflect the economic self-interest of incumbent transmission providers and prevent new entrants from developing transmission facilities, new entrants are either barred from the planning process altogether or deterred from submitting proposals by the threat of losing the rights to their project." Compliance Order P 187, JA 278 (citing Order No. 1000 P 3). The resulting lack of competition harms customers by discouraging competitive proposals that may be a more efficient or cost-effective solution to a region's transmission needs. Order No. 1000 P 256. "The Commission's concerns were particularly acute in light of its expectation that a massive amount of transmission facility development would take place during the next two decades . . . ." *South Carolina*, 762 F.3d at 72 (affirming Order No. 1000 mandate to remove rights of first refusal).

Having found that the removal of these barriers to participation by competing transmission developers "lies at the core of Order No. 1000 and is essential to meeting the demands of changing circumstances facing the electric industry," the Commission emphasized, for purposes of this compliance proceeding, that the same finding "is the foundation for our conclusion that protecting the public interest requires removal from the [Agreement] of the provisions at issue here." Compliance Order P 188, JA 278-79.

The Transmission Owners argue that findings in support of a rulemaking, made under the Commission's authority in section 206 of the Federal Power Act, 16 U.S.C. § 824e, to ensure just and reasonable rates, cannot also satisfy the heightened public interest standard necessary for a *Mobile-Sierra* determination. *See* Owners Br. 40. But this Court has already held to the contrary.

The example of FERC's Order No. 888 open-access rulemaking, upheld in this Court's *Transmission Access* decision, is particularly instructive here, as the Commission explained at considerable length in the challenged orders. *See* Compliance Order PP 176-88, JA 273-79; Rehearing Order PP 194, 205, JA 433-34, 440. In that rulemaking, the Commission made two generic *Mobile-Sierra* findings affecting existing contracts: first, given the mandate to provide open-access transmission, that it was in the public interest to permit public utilities to amend their contracts to recover stranded costs under certain conditions; and second, that customers could seek modification of wholesale requirements contracts entered into when transmission providers had monopoly control. *See Transmission Access*, 225 F.3d at 711-12 (affirming those findings); Compliance Order PP 177-81, JA 273-75. This Court held that Order No. 888 was a "rare circumstance" in which generic *Mobile-Sierra* findings were appropriate because its reforms "fundamentally change[d] the regulatory environment in which utilities operate, introducing meaningful competition into an industry that since its

inception has been highly regulated and affecting all utilities in a similar way." *Transmission Access*, 225 F.3d at 711; *see also id.* (generic public interest findings can be appropriate where "FERC implements a generic change in the industry"); *cf. South Carolina*, 762 F.3d at 50 (Order No. 888 required "structural changes" to wholesale electricity sales and transmission service).

Similarly, Order No. 1000 continued that reform process by adopting requirements for transmission planning and cost allocation, seeking to increase competitive transmission development throughout the country. *See* Order No. 1000 PP 6-13, 31, 47; *cf. South Carolina*, 762 F.3d at 66-67. In these orders, the Commission drew parallels between Order No. 888 and Order No. 1000: in both rulemakings, the Commission "acted to remove barriers to competition," and found that the monopolistic power that each rulemaking removed had affected the fairness of existing contracts (in one case, to sell power to customers who had no alternative source of supply; in the other, to exclude competitive transmission developers). Compliance Order PP 182-83, JA 275-76.

The Commission saw similar parallels between its finding in Order No. 1000 that rights of first refusal were barriers to competition in transmission development and its findings of barriers to competition in natural gas transportation that met the public interest standard in this Court's 1998 *Texaco* decision. There, the Court upheld the Commission's authority to reform certain contract rates based on its

findings in a previous rulemaking. *See* Compliance Order PP 189-91, JA 279-81 (discussing *Texaco*). The Commission had adopted regulations requiring natural gas pipelines to use a straight fixed-variable method for assigning fixed transportation costs, to prevent distortion of competitive gas market pricing.[9] Subsequently, the Commission reformed existing contracts to remove modified fixed-variable rates, based on the same finding that such rates distorted competition. *See Mojave Pipeline Co.*, 62 FERC ¶ 61,195, at pp. 62,365-66 (1993), *aff'd in Texaco*, 148 F.3d at 1097, *discussed in* Compliance Order PP 189-91, JA 279-81. *See also United Distrib. Cos.*, 88 F.3d at 1126 (affirming, as an exercise of the Commission's "plenary authority" to reform contracts "'that contravene the relevant public interests,'" a *Mobile-Sierra* public interest finding that was based on contracts' anticompetitive effects) (quoting *Permian Basin*, 390 U.S. at 784), *discussed in* Compliance Order P 193, JA 281-82.

Moreover, the Commission noted that its original, discretionary grant of *Mobile-Sierra* treatment to the right of first refusal provisions in the ISO New

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[9] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, *on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, *on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part, United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

England Transmission Operating Agreement "was not open-ended but explicitly based on the lack of harm" at that time. Rehearing Order P 198, JA 436-37. *See* 2004 Rehearing Order at P 78 (finding "no adverse impact on third parties or the New England market"); *supra* p.9. The Commission is, of course, permitted to adapt its rules and policies — including with respect to *Mobile-Sierra* findings — in light of changing circumstances. *See, e.g.*, *Permian Basin*, 390 U.S. at 784 (upholding Commission's limitation of certain price escalation clauses in existing contracts, notwithstanding its earlier decision not to abrogate such clauses); *Arizona*, 397 F.3d at 955 (affirming public interest finding based on "intervening circumstances").

Thus, the Commission appropriately concluded that its generic findings in Order No. 1000 — in particular, its reasons, grounded in ensuring competitive transmission development, for eliminating federal rights of first refusal — as well as the specific need for additional development in the ISO New England region, were sufficient to demonstrate that the right of first refusal provisions in the ISO New England region "are contrary to the public interest." Rehearing Order P 197, JA 436; *see also* Compliance Order P 174, JA 272. Furthermore, the Commission made the requisite showing (under *Texaco*, 148 F.3d at 1097) of how the right of first refusal harms the public interest and the extent to which eliminating such provisions mitigates that harm, by demonstrating (as in *Texaco*) that the

contractual provision directly contravened the essential reform that the rulemaking itself found necessary to protect the public interest. *See* Rehearing Order P 204, JA 439-40 (right of first refusal "harms the public interest by negating Commission rules promulgated for the purpose of protecting the public interest"); *see also id.* P 202, JA 439 (same).

IV. THE COMMISSION PROPERLY REQUIRED THAT THE TRANSMISSION PROVIDER DETERMINE WHETHER TO SELECT PUBLIC POLICY-DRIVEN TRANSMISSION UPGRADES FOR COST ALLOCATION PURPOSES [CASE NO. 15-1141]

In its filing to comply with Order No. 1000, ISO New England proposed different processes to consider and determine whether to include different types of transmission solutions in its regional transmission plan for purposes of cost allocation. As to transmission needs for reliability or economic considerations, ISO New England itself would evaluate and determine whether to select transmission solutions. As to transmission needs driven by public policy requirements, the States Committee would choose which potential projects it would like ISO New England to study; ISO New England would then report potential solutions to the States Committee, which would determine which projects should be included in the regional plan for purposes of cost allocation, and specify the cost allocation. *See* Compliance Order PP 77-84, JA 227-30; *supra* pp. 16-17.

The Commission found that ISO New England's proposed process for public policy-driven projects did not comply with the requirements of Order No. 1000.

Compliance Order PP 67, 118-19, 313-15, JA 222, 245-46, 294-96; Rehearing Order PP 106-08, 125-34, JA 390-92, 400-06. On appeal, the States argue that the Commission unlawfully expanded the scope of Order No. 1000 (Br. 25-34) and exceeded its statutory jurisdiction (Br. 34-43). Both claims lack merit.

A. The Commission Properly Applied Order No. 1000 In Requiring That The Transmission Provider Be Responsible For Determining Whether To Select Transmission Solutions In The Regional Plan

In Order No. 1000, the definition of a transmission facility that is "selected in a regional transmission plan for purposes of cost allocation" is "an essential element" of the rule. Order No. 1000 P 5. Such facilities are selected for inclusion because they are "more efficient or cost-effective solutions to regional transmission needs." *Id.* P 63. Further, to implement the objectives of the rulemaking, the Commission concluded it was "necessary to have an affirmative obligation . . . to evaluate alternatives that may meet the needs of the region more efficiently or cost-effectively." *Id.* P 80.

Here, the Commission reasonably found that delegating this obligation to the States Committee was not consistent with Order No. 1000, which placed responsibility for evaluating regional projects for purposes of cost allocation with transmission providers. Compliance Order PP 118-19, JA 245-46; Rehearing Order PP 129-30, JA 402-03. The Commission explained that the rulemaking "places an affirmative obligation on public utility transmission providers" — i.e.,

in a regional organization, the system operator — to evaluate and determine whether to select facilities in the regional plan for purposes of cost allocation. Compliance Order P 119, JA 246. *See* Order No. 1000 P 331 ("Whether or not public utility transmission providers within a region select a transmission facility in the regional transmission plan for purposes of cost allocation will depend in part on their combined view of whether the transmission facility is an efficient or cost-effective solution to their needs"); Order No. 1000-A P 455 (declining to set criteria that transmission providers must use to select facilities in regional transmission plans for purposes of cost allocation).

Under ISO New England's proposal on compliance, however, the transmission provider "would have neither the authority nor responsibility" for evaluating and selecting public policy-driven transmission upgrades. Compliance Order P 118, JA 246. Nor would the process even evaluate such projects to determine whether they are more efficient or cost-effective solutions, as required by Order No. 1000, or select facilities for purposes of cost allocation based on that essential standard. Compliance Order P 314, JA 295.

Of course, the Commission recognized "that state utility regulators play an important, crucial, and unique role in transmission planning processes that is distinctly different from the roles played by other stakeholders." Rehearing Order P 128, JA 402 (citing Order No. 1000-A PP 291, 293). While the Commission in

the rulemaking did not require any particular role for state regulators, leaving such details to be presented in compliance filings (*see* Order No. 1000-A PP 291-95), it explained that state commissions or groups of state regulators may play an active — even central — role in the planning process, such as by advising transmission providers of their views of the relative merits of proposed projects or recommending particular proposals. Rehearing Order P 128, JA 402.

But that involvement must stop short of delegating the transmission provider's core obligation "to evaluate and determine whether to select" transmission solutions in regional planning for cost allocation purposes. *Id.*; *see also* Compliance Order P 108, JA 239 (finding that "public utility transmission providers in a region may not rely on a committee of state regulators to select Public Policy Transmission Upgrades in the regional transmission plan for purposes of cost allocation"). Accordingly, the Commission found that ISO New England itself "must have a process to evaluate at the regional level *all* identified potential transmission solutions to transmission needs driven by public policy requirements, not only those transmission proposals that [the States Committee] indicates that it would like [ISO New England] to study further." Rehearing Order P 125, JA 400 (emphasis added); *id.* PP 129-30, JA 402-03 (same).

The States claim that the challenged orders did not merely require ISO New England to evaluate transmission solutions to public policy-driven transmission

needs, but in fact mandated the selection of such projects. States Br. 23, 26-33. The Commission made no such ruling — indeed, it rejected that interpretation outright: "the Commission did not require that [ISO New England] *must select* in the regional transmission plan for purposes of cost allocation a transmission solution to address every transmission need driven by a public policy requirement." Rehearing Order P 126, JA 400-01 (emphasis added). *See also* Order No. 1000 P 331 ("By requiring the evaluation of proposed transmission solutions in the regional transmission planning process, the Commission is not dictating that any particular proposals be accepted or that selected transmission facilities be constructed.").

But, "to the extent" that any public policy upgrade is selected in the regional plan for purposes of cost allocation, it "must be selected by [ISO New England] rather than by [the States Committee]." Rehearing Order P 126, JA 401; *accord id.* P 133, JA 404-05 (ISO New England "has the responsibility to determine whether to select" potential projects for cost allocation purposes); *id.* P 127, JA 401 ("to the extent that a transmission solution is selected" for cost allocation purposes, ISO New England "should be the entity to select it"). The Commission's directive concerned only *who* would be responsible for the relevant evaluation and selection (if any) for purposes of cost allocation — not *what* those choices ultimately would be.

B. The Commission Did Not Exceed Its Jurisdiction Under The Federal Power Act

The States further contend that the Commission exceeded its jurisdiction and infringed upon state sovereignty by requiring that ISO New England must be responsible for determining whether to select a project to address public policy-driven transmission needs in its regional plan for purposes of cost allocation. The Commission, however, appropriately respected the States' prerogative to set public policy and their traditional authority over siting, permitting, and construction of transmission facilities.

First, the Commission has, throughout the rulemaking and in this compliance proceeding, emphasized that adopting the relevant public policies themselves is left to federal and state officials, not to transmission providers:

> Order No. 1000 did not require that Public Policy Requirements themselves be considered. This is a critical distinction. . . . [W]e are not placing public utility transmission providers in the position of being policymakers or allowing them to substitute their public policy judgments in the place of legislators and regulators.

Order No. 1000-A P 318, *quoted in* Rehearing Order P 132, JA 404. "Transmission needs driven by Public Policy Requirements, and not the Public Policy Requirements themselves, are what must be considered under Order No. 1000." Rehearing Order P 132, JA 404 (citing Order No. 1000-A P 318, 326-33). In upholding the directive to consider such transmission needs, this Court likewise noted that it "does not promote any particular public policy or even the public

welfare generally. The mandate simply recognizes that state and federal policies might affect the transmission market and directs transmission providers to consider that impact in their planning decisions." *South Carolina*, 762 F.3d at 89.

The Commission has also explained that "selection in the regional transmission plan for purposes of cost allocation does not confer a right to construct . . . ." Rehearing Order P 128, JA 402 (citing Order No. 1000 P 319). Nor does such selection preempt any state laws regarding siting or construction of transmission facilities. *Id.*; *see also id.* P 134, JA 405-06 (citing Order No. 1000-A PP 378-82); *see generally* Order No. 1000 P 107 (Commission's reforms did not intrude upon "authority over those specific substantive matters traditionally reserved to the states, including integrated resource planning").

Moreover, in the compliance orders, the Commission *approved* ISO New England's proposal to rely on the States Committee to identify transmission needs driven by federal and state public policy requirements. *See* Compliance Order PP 108, 111, JA 239, 241-42; Rehearing Order P 103, JA 389; States Br. 18. Put differently, the States Committee chooses the public policy-driven transmission needs for which the regional operator must evaluate potential solutions.

For these reasons, the Commission explained that its ruling was "in no way interfering with the New England states' authority over the design or execution of their own public policies." Rehearing Order P 133, JA 404-05. ISO New England

would not make judgments about state policies or the means by which States would satisfy their policy objectives; rather, it would consider "only *transmission needs* driven by public policy requirements" — "a role appropriate for its function as a regional transmission organization and independent system operator." *Id.* (emphasis added). In fulfilling that role, ISO New England will determine whether to select, in the regional plan for cost allocation purposes, specific projects to meet specific transmission needs (identified by the States Committee) driven by Public Policy Requirements (established by federal or state officials).

To the extent that the States are claiming that they must be entitled to determine whether to select a project for cost allocation purposes (*see* States Br. 24, 36), that contention is without merit. In upholding Order No. 1000, this Court rejected similar arguments that the Commission had exceeded its jurisdiction by mandating regional transmission planning. *See South Carolina*, 762 F.3d at 62-64. The Court recognized that the Commission's authority over electricity transmission is especially broad. *See id.* at 63 (explaining that the Federal Power Act does not limit transmission authority to wholesale, reserving retail to the States, as it does for authority over electricity sales); *New York*, 535 U.S. at 17 ("There is no language in [section 201 of the Federal Power Act, 16 U.S.C. § 824] limiting FERC's *transmission* jurisdiction to the wholesale market," as there is for sale jurisdiction). *Cf. Elec. Power Supply Ass'n*, 136 S. Ct. at 776 (even with

respect to more limited FERC jurisdiction over wholesale electricity sales, wholesale and retail markets "are not hermetically sealed from each other"); *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1601 (2015) (noting similarly, in the context of natural gas regulation, that a "Platonic ideal" of rigid separation between federal and state jurisdiction cannot exist).

Though the States (at Br. 35, 41) try to distinguish *South Carolina* because it addressed the Order No. 1000 requirement to engage in regional transmission planning, the Commission's statutory authority is even more closely related to its objective here, where it assigned responsibility for selecting transmission projects *for purposes of cost allocation* — a qualification that locates the Commission's ruling squarely within its jurisdiction to regulate not just transmission planning, but the allocation of costs for new transmission projects. *See*, *e.g.*, *South Carolina*, 762 F.3d at 84-87 (affirming cost allocation reforms as practices affecting rates within FERC authority); Order No. 1000 P 112; Order No. 1000-A PP 577, 588. *See also Elec. Power Supply Ass'n*, 136 S. Ct. at 775 (upholding FERC regulation of compensation for demand response because it "directly affects" rates); *id.* at 784 ("The Commission, not this or any other court, regulates electricity rates. . . . Our important but limited role is to ensure that the Commission engaged in reasoned decisionmaking . . . .").

CONCLUSION

For the reasons stated, the Transmission Owners' petition in Case No. 15-1139 should be dismissed to the extent that they lack standing to argue that the *Mobile-Sierra* doctrine must automatically apply to certain provisions of their transmission operating agreement. In all other respects, the petitions should be denied and the challenged FERC Orders should be affirmed.

Respectfully submitted,

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March 11, 2016
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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and this Court's Order dated November 6, 2015, I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 2010, in 14-point Times New Roman) and contains 14,335 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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May 20, 2016

ADDENDUM

STATUTES

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

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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.

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

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

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and 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 anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

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

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

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

(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

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§ 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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

(June 10, 1920, ch. 285, pt. II, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852; amended Pub. L. 100–473, § 2, Oct. 6, 1988, 102 Stat. 2299; Pub. L. 109–58, title XII, §§ 1285, 1286, 1295(b), Aug. 8, 2005, 119 Stat. 980, 981, 985.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classified generally to chapter 2C (§ 79 et seq.) of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58, § 1295(b)(1), substituted ''hearing held'' for ''hearing had'' in first sentence.

Subsec. (b). Pub. L. 109–58, § 1295(b)(2), struck out ''the public utility to make'' before ''refunds of any amounts paid'' in seventh sentence.

Pub. L. 109–58, § 1285, in second sentence, substituted ''the date of the filing of such complaint nor later than 5 months after the filing of such complaint'' for ''the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period'', in third sentence, substituted ''the date of the publication'' for ''the date 60 days after the publication'' and ''5 months after the publication date'' for ''5 months after the expiration of such 60-day period'', and in fifth sentence, substituted ''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'' for ''If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, 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''.

Subsec. (e). Pub. L. 109–58, § 1286, added subsec. (e).

1988—Subsec. (a). Pub. L. 100–473, § 2(1), inserted provisions for a statement of reasons for listed changes, hearings, and specification of issues.

Subsecs. (b) to (d). Pub. L. 100–473, § 2(2), added subsecs. (b) and (c) and redesignated former subsec. (b) as (d).

EFFECTIVE DATE OF 1988 AMENDMENT

Section 4 of Pub. L. 100–473 provided that: ''The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such complaints may be withdrawn and refiled without prejudice.''

[1] See References in Text note below.

Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 20th day of May 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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