ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1232 (and consolidated cases)

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *et al.*,
Petitioners,

v.

FEDERAL REGULATORY ENERGY COMMISSION,
Respondent.

Petition for Review of Orders of the Federal Energy Regulatory Commission

FINAL BRIEF OF INTERVENORS SUPPORTING RESPONDENT CONCERNING THRESHOLD ISSUES, COST ALLOCATION, TRANSMISSION PLANNING AND PUBLIC POLICY, AND STATE SOVEREIGNTY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

All parties, intervenors, and *amici* appearing in this Court and references to the rulings under review are identified in the Joint Initial Brief of Petitioners/Intervenors Concerning Statement of the Case, Statement of Facts, and Standards of Review.

This case has not been before this Court or any other court, and undersigned counsel is not aware of any other related cases pending before this or any other court.

DATED: December 13, 2013

Respectfully submitted,

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenors Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, Union of Concerned Scientists, and American Wind Energy Association, make the following disclosures:

Conservation Law Foundation ("CLF"): CLF has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in CLF. CLF is a regional nonprofit organization that uses law, science, and the market to preserve natural resources, build healthy communities, and sustain a vibrant economy in New England.

Environmental Defense Fund ("EDF"): EDF has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in EDF. EDF is a national nonprofit organization whose mission is to

preserve natural systems by relying on science and economics to find practical and lasting solutions.

Natural Resources Defense Council ("NRDC"): NRDC has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in NRDC. NRDC is a national nonprofit organization committed to the preservation and protection of the environment, public health, and natural resources.

Union of Concerned Scientists ("UCS"): UCS has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in UCS. UCS is a national nonprofit organization working for a healthy environment and a safer world through independent scientific research and citizen action.

American Wind Energy Association ("AWEA"): AWEA has no parent, subsidiary, or affiliate that has issued shares or debt securities to the public. AWEA is a non-profit corporation representing members involved in the wind industry and, as such, no entity has any ownership interest in it.

DATED: December 13, 2013

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

CAISO	California Independent System Operating Corporation
FERC or Commission	Federal Energy Regulatory Commission
FPA	Federal Power Act
ISO	Independent System Operator
MISO	Midwest Independent System Operator
NAACP	National Association for the Advancement of Colored People
OATTs	Open Access Transmission Tariffs
Order No. 890	*Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007)
Order No. 1000	*Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, 136 FERC ¶ 61,051 (2011)
Order No. 1000-A	*Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, *order on reh'g and* clarification,139 FERC ¶ 61,132 (2012)
Order No. 1000-B	*Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, *order on reh'g and* clarification,139 FERC ¶ 61,044 (2013)

RTO	Regional Transmission Organizations
Sierra Club Dec. Comments	Supplemental Comments of Sierra Club, *et al*., FERC Docket No. RM10-23-000 (Dec. 10, 2010)
Sierra Club Nov. Comments	Reply Comments of Earthjustice on behalf of Sierra Club, *et al*., FERC Docket No. RM10-23-000 (Nov. 12, 2010)
Section 202(a)	16 U.S.C. § 824a(a)
Section 206	16 U.S.C. § 824e

INTRODUCTION AND SUMMARY OF THE ARGUMENT

With Order No. 1000, the Federal Energy Regulatory Commission ("FERC" or "Commission") has adopted basic transmission planning and cost allocation reforms that are essential to fulfilling its statutory duty of preventing unjust and unreasonable rates, and ensuring access to nondiscriminatory transmission service. *See Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011) ("Order No. 1000"), *order on reh'g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012) ("Order No. 1000-A"), *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012) ("Order No. 1000-B").

A massive overhaul of the nation's electric transmission grid is underway. In order to maintain reliability and integrate new energy resources and technologies, the power sector expects to spend approximately $300 billion for new transmission facilities during the next twenty years. Order No. 1000 P 44, JA0157. The enormous scale and cost of this investment has obvious potential to raise the rates for transmission services and wholesale electric power. To avoid rates that are unjust and unreasonable, and to prevent undue discrimination, transmission authorities within and across regions must engage in long-term planning and coordination. They must ensure that cost-effective transmission is

built, and that all those who benefit from new transmission will pay for the investment.

Adopting reforms to prevent unjustified costs, unreasonable cost burdens and unduly discriminatory practices is at the core of FERC's authority under the Federal Power Act ("FPA"). Although transmission planning and cost allocation practices have improved as a result of prior Commission orders, FERC determined that a threat of harm and abuse remains. Order No. 1000 P 1, JA0148-49. Order No. 1000's direction that transmission providers conduct regional planning, coordinate interregional plans and adopt cost allocation methodology is a reasonable exercise of FERC's authority to address the serious risk of this harm. FERC's determination was properly based on its expert knowledge of the rapidly-changing electric industry and a "careful review of the voluminous record." *Id.*

Having identified a significant threat, FERC need not have waited for costly harms to fully materialize before acting. To the contrary, under the FPA, FERC is obligated to prevent unjust and unreasonable rates and undue discrimination, 16 U.S.C. § 824e ("Section 206"), and FERC reasonably determined that it must act now. FERC's reforms are consistent with its prior reforms and court precedent affirming an agency's predictive judgment about matters within its field of expertise, *see, e.g.*, *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006), and are not barred by 16 U.S.C. § 824a(a) ("Section 202(a)") of the FPA.

Petitioners[1] insist that FERC has overreached in adopting Order No. 1000. In doing so, Petitioners mischaracterize what Order No. 1000 actually requires. The Order does not dictate details of planning processes that a transmission provider must employ, much less the outcome of that planning. It in no way prescribes which transmission facilities can or will be built, nor does it support or promote any particular public policy. Rather, Order No. 1000 is a process-based reform that accounts for an additional, increasingly prevalent category of transmission needs, driven by public policy, to ensure just and reasonable rates. Order No. 1000, moreover, does not allocate costs or mandate a particular method for cost allocation; it requires only that there be an identified, principles-based methodology in place to ensure that a new transmission facility's costs are allocated to those who benefit from the facility. FERC reasonably determined that its authority to reform cost allocation is not limited to contractual agreements, and that reforms are needed to address free ridership and improve the likelihood that efficient, cost-effective facilities will be built.

[1] This brief responds to the arguments put forth by various Petitioners and Supporting Intervenors concerning threshold issues, transmission planning and public policy, cost allocation, and state sovereignty. Although Petitioners and Supporting Intervenors vary by brief, and in some instances by argument within a brief, Petitioners and Supporting Intervenors are referred to collectively as "Petitioners" in this brief.

In short, Order No. 1000 embodies a common-sense set of minimum requirements to ensure that planners within and across regions work together, in consultation with stakeholders, as they modernize the electric grid. It also ensures that planners choose a fair approach to fund the sizeable capital investments that modernization entails. With Order No. 1000, FERC builds on the well-established requirements of its prior transmission access and planning rules, Orders Nos. 888[2] and 890[3]. FERC's actions are well-supported, consistent with the agency's statutory authority and obligations, and are entitled to deference.

ARGUMENT

I. FPA Section 206 Requires FERC to Act.

Section 206 authorizes and *requires* FERC to remedy rates and "practice[s] . . . affecting [ ] rate[s]" that are "unjust, unreasonable, unduly discriminatory or

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[2] *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, Order No. 888, 75 FERC ¶ 61,080 (1996) ("Order No. 888"), *clarified*, 76 FERC ¶¶ 61,009 and 61,347 (1997), *order on reh'g*, Order No. 888-A, 78 FERC ¶ 61,220, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[3] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007) ("Order No. 890"), *order on reh'g*, Order No. 890-A,121 FERC ¶ 61, 927 (2007), *order on reh'g and clarification*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

preferential." 16 U.S.C. § 824e(a) (upon a finding of unjust and unreasonable rates or practices affecting rates, or undue discrimination, "the Commission *shall* determine the just and reasonable rate, . . . practice . . . and *shall* fix the same by order") (emphasis added). Transmission planning and cost allocation processes are practices affecting rates. Transmission planning identifies transmission needs and solutions to these needs, thereby impacting transmission investments and rates for Commission-jurisdictional service. Order No. 1000 P 80, JA0165. Cost allocation determines who pays for transmission infrastructure that is built, and impacts Commission-jurisdictional rates. *See*, *e.g.*, *Miss. Indus. v. FERC*, 808 F.2d 1525, 1542 (D.C. Cir. 1987), *vacated in part on other grounds* by 822 F.2d 1104 (D.C. Cir. 1987) (allocation of costs significantly affects wholesale rates and is within Commission jurisdiction); *see also* FERC Br. 119-20.

Deficient transmission planning and cost allocation practices lead to jurisdictional rates that are higher than necessary. *See* Order No. 1000 P 52, JA0159. This is the harm that FERC addressed in Order No. 1000. Where, as here, FERC properly determines that a practice affecting rates is unjust and unreasonable, or unduly discriminatory or preferential, *see infra* Part II, Section 206 provides FERC with the authority and "require[s] FERC to provide a remedy," *New York v. FERC*, 535 U.S. 1, 27 (2002); *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 687 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*,

535 U.S. 1 (2002) (finding that FERC reasonably interpreted Sections 205 and 206 as giving it "broad authority" to require a marketwide remedy to prevent undue discrimination).

II. FERC Properly Exercised its Authority Under Section 206 in Adopting Order No. 1000.

In issuing Order No. 1000, FERC properly concluded that existing transmission planning and cost allocation practices within the electric industry will result in rates that are unjust and unreasonable, not merely suboptimal as Petitioners contend. Pet'rs' Threshold Br. 22. FERC's identification of this "theoretical threat" was based on the same kinds of concerns that informed its prior findings related to transmission planning and cost allocation, including its reforms in Orders Nos. 888 and 890. Order No. 1000 P 1, JA0148-49; FERC Br. 3-4. FERC's issuance of Order No. 1000, based on a threat of harm, does not suggest that the Commission's conclusions were "speculative" or "guesswork." Pet'rs' Threshold Br. 5, 26. Rather, FERC appropriately relied on its expert understanding of the electric industry to draw the inescapable conclusion that sound planning practices and fair cost allocation are essential to preventing unjust and unreasonable rates, and undue discrimination.

A. FERC May Adopt Reforms to Address a Theoretical Threat.

Contrary to Petitioners' assertions, Pet'rs' Threshold Br. 27-28, FERC's remedial action to address a "theoretical threat" is consistent with *National Fuel*

Gas Supply Corp. v. FERC, 468 F.3d 831 (D.C. Cir. 2006), and precedent considering agency regulation based on reasonable predictions. In *National Fuel*, the court vacated the order at issue because FERC explicitly relied on a deficient factual record. *Id.* at 834. The court, however, affirmed the Commission's authority to regulate based on its assessment of a theoretical threat. *Id.* at 834, 845.

National Fuel did not, as Petitioners suggest, Pet'rs' Threshold Br. 27-28, establish a test for instances in which an agency regulates based on its predictive judgment. 486 F.3d at 845 (dicta "merely illustrat[ing] the kind of analysis FERC would need to undertake if it attempts to support the Order based solely on a theoretical threat"). Rather, the case confirmed that an agency can act based on its perception of a threat when it provides a reasonable justification. *Id.*; *see also BNSF Ry. Co. v. Surface Transp. Bd.*, 526 F.3d 770, 778 (D.C. Cir. 2008) (finding that an agency's "reasonabl[e]" explanation justifies reliance on a theoretical threat); *Tenneco Gas v. FERC*, 969 F.2d 1187, 1196 (D.C. Cir. 1992) (crediting comments that "make clear there is at least a theoretical danger" of anticompetitive behavior). So long as FERC has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made," its judgment must be upheld. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (quotation marks omitted).

An "agency's predictive judgments about areas that are within the agency's field of discretion and expertise" are due particular deference. *EarthLink, Inc.,* 462 F.3d at 12 (internal quotation marks and emphasis omitted); *see also BNSF Ry. Co.*, 526 F.3d at 781 (deferring to the Board's "predictive judgment about *hypothetical* railroads") (emphasis in original). FERC's "judgment about the future behavior of entities [it] regulates," as set forth in Order No. 1000, thus should be given deference by this Court. *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 260 (D.C. Cir. 2007).

FERC's predictive judgments may be accepted "without record evidence." *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1008 (D.C. Cir. 1987); *see also Transmission Access Policy Study Grp.*, 225 F.3d at 688. In *FCC v. Nat'l Citizens Comm. for Broad.*, for example, the Supreme Court affirmed a rule based in part on the agency's "factual determinations" that were "primarily of a judgmental or predictive nature." 436 U.S. 775, 813 (1978). Rejecting an argument that the rulemaking record was deficient, the court noted that, "in such circumstances *complete* factual support in the record for the [Federal Communications] Commission's judgment or prediction *is not possible or required* . . . ." *Id.* 814 (emphasis added). "An agency need not—indeed cannot—base its every action upon empirical data; depending on the nature of the problem, [it] may be entitled to conduct . . . a general analysis based on informed conjecture." *Chamber of*

Commerce of U.S. v. SEC, 412 F.3d 133, 142 (D.C. Cir. 2005) (internal quotation marks and citation omitted); *see also Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 530-31 (D.C. Cir. 2010) (holding that FERC may properly issue "findings based on general factual predictions derived from . . . economic *research and theory*," so long as they are explained and applied in a "reasonable manner") (quotation marks omitted) (emphasis added).

As this Court observed in *Associated Gas*, "[a]gencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall; nor need they do so for predictions that competition will normally lead to lower prices." 824 F.2d at 1008-09; Order No. 1000-A PP 62-73, JA0343-46. Similarly, here, FERC did not need to conduct experiments to know that planning and cost allocation deficiencies will lead to unjust and unreasonable rates, especially during a prolonged period of actual and expected transmission investment. Notwithstanding Petitioners' claims to the contrary, FERC's approach is entirely consistent with accepted principles of agency rulemaking.

Having identified a legitimate threat, FERC properly determined that it "need not, and should not, wait for systemic problems to undermine transmission planning before it act[ed]." Order No. 1000 P 50, JA0159. It is well-understood that a transmission network has to be planned in order to result in rates and costs that are just and reasonable, and transmission planning is a complicated and

lengthy process. *Id.*; Order No. 1000-A P 54, JA0342; FERC Br. 53-54. Comprehensive planning for the transformation that is needed and underway in the electric industry will make the necessary investments in the grid affordable and more cost-effective than what they otherwise would be without the reforms mandated by Order No. 1000. Order No. 1000 P 2, 50, JA0149, 0159; *see, e.g.*, Supplemental Comments of Sierra Club, *et al.*, FERC Docket No. RM10-23-000 P 2 (Dec. 10, 2010) ("Sierra Club Dec. Comments"), JA1490-91. Accordingly, the threats FERC considered in Order No. 1000 will simply become more entrenched – and more difficult to remedy – if not addressed now. While Petitioners complain that FERC's adoption of Order No. 1000's reforms was not based on widespread, empirical evidence of actual harm, FERC is empowered to *prevent* unjust and unreasonable rates in the first place. 16 U.S.C. §§ 824d, 824e; *Associated Gas*, 824 F.2d at 1008; FERC Br. 32-33.

B. The Theoretical Threat Is Well-Founded.

Petitioners wrongly claim that Order No. 1000 is supported by "pure speculation." Pet'rs' Threshold Br. 25. To the contrary, FERC began documenting and addressing the threat posed by inadequate planning and cost allocation nearly two decades ago when it first instituted planning reforms in Order No. 888 and, more recently, when it improved on those reforms in Order No. 890. *See* Order No. 1000 PP 3-6, 15-21, JA0149-50, 0151-53. Deficiencies, however,

remained after FERC promulgated these orders. *See e.g.*, Order No. 1000 PP 497-98, JA0250-51. Technical conferences convened by FERC after its issuance of Order No. 890 detailed continuing problems with planning practices and cost allocation methods, and the threat of even greater harms absent further reform. Order No. 1000 PP 22-24, JA0153; FERC Br. 12-14. Conference participants, for example, identified "the lack of mechanisms to allocate and recover the costs of certain types of new transmission facilities and upgrades to existing facilities" as a barrier to the expansion of transmission facilities necessary to reduce congestion, meet renewable resource requirements, and ensure reliable operation of the grid. Notice of Request for Comments, *Transmission Planning Processes Under Order No. 890*, FERC Docket No. AD09-8-000 at 5 (Oct. 8, 2009). The abuses FERC sought to remedy in Order No. 1000 were well-understood and certainly not based on "guesswork," as Petitioners allege. Pet'rs' Threshold Br. 26.

Petitioners further contend that Order No. 1000 is unjustified because Order No. 890 incrementally improved transmission planning. Pet'rs' Threshold Br. 19-20, 22-23. FERC, however, correctly identified an unresolved threat posed by the lack of requirements regarding regional planning and interregional coordination, accounting for public policies in planning, and identifying cost allocation methods. *See* Notice of Proposed Rulemaking, 131 FERC ¶ 61,253 (2010), PP 32, 35-49, 71, JA0105-08, 0112; Order No. 1000 P 3, JA0149. This threat is acute in light of

today's rapid grid transformation, which was not as prevalent at the time Order No. 890 was drafted. Notice of Proposed Rulemaking, 131 FERC ¶ 61,253, P 33, JA0105; Order No. 1000 P 498, JA0251. FERC, thus, logically sought to extend the planning and cost allocation principles it had developed through prior rulemakings to address an evolving threat of harm.

The substantial record before FERC supports its conclusion that, absent Order No. 1000's reforms, consumers will face the threat of unjust and unreasonable rates. Commenters to the proposed Order, for example, discussed how many states have implemented public policy requirements, such as energy efficiency standards, that seek to defer new generation and transmission additions through demand reductions, improved efficiency, and load management. Reply Comments of Earthjustice on behalf of Sierra Club, *et al*., FERC Docket No. RM10-23-000 P 18-19 (Nov. 12. 2010) ("Sierra Club Nov. Comments"), JA1369-71. However, without Order No. 1000's planning reforms, regional planning authorities may not consider the effects of these programs in their load forecasts, resulting in excessive infrastructure development and costs ultimately passed on to customers. *See* Sierra Club Nov. Comments P 2, 20-21, JA1361, 1371-72; Sierra Club Dec. Comments, Attachment at E-3, 27-35, JA1499, 1526-34 (estimating a 20% reduction in forecasted peak load for three regional transmission

organizations ("RTO") due to state policies aimed at reducing energy consumption).

Commenters also detailed numerous interregional transmission projects that have been delayed for years due to uncertainties related to cost allocation. Joint Comments of American Electric Power Corp., *et al*., FERC Docket No. RM10-23-000 at 7-10 (Sept. 29, 2010), JA0937-40. The Midwest Independent System Operator ("MISO") expressed concern that inadequate cost allocation rules "serve as a potential barrier not only to construction, but even to planning at the outset based on a belief that failure to construct is a foregone conclusion." Comments of the MISO, FERC Docket No. RM10-23-000 at 16 (Sept. 29, 2010), JA0863. If needed transmission projects cannot move forward, transmission providers cannot assure reliable service at reasonable cost. *See* Order No. 1000 P 2, JA0149.

Petitioners mistakenly attempt to equate FERC's rationale for Order No. 1000 with the reasoning rejected by the Court in *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305 (D.C. Cir. 1991). Pet'rs' Threshold Br. 24-25. In *Algonquin*, the Court found FERC's conclusion – that all of a natural gas pipeline's customers benefited from an operator's new facilities – was wholly unsupported, as the record indicated only a small portion of customers would in fact benefit. 948 F.2d at 1312-13. The informed analysis underlying Order No. 1000 stands in sharp contrast to the conclusory statements at issue in *Algonquin*.

In short, Petitioners fail in their attempts to discredit a legitimate threat recognized by FERC. FERC's assessment of the threat can hardly be characterized as "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43. Here, the record compiled by FERC provides ample support for its predictive judgment and identification of a theoretical threat.

III. FPA Section 202(a) Does Not Bar FERC from Mandating Regional Transmission Planning.

FERC reasonably concluded that Section 202(a) of the FPA does not prohibit FERC from requiring mandatory regional transmission planning, and its interpretation is due deference by this Court. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Section 202(a) provides, in relevant part:

> For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy . . . . It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts.

16 U.S.C. § 824a(a). Petitioners claim that the term "coordination" in Section 202(a) encompasses regional transmission planning, and that planning is therefore "voluntary." Pet'rs' Threshold Br. 9-14. FERC, however, interprets the term

"coordination" to refer only to coordination of *operations* and not to "the planning process for the identification of transmission facilities." Order No. 1000 PP 101, 105, JA0169, 0170; FERC Br. 35-45. The reasonableness of FERC's interpretation is manifest in the statutory context of Section 202(a), which addresses *only* system *operations* and not transmission planning for new facilities, as well as in case law that addresses Section 202 in the context of power pooling (*i.e.* coordinated operations of generation and transmission facilities) and other operations of existing facilities.

While Section 202(a) emphasizes the "voluntary" nature of "interconnection and coordination of facilities," the remaining subsections support FERC's determination that Section 202 addresses only interconnection and coordination of *operations*. Section 202(b) authorizes FERC, under certain circumstances, to order a utility "to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons . . . ." 16 U.S.C. § 824a(b). Subsections (c) and (d) similarly address FERC's authority to require temporary physical interconnections of facilities under limited circumstances. *See id.* § 824a(c)-(d). Section 202(b), (c), and (d)'s focus on the *operation* of facilities reasonably supports FERC's conclusion that Section 202(a)'s reference to "interconnection and coordination" similarly addresses such

system operations. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

Case law also supports FERC's understanding of Section 202 as addressing the interconnection and coordination of *operations*, such as power pooling, rather than transmission planning. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973) (recognizing that the "essential thrust of [Section] 202 . . . is to encourage voluntary *interconnections of power*") (emphasis added); *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1298 (D.C. Cir. 1978) (explaining that "Section 202(a) of the Act sanctions and encourages these voluntary [power] pooling agreements").

Petitioners argue that this Court's decision in *Central Iowa Power Cooperative, Inc. v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979), is "dispositive of FERC's *Chevron* claim." Pet'rs' Threshold Br. 10. However, the Court's discussion of Section 202(a) in *Central Iowa* was limited to the context of the challenged power pool agreement, and therefore supports FERC's interpretation. *See* FERC Br. 38-42. And while Petitioners highlight the Court's reference to the definition of "coordination" in the 1970 National Power Survey, Pet'rs' Threshold Br. 9-10, Petitioners fail to note that the Court described this passage as

"explain[ing] the different degrees of *power pooling*." 606 F 2d. at 1168 n.36 (emphasis added). Petitioners also mischaracterize the court's decision as rejecting the argument that FERC should expand the scope of the power pool at issue to require participants to "engage in single system planning." Pet'rs' Threshold Br. 9 (internal quotation marks omitted). In fact, the Court rejected the argument that FERC should consider whether the pool participants should "engage in single system planning *with central dispatch*," that is, a tighter *power pool*. *Central Iowa*, 606 F 2d. at 1166, 1168 (emphasis added); Order No. 1000 PP 102-03, JA0170.

In sum, FERC's interpretation of the term "coordination" in Section 202(a) to exclude regional transmission planning for new facilities is a reasonable usage of that term to which this Court must accord deference.

IV. FERC Reasonably Required Consideration of Transmission Needs Driven by Public Policy Requirements.

In Order No. 1000, FERC directed transmission providers to consider, in their local and regional transmission planning processes, transmission needs driven by laws and regulations at the federal, state and local levels ("Public Policy Requirements"), such as state energy efficiency and renewable energy portfolio standards, and federal energy efficiency standards and environmental regulations. Order No. 1000 PP 6, 82, JA0150, 0165-66. Contrary to Petitioners' claims, Order No. 1000's public policy directive does not promote or even address the substance of any Public Policy Requirement. Rather, FERC adopted a process-based reform

that requires providers to establish procedures for the identification of public policy-driven transmission needs and evaluation of proposed solutions to such needs. In light of the increasing prevalence of Public Policy Requirements, FERC's reform is a logical extension of Order No. 890's mandate to take into account reliability and economic considerations. Order No. 890 P 542.[4] By accounting for this additional category of transmission needs that impact the grid, Order No. 1000 promotes cost-effective planning, not policy, and is critical to ensuring just and reasonable rates.

A. Public Policy Requirements Can Drive Transmission Needs.

Public Policy Requirements can have a significant impact on the mix of resources available to meet our electricity needs, and the transmission infrastructure required to carry electricity from these resources. Order No. 1000 P 45, JA0157-58. State renewable energy standards, for example, drive future transmission needs because policies to increase the availability and integration of renewable energy resources may require a significant expansion of the transmission grid. *See, e.g.,* Comments of LS Power Transmission, FERC Docket No. RM10-23-000 at 5 (Sept. 29, 2010), JA0880 ("Thousands of miles of new transmission are needed to support the goal of increasing the availability of renewable electricity. In the Eastern Interconnection alone, studies have suggested

[4] Order No. 890, *available at* https://www.ferc.gov/whats-new/comm-meet/2007/021507/E-1.pdf.

that in order to support 20 percent wind integration by 2024, 15,000 miles of new transmission, at an estimated cost of $80 billion, will be needed."); Order No. 1000 P 29, JA0154 (NERC estimates that roughly 13,000 of the 39,000 circuit miles of high-voltage transmission planned in the next ten years will be needed to integrate variable and renewable generation).

Although many Public Policy Requirements drive new transmission investments, others can reduce the need for transmission services. For example, state energy efficiency requirements lower overall energy consumption, avoiding or deferring transmission upgrades and generation investments. *See* Sierra Club Dec. Comments P 5, JA1492 (describing a report by Synapse Energy Economics finding that existing energy efficiency programs should reduce or flatten peak loads in 2030, as compared to 2010, in the MISO and New England Independent System Operator ("ISO"), respectively).

Federal environmental regulations also impact transmission needs. For example, many utilities are choosing to retire older generating units in response to new federal compliance obligations. *Id.* at Attachment, E-1, JA1497; Order No. 1000-A P 5, JA0332. To cost-effectively address the resource availability, grid access, and transmission issues associated with these retirements, transmission planning must account for the impacts of these environmental regulations and "at-risk" generation. *See*, *e.g.*, Sierra Club Dec. Comments P 6, 8, JA1493, 1494

(planning reforms are needed to account "both for fossil generation retirements and offsetting load reductions achieved by energy efficiency programs"); Comments of the Conservation Law Foundation, FERC Docket No. RM10-23-000 at 9-10 (Sept. 29, 2010), JA0783-84 (describing two coal-fired units in Massachusetts that were unable to retire due to reliability concerns that will cost ratepayers millions in above-market costs); *see also* Order No. 1000-A PP 5, 50, JA0332, 0341.

As these examples demonstrate, Public Policy Requirements can significantly affect the need for new transmission, and the resources available to meet electricity demand. In view of the "significant activity at the federal and state levels in enacting" Public Policy Requirements, FERC reasonably determined that this additional category of considerations must be accounted for in planning processes, along with the reliability and economic considerations required by Order No. 890. Order No. 1000-A P 336, JA0396; *accord id.* at P 206, JA 0372 ("[T]he record shows that there are, and there will continue to be, federal and state laws and regulations that will have a direct impact on transmission needs, just as reliability and economic concerns have a direct impact on transmission needs."). Because customers ultimately bear the costs of investments in new transmission (and generation), there can be no assurance of just and reasonable rates unless transmission planning accounts for needs driven by Public Policy Requirements. Order No. 1000 PP 203-04, JA0191-92.

B. FERC's Process-Based Reform Requires Consideration of Transmission Needs Driven by Public Policy Requirements.

Effective transmission planning requires consideration of all transmission drivers. Order No. 1000-A PP 60, 98, JA0343, 0351. However, as FERC explained, Order No. 890 did not require transmission providers to consider, in the planning process, transmission needs driven by Public Policy Requirements. Order No. 1000 P 204, JA0191-92. As a result, existing planning processes are not designed to account for, and some do not consider, this important driver of transmission needs. *Id. at* P 82, JA0165-66.

To address this gap, Order No. 1000 requires that transmission providers amend their open access transmission tariffs ("OATTs") to describe the procedures through which they will consider transmission needs driven by Public Policy Requirements in the local and regional transmission planning processes. Order No. 1000 P 203, JA0191; Order No. 1000-A P 267, JA0383. Transmission providers, in consultation with stakeholders, must develop a process through which they can identify needs driven by Public Policy Requirements and then, for a subset of these identified needs, evaluate proposed solutions. Order No. 1000 P 205, JA0192.

Petitioners do not dispute FERC's finding that, since Order No. 890, there has been an increase in the number of Public Policy Requirements that will likely impact transmission needs. Petitioners nevertheless argue that FERC exceeded its

authority by promoting certain public policies. Pet'rs' Pub. Pol. Br. 12 (transmission providers will be "inundated with myriad of public policies that they *must* consider"), 13 (RTOs will be "selecting and promoting some public policies over others"). Petitioners' focus on the substance of Public Policy Requirements suggests a fundamental misunderstanding of what Order No. 1000 requires. Order No. 1000's public policy directive is a process-based reform. It does not mandate consideration of any particular public policy or identification of any particular transmission need driven by public policy, nor does it promote any particular policy. Order No. 1000 PP 111, 207, JA0171-72, 0192. Petitioners' claims to the contrary are without merit.

Petitioners' reliance on *Nat'l Association for the Advancement of Colored People v. FPC* ("*NAACP*"), 425 U.S. 662 (1976) is misplaced. In that case, the Court held that the Federal Power Commission could consider the impacts of employment discrimination on part of its regulatees "only insofar as such consequences are directly related to the Commission's establishment of just and reasonable rates in the public interest." *NAACP*, 425 U.S. at 671. As discussed above, Public Policy Requirements can impact the type and level of transmission needed, as well as resulting rates for transmission. Therefore, consideration of transmission needs driven by Public Policy Requirements is "directly related to the Commission's establishment of just and reasonable rates." *Id.*

C. Order No. 1000's Public Policy Requirements Are Not Vague or Confusing.

Petitioners contend that Order No. 1000's public policy directive is impermissibly vague and does not provide transmission providers with clear notice of what they are required to do. Pet'rs' Pub. Pol. Br. 9-15. However, in Order No. 1000, FERC defined "Public Policy Requirements" with specificity as policies "established by state or federal laws or regulations . . . . mean[ing] enacted statutes (*i.e.*, passed by the legislature and signed by the executive) and regulations promulgated by a relevant jurisdiction, whether within a state or at the federal level." Order No. 1000 P 2, JA0149; Order No. 1000-A P 319, JA0393 (clarifying that public policy requirements "within a state" includes requirements established by local government). FERC also clearly outlined the process for considering Public Policy Requirements in transmission planning, while providing transmission providers with flexibility in how they design and implement the process. Order No. 1000 PP 205-11, JA0192-93; FERC Br. 108-09. Order No. 1000's public policy directive provides clear notice of transmission providers' obligation to consider Public Policy Requirements in the transmission planning process, and the process for doing so.

Moreover, to the extent there is disagreement about whether a specific Public Policy Requirement driver merits consideration in the planning process, the terms of the transmission provider's planning process will govern the resolution.

Order No. 1000 P 205-11, JA 0192-93. This is no different than what occurs with other facets of the transmission planning process: the transmission provider and stakeholders assess what transmission is needed to fulfill a variety of needs (*i.e.*, reliability, load growth, economic expansion, *etc.*), and then act to fulfill those needs. *Id.* at PP 11, 21, JA 0151, 0153. As with any aspect of the transmission planning, if a stakeholder believes the transmission planning process failed to consider a public policy, that stakeholder can file a complaint with FERC under Section 206. 16 U.S.C. § 824e. Thus, there is no confusion or vagueness.

D. Order No. 1000 Compliance Filings Illustrate that the Public Policy Directive Is an Achievable, Process-Based Requirement.

Petitioners assert that FERC's partial rejection of several Order No. 1000 compliance filings supports their claim that the public policy directive is confusing. Pet'rs' Pub. Pol. Br. 14-15. However, such rejections of initial compliance filings is common, and Petitioners' examples consist of filings in which the transmission providers did not explain or even propose some portion of the process to consider needs driven by Public Policy Requirements. *PJM Interconnection*, 142 FERC ¶ 61,214, P 115 (2013) (failure to describe the process for identifying Public Policy Requirement-driven needs for which solutions will be evaluated); *S.C. Elec. & Gas*, 143 FERC ¶ 61,058, P 116 (2013) (same); *Pub. Serv. Co. of Colo.*, 142 FERC ¶ 61,206, P 200 (2013) (same); *NorthWestern Corp.*, 143 FERC ¶ 61,056, PP 83-87 (2013) (same with additional deficiencies); and

Me. Pub. Serv., 142 FERC ¶ 61,129, P 41 (2013) (failure to discuss process for selecting policy-driven needs for further evaluation in local planning process); FERC Br. 112-14. It is therefore unsurprising that FERC rejected these compliance filings. Pet'rs' Pub. Pol. Br. 14

Other transmission providers, moreover, have submitted plans that substantially comply with Order No. 1000's public policy directive, and FERC has mainly approved those plans. For example, FERC largely accepted California Independent System Operating Corporation's ("CAISO") proposed procedures for considering transmission needs driven by Public Policy Requirements. *Cal. Indep. Sys. Operator Corp.*, 143 FERC ¶ 61,057, P 84 (2013). CAISO's existing (*i.e.*, pre-Order No. 1000) tariff provisions "address[ed] transmission needs driven by public policy requirements," *id.*, and required only minor modifications to the overall framework, such as, to clarify that CAISO must evaluate potential solutions for transmission needs selected for evaluation, and to ensure that the definition of Public Policy Requirements is consistent with Order Nos. 1000 and 1000-A. *Id.* at PP 85-86, 95; *see also ISO New England Inc.*, 143 FERC ¶ 61,150, PP 108-115 (2013) (finding that the proposal largely complies with Order No. 1000's requirement to establish a process for identifying public policy-driven transmission needs).

V. FERC Acted Within Its FPA Authority in Mandating Cost Allocation in a Manner that Is Commensurate with the Benefits Received.

Order No. 1000 requires transmission providers to have in place a principles-based method to allocate costs "in a manner that is at least roughly commensurate with the benefits received by those who will pay those costs," and to ensure that those who do not benefit from a facility are not compelled to bear the costs. Order No. 1000 P 10, JA0151. These cost allocation reforms satisfy the principle of cost causation and are within FERC's authority to fix unjust and unreasonable rates. FERC's authority is not limited to customer relationships, and its reforms do not prescribe specific cost allocation methods, abrogate existing contracts, or constitute a tax, as Petitioners contend. Pet'rs' Cost Allocation Br. 2, 12-13. FERC's cost allocation reforms are based on its well-supported finding that a lack of clear allocation methods and the existence of free riders threaten the development of more efficient, cost-effective transmission. *See supra* Part II; Order No. 1000 PP 10, 495, JA0151, 0250; Order No. 1000-A P 592, JA0447.

A. FERC's Cost Allocation Reforms Satisfy the Cost Causation Principle and Ensure Just and Reasonable Rates.

To ensure just and reasonable rates, the long-standing principle of "cost causation" requires "costs . . . be allocated to those who cause the costs to be incurred and reap the resulting benefits." *Nat'l Ass'n of Regulatory Util. Comm'rs.*

v. FERC, 475 F.3d 1277, 1285 (D.C. Cir. 2007); Order No. 1000 P 535, JA0257. This Court "evaluate[s] compliance with this unremarkable [cost causation] principle by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party." *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004). As one court explained, "[t]o the extent that a utility benefits from the costs of the new facilities, it may be said to have 'caused' a part of the costs to be incurred, as without the expectation of its contributions the facility might not have been built, or might have been delayed." *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009);[5] *see also Ill. Commerce Comm'n v.* FERC, 721 F.3d 764, 770 (7th Cir. 2013) (explaining that the FPA requires that the fees for expanding and upgrading the grid be "'just and reasonable,' 16 U.S.C. § 824d(a), and therefore at least roughly proportionate to the anticipated benefits to a utility of being able to use the grid") (citing *Ill. Commerce Comm'n,* 576 F.3d at 476; *Pacific Gas & Electric Co. v. FERC,* 373 F.3d 1315, 1320-21 (D.C. Cir. 2004)); FERC Br. 132-33.

[5] Petitioners argue that *Ill. Commerce Comm'n* cannot be relied on because the court refers to "customers" in its discussion of cost allocation. However, the word "customer" does not alter the meaning of cost causation. *See* FERC Br. 132; Order 1000-A P 565, JA0442.

Consistent with this principle, Order No. 1000 provides that those who have caused a part of the costs to be incurred must pay an amount that is "roughly commensurate" with the benefit they receive. Order No. 1000 P 10, JA0151. Order No. 1000 also prohibits the involuntary allocation of costs to non-beneficiaries. Order No. 1000 P 637, JA0275. These requirements, along with the Order's other cost allocation principles, are consistent with FERC's obligation to ensure just and reasonable rates under FPA Section 206. *Midwest ISO*, 373 F.3d at 1369 (finding that it is not necessary to "allocate costs with exacting precision").

Petitioners criticize FERC for mandating a "broad assessment" of charges by transmission providers to beneficiaries through its cost allocation reforms. Pet'rs' Cost Allocation Br. 2. Under Order No. 1000's beneficiary pays approach, however, the scope of the cost allocation is a function of the scope of the benefits. Thus, a broad allocation of costs is improper only if the benefits are not similarly broad, that is, if costs are not allocated in a manner that is "roughly commensurate" with benefits. *See Ill. Commerce Comm'n*, 721 F.3d at 773-74 (upholding a broader sharing of benefits for high voltage multi-value project lines compared to the narrower, more localized benefits of low-voltage lines). Today's interconnected transmission grid provides widespread and diffuse transmission benefits, justifying a broad allocation of costs. Order No. 1000 P 497, JA0250-51 ("The industry's continuing transition also has enabled greater utilization of

resources (e.g., reserve sharing) resulting in, among other effects, broader diffusion of the benefits associated with transmission facilities.").

Moreover, it is transmission planners – in consultation with stakeholders, not FERC – who identify the benefits and beneficiaries for cost allocation purposes. Order No. 1000 P 539, 563, 625, JA0258, 0262, 0274 ("any benefit used by public utility transmission providers in a regional cost allocation method or methods must be an identifiable benefit"). Indeed, transmission providers have proposed how to define benefits and to identify beneficiaries in their Order No. 1000 compliance filings, and some had tariffs provisions in place prior to the issuance of Order No. 1000 that largely satisfied its cost allocation requirements. *See, e.g., N.Y. Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059, PP 98, 222, 269, 275, 320 (2013) (describing the metrics and methods used to identify the benefits and beneficiaries of proposed transmission solutions to address the needs driven by economic factors and Public Policy Requirements); *CAISO*, 143 FERC ¶ 61,057, PP 297, 302 (noting that CAISO's pre-existing and "current cost allocation method" already addresses benefits and beneficiaries in substantial compliance with Order No. 1000).

B. FERC's Authority to Fix Unjust and Unreasonable Rates Is Not Limited to Contracts.

Petitioners argue that FERC can remedy unjust and unreasonable rates only if an underlying contract exists between a public utility and a beneficiary. Pet'rs'

Cost Allocation Br. 13. The scope of FERC's authority under the FPA, however, is not so limited. Section 206 explicitly provides FERC with the authority to fix practices affecting rates for "any transmission. . . subject to the jurisdiction of the Commission" that are unjust and unreasonable, unduly discriminatory or preferential. 16 U.S.C. § 824e(a). Cost allocation, as discussed above, is a practice affecting rates. *See supra* Part I; FERC Br. 120. Additionally, the plain language of Section 201(b) of the FPA "clearly and unambiguously" establishes FERC's broad jurisdiction over "the transmission of electric energy in interstate commerce" and "all facilities for such transmission," without reference to the existence of contractual relationships. *Transmission Access*, 225 F.3d at 693; 16 U.S.C. § 824(b); FERC Br. 122.

FERC's reforms reflect the "physics of electrical transmission." *N. States Power Co. v. FERC*, 30 F.3d 177, 179 (D.C. Cir. 1994); Order No. 1000-A P 560, JA0441. As FERC explained, in an integrated transmission grid, an entity that uses part of the grid could benefit from transmission facility improvements or additions in another part of that grid. Order No. 1000-A P 562, JA0441. Such potential benefits are not limited by contracts. *Id.* Thus, in its cost allocation reforms, FERC has acted in accordance with the nature of the "integrated system," *i.e.,* a system that performs as a whole, so that those who benefit from a transmission facility in a particular region are allocated costs commensurate with

the benefits they receive. *Id.* at P 560, JA0441; *see also W. Mass. Elec. Co.v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999) ("When a system is integrated, any system enhancements are presumed to benefit the entire system."). FERC also ensured that an entity that receives no benefit will not be assessed any cost. Order No. 1000 P 637, JA 0275.

Had FERC not reformed cost allocation practices, the entities that benefit from new transmission could "utilize the absence of a contractual relationship to shield themselves from an allocation of costs." Order No. 1000-A P 565, JA0442. That is, the well-founded threat that FERC identified, *see supra* Part II, would have remained and grown. Petitioners' interpretation of FERC's authority would strip the agency of its power and obligation to prevent unjust and unreasonable rates. *See, e.g.,* 16 U.S.C. §§ 824d, 824e; *Associated Gas*, 824 F.2d at 1008; FERC Br. 32-33. FERC's interpretation of its authority under Section 206 is reasonable, is consistent with "the flow of electric energy" on the grid, Order No. 1000-A P 577, JA0444 (internal quotation marks omitted), and is entitled to deference. *See City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863, 1871-75 (2013).

Finally, FERC's cost allocation reforms do not diminish the role of contracts in the statutory scheme of the FPA, as Petitioners suggest. Pet'rs' Cost Allocation Br. 18. FERC did not allocate costs, set rates or mandate a specific cost allocation method to govern relationships between utilities and beneficiaries. Petitioners'

discussion of cases concerning the modification or abrogation of existing contracts is misplaced. *Id.* at 12-13.

C. Order No. 1000 Reduces the Likelihood of Free Ridership.

Free ridership occurs when an entity does not bear cost responsibility for the service or "benefits" it receives from new transmission facilities by virtue of the interconnected grid. Order No. 1000-A P 576, JA0444. "[T]he potential opportunity for free ridership [is] inherent in transmission services, given the nature of power flows over an interconnected transmission system." Order No. 1000 P 10, JA0151. When free ridership occurs, the costs that are not borne by the responsible party are paid for by the remaining entities benefitting from a project, resulting in overpayment by those who pay for the new facility. Order No. 1000-A P 578, JA0444-45.

Order No. 1000 reduces the opportunity for free ridership by requiring transmission providers to clearly define cost allocation methods so that entities share in costs roughly commensurate with the benefits they receive. Moreover, by reducing the opportunity for free ridership, FERC's cost allocation reforms improve the likelihood that the most cost-effective facilities considered in transmission planning will in fact be built. Order No. 1000 P 499, JA0251. By contrast, Petitioners' interpretation of the FPA – that an entity who benefits from new transmission facilities cannot be made to pay for such benefits absent a

contract for service – would make it impossible for FERC ever to protect against free ridership. Order No. 1000-A P 562, JA0441. For that reason too, Petitioners' claims are without merit.

VI. Order No. 1000 Does Not Intrude on State Sovereignty

Petitioners' assertion that Order No. 1000 intrudes on traditional state powers, *see*, *e.g.*, Joint Brief of State Petitioners Intervenors, is without merit. As noted above, Order No. 1000 is a process-based reform. *See supra* 3, 17-18, 21-22; Order No. 1000 P 111, JA0171-72. The Order does not infringe on substantive issues that are traditionally left to state regulators, such as transmission and siting decisions. *See* FERC Br. 93-99.

CONCLUSION

For the foregoing reasons, and those set forth in the Brief of Respondent Federal Energy Regulatory Commission, the Court should dismiss these petitions for review.

Dated: December 13, 2013

Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies on this 13th day of December, 2013, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing **Final Brief of Intervenors Supporting Respondent Concerning Threshold Issues, Cost Allocation, Transmission Planning and Public Policy, and State Sovereignty** contains **7,559** words, as counted by counsel's word processing system, and thus complies with the applicable word limit established by the Court.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2013, I have served the foregoing **Final Brief of Intervenors Supporting Respondent Concerning Threshold Issues, Cost Allocation, Transmission Planning and Public Policy, and State Sovereignty** on all registered counsel through the Court's electronic filing system (ECF) and the following counsel by U.S. Mail:

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STATUTES AND REGULATIONS

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United States Code Annotated
Title 16. Conservation
Chapter 12. Federal Regulation and Development of Power (Refs & Annos)
Subchapter II. Regulation of Electric Utility Companies Engaged in Interstate Commerce

16 U.S.C.A. § 824

§ 824. Declaration of policy; application of subchapter

Currentness

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

(4) Nothing in this section shall--

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

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

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

CREDIT(S)

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

Notes of Decisions (176)

Footnotes

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

16 U.S.C.A. § 824, 16 USCA § 824

Current through P.L. 113-36 approved 9-18-13

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United States Code Annotated
Title 16. Conservation
Chapter 12. Federal Regulation and Development of Power (Refs & Annos)
Subchapter II. Regulation of Electric Utility Companies Engaged in Interstate Commerce

16 U.S.C.A. § 824a

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

Currentness

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before

or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(d) Temporary connection during emergency by persons without jurisdiction of Commission

During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: *Provided,* That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: *Provided further,* That upon approval of the Commission permanent connections for emergency use only may be made hereunder.

(e) Transmission of electric energy to foreign country

After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

(f) Transmission or sale at wholesale of electric energy; regulation

The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from the State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this subchapter. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection (e) of this section.

(g) Continuance of service

In order to insure continuity of service to customers of public utilities, the Commission shall require, by rule, each public utility to--

(1) report promptly to the Commission and any appropriate State regulatory authorities any anticipated shortage of electric energy or capacity which would affect such utility's capability of serving its wholesale customers,

(2) submit to the Commission, and to any appropriate State regulatory authority, and periodically revise, contingency plans respecting--

(A) shortages of electric energy or capacity, and

(B) circumstances which may result in such shortages, and

(3) accommodate any such shortages or circumstances in a manner which shall--

(A) give due consideration to the public health, safety, and welfare, and

(B) provide that all persons served directly or indirectly by such public utility will be treated, without undue prejudice or disadvantage.

CREDIT(S)

(June 10, 1920, c. 285, § 202, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 848; amended Aug. 7, 1953, c. 343, 67 Stat. 461; Nov. 9, 1978, Pub.L. 95-617, Title II, § 206(a), 92 Stat. 3141.)

Notes of Decisions (32)

16 U.S.C.A. § 824a, 16 USCA § 824a
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United States Code Annotated
Title 16. Conservation
Chapter 12. Federal Regulation and Development of Power (Refs & Annos)
Subchapter II. Regulation of Electric Utility Companies Engaged in Interstate Commerce

16 U.S.C.A. § 824d

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

Currentness

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

CREDIT(S)

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

Notes of Decisions (438)

16 U.S.C.A. § 824d, 16 USCA § 824d
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United States Code Annotated
Title 16. Conservation
Chapter 12. Federal Regulation and Development of Power (Refs & Annos)
Subchapter II. Regulation of Electric Utility Companies Engaged in Interstate Commerce

16 U.S.C.A. § 824e

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

Effective: August 8, 2005
Currentness

(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 [15 U.S.C.A. § 79 et seq.].

(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.

CREDIT(S)

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

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