ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

NOS. 15-1098, *ET AL.*

VERSO CORPORATION, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

JAMES P. DANLY
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

HOLLY E. CAFER
SENIOR ATTORNEY

NICHOLAS M. GLADD
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426

FINAL BRIEF: DECEMBER 11, 2017

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, the parties, intervenors, and amici before this Court and before the Federal Energy Regulatory Commission in the underlying agency dockets are as stated in the Joint Brief of Petitioners.

B. Rulings Under Review

1. Order on Complaint, Tariff Filings, and Rehearing, and Establishing Hearing and Settlement Procedures, *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071 (2014) ("Complaint Order"), R.148, JA 579;

2. Order on Rehearing, Accepting Compliance Filings, Rejecting Compliance Filings and Requiring Further Compliance, and Dismissing Complaint, *Pub. Serv. Comm'n v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104 (2015) ("Second Order"), R.485, JA 1358;

3. Order Rejecting and Conditionally Accepting Tariff Revisions, *Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,216 (2015) ("Third Order"), R.551, JA 1539;

4. Order on Rehearing and Compliance, *Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,134 (2016) ("Fourth Order"), R.568, JA 1627; and

5. Order on Rehearing and Clarification and Order on Refund Report, *Pub. Serv. Comm'n v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,205 (2016) ("Fifth Order"), R.615, JA 1705.

C. Related Cases

This case has not previously been before this Court or any other court. These appeals were initially placed in abeyance pending completion of an

administrative proceeding to determine the amount of money at issue in this case. On April 26, 2017, the Court *sua sponte* severed that issue from the instant petitions, assigned No. 17-1104 to that issue, and also ordered that it be held in abeyance pending a final order from the agency on that issue. *See Mich. Pub. Serv. Comm'n v. FERC*, Nos. 15-1049, *et al.* (D.C. Cir. Apr. 26, 2017). An Administrative Law Judge issued an initial decision addressing that issue on July 25, 2016. *See Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 63,013 (2016). On October 19, 2017, the Commission issued an order affirming in part and reversing in part the initial decision. *See Midcontinent Indep. Sys. Operator, Inc.*, Op. No. 556, 161 FERC ¶ 61,059 (2017). No party has sought rehearing of that decision.

/s/ Holly E. Cafer
Holly E. Cafer

December 11, 2017

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GLOSSARY

American Transmission	American Transmission Company LLC
Br.	Petitioners' opening brief
Commission or FERC	Federal Energy Regulatory Commission
Complaint Order	*Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071 (2014), R.148, JA 579
Fifth Order	*Pub. Serv. Comm'n of Wisconsin v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,205 (Sept. 22, 2016), R.615, JA 1705
Fourth Order	*Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,134 (May 3, 2016), R.568, JA 1627
FPA	Federal Power Act
JA	Joint Appendix
Michigan	Petitioners City of Escanaba, Michigan; City of Mackinac Island, Michigan; Cloverland Electric Cooperative; Constellation Energy Services, Inc.; Michigan Public Service Commission; The Sault Ste. Marie Tribe of Chippewa Indians; Tilden Mining Company, L.C.; Empire Mining Partnership; Upper Peninsula Power Company; and Verso Corporation
P	Denotes a paragraph number in a Commission order
R.	Indicates an item in the certified index to the record
Second Order	*Pub. Serv. Comm'n of Wisconsin v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104 (Feb. 19, 2015), R.485, JA 1358

Support Resource	A System Support Resource (elsewhere referenced as "SSR" or "SSR Unit"), a generation resource required by the regional transmission grid operator to continue operating for reliability purposes, despite the resource owner's request to suspend or retire the resource
System Operator	Midcontinent Independent System Operator
Third Order	*Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,216 (Sept. 17, 2015), R.551, JA 1539
Wisconsin Commission	Public Service Commission of Wisconsin

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BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

Three power plants in Michigan became unprofitable as a result of a Michigan law freeing their captive customers to buy power elsewhere. Those plants proposed to deactivate or retire, but the regional transmission grid operator compelled them to continue operating under short-term agreements in order to maintain electric reliability.

This case concerns who should pay for the costs associated with that compulsory reliability service. Under the existing rate method, Wisconsin customers would pay for nearly all of the costs. On behalf of those customers, the

Wisconsin Public Service Commission filed a complaint claiming that the method was unlawful because it did not allocate costs to customers who actually benefit from that service.

In the orders on review, the Federal Energy Regulatory Commission ("Commission" or "FERC") agreed, and directed the grid operator to adopt a new rate method that would allocate costs based on this nexus to benefits. Based on the equities—undisputed before this Court—the Commission exercised its broad remedial discretion to direct the grid operator to issue refunds to the customers (generally in Wisconsin) who paid too much under the existing rate method. Because the grid operator is a non-profit entity that is unable to fund such refunds itself, the Commission also authorized the grid operator to fund the refunds by surcharging the customers (generally in Michigan) who had paid too little.

These actions, in the FERC orders now on review, understandably pleased Wisconsin customers and displeased Michigan customers. On review, a collection of Michigan-based petitioners, hereinafter referred to simply as "Michigan,"[1] presents two issues for review:

1. Whether substantial record evidence supports the Commission's finding that the existing rate method requires correction—is not "just

[1] *See Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 773 (7th Cir. 2013) (similarly referring to objecting Michigan utilities and their state regulator as "Michigan").

and reasonable" in Federal Power Act parlance—because it allocated costs to customers without any consideration of benefits; and

2. Whether the Commission properly exercised its broad remedial discretion, in a manner consistent with its statutory authority, to authorize surcharges from those entities that paid too little to fund refunds to those entities that paid too much.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY FRAMEWORK

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. Section 205(c) of the Act, 16 U.S.C. § 824d(c), requires public utilities to file tariffs with the Commission showing their rates and terms of service, along with related contracts, for service subject to FERC jurisdiction. When those tariffs are filed, sections 205(a)-(b) of the Act, 16 U.S.C. §§ 824d(a)-(b), obligate the Commission to assure that the rates and services described in the tariff are "just and reasonable," and not "unduly discriminatory." *See, e.g.*, *FERC v. Elec. Power Supply Ass'n*,

136 S. Ct. 760, 766-68 (2016) (describing federal regulation and development of energy markets).

Section 206 of the Federal Power Act, 16 U.S.C. § 824e, authorizes the Commission to investigate whether existing rates and practices remain appropriate. Under this section, the Commission may act either on its own initiative or on a third-party complaint to determine whether an existing rate or practice is "unjust, unreasonable, unduly discriminatory or preferential." FPA § 206(a), 16 U.S.C. § 824e(a). If the Commission finds that any rate, charge, or classification on file for the transmission or wholesale sale of electric energy subject to its jurisdiction is unjust, unreasonable, or unduly discriminatory, it must determine and fix the just and reasonable rate, charge, or classification to be prospectively in effect. FPA § 206(a), 16 U.S.C. § 824e(a).

The Commission's authority to remedy an unlawful rate under Federal Power Act section 206, 16 U.S.C. § 824e, is mainly prospective. Upon making necessary findings, the Commission can determine a revised rate "to be thereafter observed and in force." 16 U.S.C. § 824e(a). As revised by the Regulatory Fairness Act, Pub. L. No. 100-473, 102 Stat. 2299 (1988), however, FPA section 206(b) allows the Commission to provide refunds for the 15-month period following a refund effective date established under that section upon the filing of a

complaint. 16 U.S.C. § 824e(b). *See, e.g., La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1299 (D.C. Cir. 2014).

Finally, section 309 of the Federal Power Act, 16 U.S.C. § 825h, provides that "[t]he Commission shall have the power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act." 16 U.S.C. § 825h. *See, e.g.*, *TNA Merchant Projects, Inc. v. FERC*, 857 F.3d 354, 359 (D.C. Cir. 2017).

II. THE COMMISSION'S PROCEEDINGS AND ORDERS

A. System Operator And The Electrical Grid In Wisconsin And The Upper Peninsula Of Michigan

The Midcontinent Independent System Operator, Inc. ("System Operator") is a non-profit regional transmission organization that operates the interstate electric grid in 15 states and one Canadian province and administers auction-based wholesale energy markets. *See Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 245 (D.C. Cir. 2007); *see also Ill. Commerce Comm'n*, 721 F.3d at 769 (showing map of all regional transmission organizations). The portions of the electric grid that System Operator oversees consist of transmission assets that are owned by various transmission companies. *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363-65 (D.C. Cir. 2004) (discussing System Operator and how it was formed); *Wisconsin*, 493 F.3d at 246-49 (same). System Operator's grid is divided

into numerous sub-regions, each of which is monitored by a local entity ("Local Balancing Authority"). *See Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,318 at P 174-75 (2008). System Operator works with those Local Balancing Authorities to continuously balance electricity supply and demand across those portions of the electric grid that are under System Operator's jurisdiction. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,172 at PP 2-3 & n.4 (2008). Each Local Balancing Authority sub-region consists of one or more load-serving entities, each of which serves its own retail customers (also known as "load"). *See Pub. Serv. Comm'n v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104 at P 85 (2015) ("Second Order"), R.485, JA 1407.

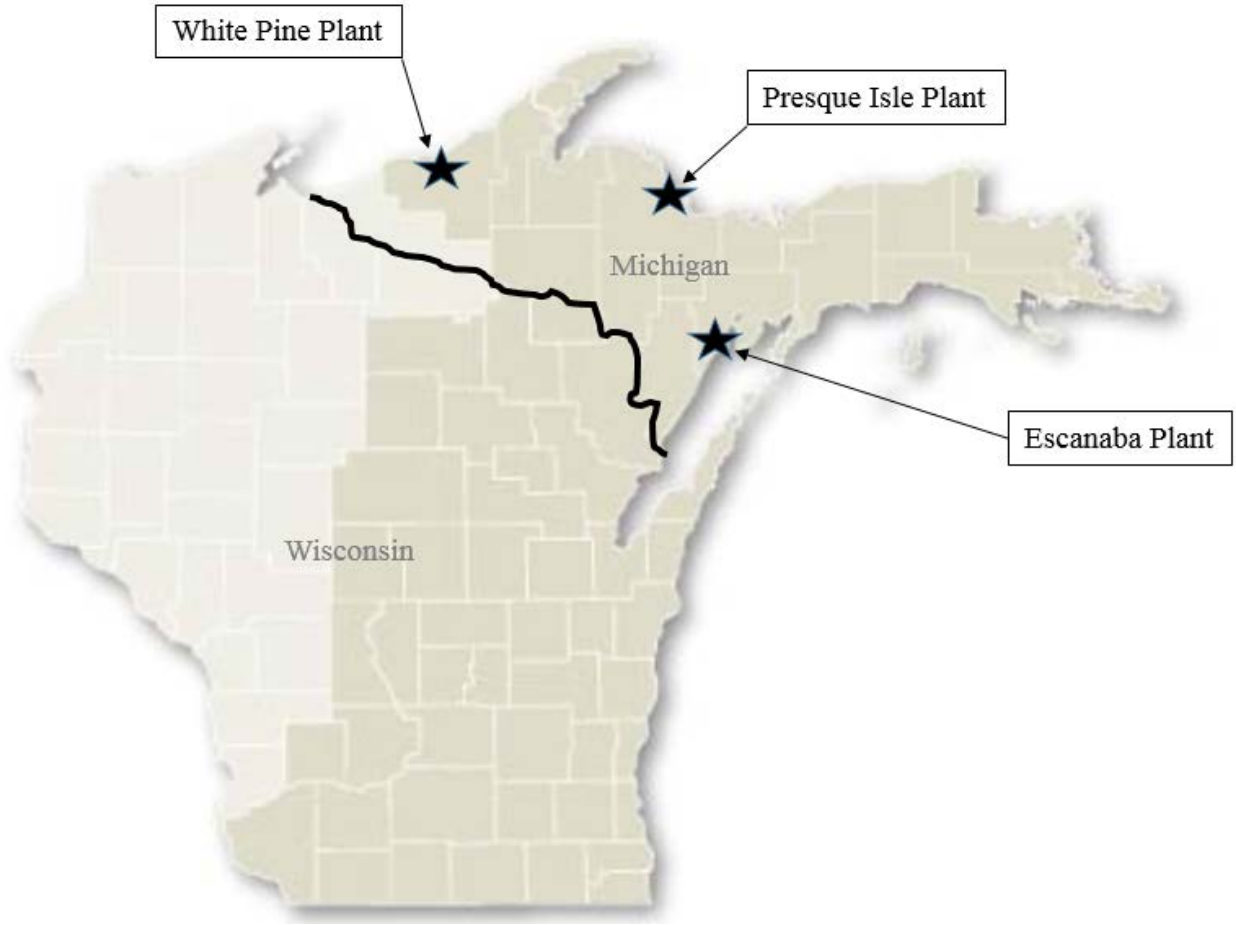
This case involves the portion of System Operator's grid in which the transmission assets are owned by American Transmission Company LLC ("American Transmission")—which covers much of Wisconsin and the Upper Peninsula of Michigan ("Upper Peninsula"). *See infra* p.8 (map of American Transmission footprint). In order to promote the sharing of costs for regional transmission planning, when American Transmission was originally formed, Wisconsin law required it to apply for membership in System Operator as a single pricing zone or elect to be included in a single zone for purposes of System

Operator's tariff. *See Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071 at P 65 (2014) ("Complaint Order"), R.148, JA 611.

At the outset of this proceeding, the American Transmission footprint contained five Local Balancing Authorities. *See* Complaint Order P 14, JA 585. During the Commission's proceedings in this case, one of the five Local Balancing Authorities was split in two. *See* Second Order P 17, JA 1370. The Local Balancing Authorities in the American Transmission footprint cover the service territory of numerous load-serving entities, including several of the petitioners and intervenors in these appeals. *See id.* P 85, JA 1407.

B. Relevant Generation Resources On Michigan's Upper Peninsula

At the heart of this case are three generation resources located on Michigan's Upper Peninsula: (1) the 344-megawatt Presque Isle Units 5-9 ("Presque Isle Plant") in Marquette, Michigan; (2) the approximately 12.5-megawatt Escanaba Units 1 and 2 ("Escanaba Plant") in Escanaba, Michigan; and (3) the 20-megawatt White Pine Unit 1 ("White Pine Plant") in White Pine, Michigan. *See* Second Order n.11, n.32, n.41, JA 1362, 1366, 1368. The following map represents the American Transmission footprint (shaded) and the approximate locations of those three generation resources:



See American Transmission, *2016 10-Year Assessment: Introduction*, atc10yearplan.com, http://www.atc10yearplan.com/ (last visited Sept. 15, 2017) (map of American Transmission footprint); R.507 at Tab I, JA 1530-32 (maps showing generator locations).

The Presque Isle Plant, which is owned by Wisconsin Electric Power Co. ("Wisconsin Electric"), is the only generator of significant size on Michigan's Upper Peninsula. Complaint Order P 13, JA 584. It was built in the 1950s to provide power for the Tilden and Empire iron ore mines located approximately 17 miles from the plant, which represented approximately 80 percent of Wisconsin

Electric's load in the Upper Peninsula. *Id.* When the Presque Isle Plant began providing service, electric utilities in Michigan recovered their revenue requirements from the captive retail consumers in their respective service territories. *See* Complaint Order P 13, JA 584-85. Michigan subsequently restructured its utility sector to give Michigan consumers the ability to choose between different retail service providers (i.e., between different load-serving entities). *See id.*

The Tilden and Empire mines exercised that option in July 2013, changing their service provider from Wisconsin Electric to Integrys Energy Services, Inc. *Id.* As a result, Wisconsin Electric lost more than 80 percent of its customer base in the Upper Peninsula. *Id.* at n.23. Wisconsin Electric therefore sought to suspend, and then retire, the Presque Isle Plant. *Id.* P 13; Second Order P 9, JA 1365. The owners of the Escanaba and White Pine Plants also sought to suspend and retire, respectively, those plants. *See* Second Order PP 11-13, 14-16, JA 1366-68, 1368-69.[2]

[2] For the sake of simplicity, this brief focuses on the Presque Isle Plant over the Escanaba and White Pine Plants, as do the Commission's orders, because the Presque Isle Plant is responsible for the vast majority of cost impacts associated with the orders on appeal.

C. System Operator's Rules For Resources That Seek To Deactivate But Are Needed To Maintain Reliability

System Operator's tariff sets forth specific rules for market participants seeking to suspend or retire a generation resource. *See* Complaint Order P 5, JA 581. The market participant must first submit a notice to System Operator at least 26 weeks prior to the resource's retirement or suspension effective date. *Id.* During that 26-week period, System Operator conducts a study to determine whether any or all of the resource's capacity is needed to maintain the reliability of the system, or if alternatives are available. *Id.* If the study results so require, the generation resource is deemed a System Support Resource ("Support Resource," elsewhere "SSR"), and System Operator and the market participant enter into a System Support Resource Agreement ("Support Resource Agreement" or "Agreement") to ensure that the resource continues to operate as needed. *Id.*

The Agreement, which must be filed with the Commission, sets forth the terms and conditions of the service provided by the Support Resource, including the compensation. *See Pub. Serv. Comm'n v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,205 at P 2 (2016) ("Fifth Order"), R.615, JA 1706. For each such Agreement filed with the Commission, System Operator must also file a separate rate schedule to provide for recovery of the costs identified in the Agreement. *Id.* At the outset of this proceeding, that cost recovery was governed by the following cost allocation provision in System Operator's tariff:

> Allocation of SSR Costs. The costs pursuant to the SSR Agreement shall be allocated to the [load-serving entity or entities] which require(s) the operation of the [Support Resource] for reliability purposes, and shall be specified in the [Support Resource] Agreement. For the purposes of this Section, any costs of operating [a Support Resource] allocated to the footprint of [American Transmission] shall be allocated to all [load-serving entities] within the footprint of [American Transmission] on a *pro rata* basis.

See Complaint Order P 60, JA 608 (quoting section 38.2.7.k of System Operator's tariff).

The Commission first accepted a version of that cost allocation provision in 2004, when System Operator established the Support Resource program. *See id.* P 18, JA 588. In 2012, the Commission accepted the version quoted above, when System Operator modified aspects of the program. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,237 at PP 146, 153-54 & n.218 (2012) (2012 Tariff Order). Although the program was established in 2004, System Operator did not designate a Support Resource until 2012, when it designated the Escanaba Plant. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,170 at PP 1, 7, 11 (2013) (2013 Escanaba Order). That Support Resource Agreement was the first of many in the region. *See* 2012 Tariff Order P 5 (anticipating Support Resource designations "due to changing economic and regulatory conditions"); *accord* 2013 Escanaba Order P 7.

D. The Presque Isle, White Pine, And Escanaba Support Resource Agreements And The Wisconsin Commission Complaint

On August 1, 2013, Wisconsin Electric notified System Operator of its intent to suspend operation of the Presque Isle Plant from February 1, 2014 to June 1, 2015. *See* Complaint Order P 7, JA 581. System Operator conducted a reliability study and determined that suspension of the Presque Isle Plant would result in reliability violations during that period for which no near-term alternative solutions had been identified. *Id.* PP 7-8, JA 581-82. As a result, System Operator commenced negotiations with Wisconsin Electric to ensure the Presque Isle Plant's continued operation until alternatives could be implemented to mitigate the reliability issues. *Id.*

On January 31, 2014, System Operator filed a Support Resource Agreement for the Presque Isle Plant, and separately submitted the required rate schedule specifying the allocation of costs associated with the Presque Isle Plant's operation as a Support Resource under that agreement. *Id.* PP 7-9, JA 581-82.[3] In studying the reliability implications of the Presque Isle Plant's suspension, System Operator conducted a preliminary load-shed study to determine which of the five Local Balancing Authorities that existed within the American Transmission footprint at

[3] On September 12, 2014, Wisconsin Electric notified the Operator that it intended to retire the Presque Isle Plant, rather than merely suspend its operations. *See* Second Order P 9, JA 1365.

that time, and therefore which load-serving entities, would benefit from the Presque Isle Plant's operation as a Support Resource. *See id.* P 14, JA 585-86. That study showed that 58 percent of the Presque Isle Plant's reliability benefits would go to the Upper Peninsula and 42 percent of the benefits would go to load in Wisconsin. *Id.*

Nonetheless, pursuant to the tariff, System Operator's cost allocation filing proposed to allocate the Presque Isle Plant's Support Resource costs to all load-serving entities within the American Transmission footprint on a *pro rata* basis. *Id.* P 9, JA 583. Under that approach, 8 percent of the costs would be allocated to load-serving entities in Michigan's Upper Peninsula and 92 percent of the costs would be allocated to load-serving entities in Wisconsin. *See id.* P 14, JA 585-86. On April 1, 2014, the Commission accepted System Operator's filings, to be effective February 1, 2014, subject to refund and a further Commission order. *Id.* P 10, JA 583.

On April 3, 2014, the Public Service Commission of Wisconsin ("Wisconsin Commission") filed a complaint alleging that the tariff's cost allocation provision for Support Resources in the American Transmission footprint is unjust and unreasonable, in violation of the Federal Power Act. *Id.* P 12, JA 583-84; *see also* Complaint, R.42, JA 307. The Wisconsin Commission argued that—unlike in the rest of System Operator's territory, in which costs are allocated to the load-serving

entities that require the operation of the Support Resource for reliability purposes—costs are allocated to all load-serving entities in the American Transmission footprint regardless of whether they benefit from the operation of the Support Resource. *See* Complaint Order PP 15-16, JA 586-87. The Wisconsin Commission contended that the approach to allocating costs within the American Transmission footprint is unjust and unreasonable because it ignores the principle that rates must, to some degree, reflect the costs that were caused by the customer who pays them. *Id.* P 15, JA 586. As evidence, the Wisconsin Commission pointed to the allocation of 92 percent of the Presque Isle Plant's Support Resource costs to load-serving entities in Wisconsin, even though System Operator's preliminary load-shed study showed that Wisconsin would only receive 42 percent of the benefits. *Id.* P 14, JA 585-86.

On April 15, 2014, and June 13, 2014, respectively, System Operator submitted Support Resource Agreements, and related cost allocation filings, to designate the White Pine Plant and the Escanaba Plant as Support Resources, in response to reliability issues that would be caused by their retirement or suspension. *See* Second Order PP 11-13, 14-16, JA 1366-68, 1368-69. As required by the tariff, System Operator again proposed to allocate the costs on a *pro rata* basis, without regard to benefits, to all load-serving entities within the American Transmission footprint. *Id.* PP 11, 14, JA 1367, 1368.

E. The Commission's Orders On Review

On July 29, 2014, the Commission granted the Wisconsin Commission's complaint and also acted on rehearing of its order accepting the Presque Isle Plant's Support Resource filings. Complaint Order P 1, JA 579. As to the Presque Isle Plant orders, the Commission denied rehearing, but set the compensation for hearing. *See id.* PP 2, 70, JA 580, 613. As to the tariff provision allocating Support Resource costs *pro rata* to all load-serving entities in the American Transmission footprint, the Commission found the provision unjust, unreasonable, and unduly discriminatory, in violation of the Federal Power Act, because the *pro rata* approach does not satisfy fundamental "cost causation principles," *see id.* PP 59-61, JA 608-09, and is "contrary to the Commission's previously stated support for a nexus between the reliability benefits of [Support Resources] and the allocation of those [Support Resources'] costs"), *id.* P 62, JA 609; *see also* Second Order P 73, JA 1400-01.

In discussing the history of the cost allocation provisions for Support Resources, the Commission explained that it accepted those provisions, in 2004, as modified in 2012, because it found that the Support Resource program was consistent with Commission policy and because System Operator explained that the 2012 modifications would ensure that costs are allocated based on reliability benefits. *See* Complaint Order P 62, JA 609-10; Second Order PP 76-77, JA 1402-

03. The Commission explained that, in the 2004 and 2012 proceedings, it had also accepted the different, *pro rata* cost allocation method for Support Resources in the American Transmission footprint, "alongside the general benefits-based" cost allocation. Complaint Order P 62, JA 610.

In contrast to those earlier proceedings, the Commission found that the record in this proceeding demonstrates that assigning costs *pro rata* to all load-serving entities in the American Transmission footprint, without regard to reliability benefits, would be inappropriate. *See, e.g.*, Complaint Order P 62, JA 609; *see also id*. P 61, JA 609. The Commission highlighted that System Operator's preliminary load-shed study of the Presque Isle Plant's suspension determined that 58 percent of the reliability benefits would go to "the Upper Peninsula, while only 42 percent of the benefitting load is in Wisconsin." Complaint Order P 60, JA 609-10; *see also* Second Order P 74, JA 1401.

The Commission acknowledged that System Operator had not yet analyzed all of the reliability contingencies that might impact which load-serving entities benefit from the Presque Isle Plant's operation. Complaint Order P 64, JA 610. The Commission directed System Operator to remove the *pro rata* allocation provision from the tariff, to prepare a final load-shed study, and to allocate costs within the American Transmission footprint to those load-serving entities that require the resource for reliability purposes. *Id.* P 66, JA 611.

In its compliance filing, System Operator included the final load-shed analysis and a revised cost allocation method, which allocated 14.31 percent of the Presque Isle costs to Michigan load and 85.69 percent of those costs to Wisconsin load. *See* R.178 at 6, JA 983. System Operator proposed to allocate costs based on benefits at the Local Balancing Authority level, using the five Local Balancing Authorities in the American Transmission footprint at that time. *See* Second Order P 8, JA 1365. After System Operator submitted that filing, however, Wisconsin Electric split its Local Balancing Authority area in two, separating its Wisconsin load from its Upper Peninsula load. *See id.* P 17, JA 1370. Accordingly, System Operator revised its final load-shed analysis, and submitted a new filing, to reflect the six Local Balancing Authorities. *See id.* PP 18, 81, JA 1370, 1406. Based on that filing, 99.23 percent of the Presque Isle costs would be allocated to load-serving entities in Michigan and 0.77 percent would be allocated to load-serving entities in Wisconsin. *See id.* P 19, JA 1370.

In response to System Operator's compliance filings, the Commission's staff issued a deficiency letter requesting that System Operator provide more information concerning its ability to assign Support Resource costs, on a more granular level, to specific load-serving entities that benefit, rather than to all load-serving entities in a Local Balancing Authority area that benefits. *See* Second Order PP 55-60, JA 1391-93. After reviewing System Operator's response to the

deficiency letter, *see id.*, the Commission found that System Operator has sufficiently detailed information to identify (1) the specific pricing nodes on the transmission grid that would be impacted by the Support Resources' operation during a reliability event, and (2) the load-serving entities that withdraw energy at those nodes, thereby benefitting from operation of the Support Resources in such circumstances. *See id.* PP 86-88, JA 1408-10. Thus, the Commission directed System Operator to submit a compliance filing allocating the costs of the Support Resources at issue directly to the load-serving entities that benefit from their operation. *See id.* P 86, JA 1408.

In response, System Operator submitted a compliance filing proposing to allocate Support Resource costs to load-serving entities based on their energy withdrawals from impacted pricing nodes. *See Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,216 at PP 15-22 (2015) ("Third Order"), R.551, JA 1548-51. That method "recognizes the physical location of the loads in relation to the issues that are caused by the [Support Resources]; thus, loads that would contribute to the thermal or voltage violations in the absence of the [Support Resource] benefit by keeping the unit available . . . to avoid the reliability issues." *Id.* P 15, JA 1548. The Commission ultimately accepted System Operator's proposed method as applied to the Presque Isle, Escanaba, and White Pine Plants, subject to minor modifications, and denied the requests for rehearing of that decision. *Id.* PP 59-73,

JA 1571-78, *order on reh'g and compliance*, *Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,134 at PP 3, 19-20, 28-33, 53-57 (2016) ("Fourth Order"), R.568, JA 1540, 1550-51, 1553-57, 1569-71.

The Commission established a refund effective date on the earliest date possible for each of the Support Resources at issue: (1) for the Presque Isle Plant, April 3, 2014, the date that the Wisconsin Commission filed its complaint under Federal Power Act section 206; (2) April 16, 2014, for the Escanaba Plant; and (3) June 15, 2014, for the White Pine Plant. *See* Complaint Order P 67, JA 612; Fifth Order P 11 & n.31, JA 1712. The Commission acknowledged that its general policy in cases involving cost allocation has been to not require refunds. *See* Second Order P 90, JA 1410; Fifth Order PP 41-44, JA 1726-28. However, the Commission found that neither of the primary grounds underlying that policy is present in this case. *See* Fifth Order PP 44-50, JA 1728-31. Thus, the Commission balanced the equities involved in the case and concluded refunds are warranted for the Presque Isle, Escanaba, and White Pine Plants' Support Resource costs, to reflect the difference between what each load-serving entity paid under the unjust and unreasonable *pro rata* method, and what, if anything, each would have paid under the benefits-based method that was ultimately found to be just and reasonable. *See* Complaint Order P 68, JA 612-13; Second Order PP 90-93, JA 1410-13; Third Order P 74, JA 1578; Fourth Order P 37, JA 1647; Fifth Order

PP 40-56, JA 1725-34. Because System Operator is a non-profit, and lacks funds of its own to pay refunds, the Commission also authorized System Operator to assess surcharges to those entities that underpaid under the old method, to fund the refunds to be paid to those entities that overpaid under that method. *See* Fifth Order PP 51, 79, JA 1732, 1745; *see also* Second Order PP 90-93, JA 1410-13. In so doing, the Commission rejected arguments that it lacks authority to authorize surcharges to fund refunds, finding that its broad equitable authority, as recently clarified in *Xcel Energy Services Inc. v. FERC,* 815 F.3d 947 (D.C. Cir. 2016), allows it to correct unjust circumstances. *See* Fifth Order PP 48-50, JA 1730-31.

These appeals—filed by Michigan-based petitioners in Nos. 15-1098, 16-1205, 16-1212, 16-1226, 16-1228, 16-1385, 16-1388, 16-1389, 16-1391, 16-1397, and 16-1404—followed. Initially, they were consolidated and placed in abeyance pending completion of the hearing concerning the Presque Isle Plant's Support Resource costs. On April 4, 2017, the Court granted a motion to remove the cases from abeyance and proceed to briefing. *See Mich. Pub. Serv. Comm'n v. FERC,* Nos. 15-1049, *et al*. (D.C. Cir. Apr. 4, 2017), at 1-2. However, the Court *sua sponte* severed the issue of the Presque Isle Plant's Support Resource costs, assigned No. 17-1104 to that issue, and also ordered that it be held in abeyance pending a final order from the Commission on that issue. *Id.* at 2, *order on*

clarification, *Mich. Pub. Serv. Comm'n v. FERC*, Nos. 15-1049, *et al.* (D.C. Cir. Apr. 26, 2017), at 2.

SUMMARY OF ARGUMENT

As is common in FERC cost allocation cases, one side claims that the Commission has assigned that side too large a share of costs and has assigned the other side too little. What is uncommon here is that the Commission is correcting, through refunds and surcharges, a prior cost allocation decision by requiring the under-charged side (Michigan) to compensate the over-charged side (Wisconsin). So this case concerns both the reasonableness of the agency's cost allocation decision and the lawfulness of its remedy.

The foundation of the Commission's decision here is the well-established principle—affirmed by this Court on many occasions—that a customer's rates should reflect, to some degree, the costs actually caused by that customer. The Commission reasonably concluded, based on substantial record evidence, that the American Transmission *pro rata* cost allocation method ("old method") was inconsistent with that principle, and, after an iterative process aimed at allocating costs at a more granular level, arrived at a new method that allocates costs to benefitting entities with some precision.

Michigan claims that the old method was good enough, i.e., that the Commission did not demonstrate that it is unjust and unreasonable, as the Federal

Power Act requires. But the Commission's conclusion is supported by the language of the tariff provision, which plainly requires that costs be allocated without consideration of benefits. Moreover, the Commission's decision is also supported by record evidence demonstrating the fundamental unfairness of the old method. As applied to the Presque Isle Plant, the record showed that the old method would have saddled Wisconsin customers with 92 percent of the costs associated with that service, even though those customers would receive only 42 percent of the reliability benefits associated with the Plant's continued operation. The Commission reasonably concluded that a change was necessary.

Michigan does not contest the reasonableness of the Commission's replacement rate method—one that now aligns costs with benefits. Instead, it objects to the Commission's choice of remedy for Wisconsin customers. The Commission directed refunds to the Wisconsin customers and, because System Operator is a non-profit entity that cannot fund the refunds itself, authorized surcharges to the Michigan customers to fund the refunds. Michigan does not even suggest that either refunds or surcharges are inequitable. Nonetheless, Michigan asks the Court to hold that the Commission is powerless—notwithstanding its broad remedial authority under section 309 of the Federal Power Act—to remedy this unjust situation. With the Court's guidance in recent cases, including its 2016 *Xcel* decision, the Commission reasonably determined that its remedial authority

can and should be interpreted in a manner consistent with the primary aim of the statute—to protect consumers from excessive rates and charges.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews Commission orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g., Sithe/Indep. Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). As the Supreme Court has recently explained, "[t]he 'scope of review under the 'arbitrary and capricious' standard is narrow.'" *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id*. Rather, the court must uphold an agency's decision "if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id*. (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43); *see also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014). "And nowhere is that more true than in a technical area like electricity rate design: '[W]e afford great deference to the Commission in its rate decisions.'" *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (quoting *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532

(2008)); *see also, e.g.*, *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017) (upholding FERC-approved rate method tied to resource performance).

"Substantial evidence 'is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *S.C. Pub. Serv. Auth.*, 762 F.3d at 54 (quoting *Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011)). It "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

The Court "will set aside FERC's remedial decision only if it constitutes an abuse of discretion." *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999) (affirming Commission orders denying refunds despite violation of filed rate, based on equitable factors). "In general, [this Court] defer[s] to FERC's decisions in remedial matters, respecting that the difficult problem of balancing competing equities and interests has been given by Congress to the FERC with full knowledge that this judgment requires a great deal of discretion." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998) (internal quotation marks omitted). Thus, this Court has repeatedly recognized that "'the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions.'" *La. Pub.*

Serv. Comm'n v. FERC, 522 F.3d 378, 393 (2008) (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)).

In reviewing Commission decisions interpreting provisions of the Federal Power Act it administers, courts apply the familiar *Chevron* framework. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). "*Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013); *see also Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1001 (D.C. Cir. 1987). The *Chevron* standard applies both to questions about "the scope of the [agency's] delegated authority" and to questions about the "application of its delegated authority." *Arlington*, 133 S. Ct. at 1870 (emphases omitted).

II. THE COMMISSION REASONABLY DETERMINED THAT ALLOCATING COSTS WITHOUT REGARD TO BENEFITS IS INAPPROPRIATE

The Commission found that the old method, allocating Support Resource costs *pro rata* to every load-serving entity in the American Transmission footprint without regard to benefits, is unjust and unreasonable, in violation of the Federal Power Act. *See* Complaint Order PP 59-65, JA 608-11; Second Order PP 73-79,

JA 1400-04. After investigation, the Commission then determined that allocating the Presque Isle, Escanaba, and White Pine Support Resource costs to the specific load-serving entities that benefit from their operation—based on whether a load-serving entity withdraws energy from a pricing node impacted by the operation of the Support Resources—is just and reasonable, and thus consistent with the Act. *See* Third Order PP 59-73, JA 1571-78; Fourth Order PP 19-20, 28-33, JA 1636-37, 1642-45.

Michigan does not challenge the Commission's conclusion that the replacement cost allocation method ultimately used in this proceeding is just and reasonable. *See* Br. 30-54. Rather, it argues that the Commission did not carry its burden of proof in finding the old method to be unjust and unreasonable. *See id.* at 40-54. As a result, Michigan takes the position that the Commission erred in replacing a rate that Michigan believes to be just and reasonable with a different just and reasonable rate.

As explained below, Michigan is mistaken that the Commission did not carry its burden of proof in finding the old method unjust and unreasonable. The Commission's conclusion is well-reasoned and supported by substantial evidence that the old method would allocate costs to customers without regard to whether they benefit from the Support Resources at issue.

A. The Commission Reasonably Concluded That The Old Cost Allocation Method Is Unjust And Unreasonable

This Court has long upheld the Commission's "cost-causation principle," requiring that "all approved rates reflect to some degree the costs actually caused by the customer who must pay them." *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 237 (D.C. Cir. 2013) (quoting *E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1303 (D.C. Cir. 2007)) (internal quotations omitted); *see also Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) ("Not surprisingly, we evaluate compliance with this unremarkable principle by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party."); *Ala. Elec. Coop., Inc. v. FERC*, 684 F.2d 20, 29 (D.C. Cir. 1982) ("This is simply a logical element of the standard for the overall reasonableness of a rate scheme—that it should produce revenues from each class of customers which match, as closely as practicable, the costs to serve each class or individual customer." (internal quotations omitted)). It should do so again here.

The Commission reasonably found that the old method for allocating Support Resource costs in the American Transmission footprint—i.e., *pro rata* to all load-serving entities in that footprint—is inconsistent with the cost causation principle because it allocates costs to entities without regard to whether they benefit from the operation of Support Resources. *See* Complaint Order PP 59-60, JA 608-09 (finding that the tariff language setting forth the American Transmission

pro rata method, which makes no reference to benefits, is inconsistent with cost causation principles); *id.* (explaining that most of the costs would be allocated to Wisconsin consumers "because that is where the bulk of the load in the [American Transmission] footprint is located"); *accord id.* P 66, JA 611-12 (contrasting the tariff provision setting forth the old method with the provision applicable to the rest of System Operator's territory).

Given the mismatch between costs and benefits, the Commission reasonably concluded that the old method will not produce just and reasonable results. *See* Complaint Order P 62, JA 609 ("We find that the assignment of [Support Resource] costs to all [load-serving entities] within the [American Transmission] footprint based on their load share ratio is contrary to the Commission's previously stated support for a nexus between the reliability benefits of [Support Resources] and the allocation of those [Support Resource] costs."); *accord* Second Order P 86 n.210, JA 1408 (in contrast to the finding on the old method, expressly leaving open the possibility that System Operator could present evidence in future cases showing that a cost allocation method based on beneficiary Local Balancing Authority areas is just and reasonable under other circumstances); Third Order P 59, JA 1571 (same).

But the Commission did not base its analysis solely on the tariff language. The Commission also analyzed System Operator's preliminary load-shed study and

concluded that it supported the finding that the old method was unjust and unreasonable. *See* Complaint Order PP 59-61, JA 608-09 (explaining that the preliminary load-shed study revealed that, under the old method, Wisconsin consumers would pay 92 percent of the costs but receive only 42 percent of the benefits; and the record contains "no evidence or other studies" that support allocating 92 percent of the costs to Wisconsin); Second Order P 73, JA 1400 (describing the preliminary load-shed study as "new evidence" that the old method is unjust and unreasonable); *id.* P 74, JA 1401 ("No party has persuaded us that the preliminary load-shed study did not constitute substantial evidence that the [old method] is not just and reasonable.").

Although the Commission relied on the preliminary study in finding the existing rate to be unjust and unreasonable, the Commission chose not to use the preliminary study to set the just and reasonable replacement rate; it instead chose to further investigate which load-serving entities would benefit from the Support Resources before making that determination. *See* Complaint Order PP 61, 64, 118, JA 609, 610, 638. In other words, the Commission relied on the preliminary study to satisfy the first step of the Federal Power Act section 206 analysis, but not the second step of that analysis. *See Emera Me. v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017) (explaining the requisite two-step procedure under FPA section 206). That is permissible under this Court's precedent. *See id.* at 25-26 (rejecting

Commission's reliance on a single return on equity study to satisfy both prongs of the section 206 analysis).

Rather than rely on the same piece of evidence to satisfy both prongs of its FPA section 206 analysis, the Commission directed System Operator to conduct an even more detailed analysis of the Local Balancing Authorities that would benefit from the Support Resources at issue. *See* Complaint Order P 118, JA 638; Second Order PP 73-74, 80-89, JA 1400-01, 1404-10. After further investigation, including three rounds of compliance filings, the Commission ultimately directed System Operator to adopt an even more granular identification of beneficiary load-serving entities than the final load-shed study produced. *See* Second Order PP 86-89, JA 1408-10; Third Order PP 60-73, JA 1572-78.

In total, the Commission in this proceeding analyzed four alternatives to the old method. And every one of those alternatives indicated that the result of the old method—i.e., allocating 92 percent of the costs to Wisconsin consumers receiving a much smaller share of the benefits—is unjust and unreasonable. That conclusion warrants this Court's respect. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (explaining that it is "not our job" to "render . . . judgment" on an issue "on which reasonable minds can differ," as long as the Commission has "addressed that issue seriously and carefully").

B. Michigan's Attempts To Undermine The Commission's Findings Have No Merit

Michigan presents several reasons why it believes the Commission erred in finding the old method to be unjust and unreasonable. *See* Br. 40-53. All of Michigan's arguments either misapprehend the law, or ignore the Commission's findings, and some were not properly raised for the Commission's consideration.

First, Michigan argues that the Commission failed to show "changed circumstances or new evidence," Br. 42, to support its conclusion that the old method has become unjust and unreasonable. *See also* Br. 40-47. The Commission disagreed, finding that the preliminary load-shed study, which was developed during the negotiation of the Agreement for the Presque Isle Plant, satisfies this standard. *See* Complaint Order PP 61-63, JA 609-10 (explaining that, unlike in the earlier proceedings involving Support Resources, the record in this proceeding demonstrates that the old method is not consistent with the cost causation principle); Second Order PP 76-77, JA 1402-03 (same). That decision is fully consistent with precedent, which establishes that the Commission may rely on new facts, circumstances, or evidence—as it has here—to support a finding that the previously accepted rate has become unjust and unreasonable. *See, e.g.*, *Advanced Energy*, 860 F.3d at 664-65; *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1288 (D.C. Cir. 2000); *accord Elec. Power Supply Ass'n*, 136 S. Ct. at 782

(emphasizing that a court "may not substitute [its] own judgment for that of the Commission").

Next, Michigan argues that "[n]ewly raised evidence is not the same as new evidence," Br. 42 (citing *BP Pipelines (Alaska) Inc.*, 149 FERC ¶ 61,149 at P 59 (2014), *rev'd sub nom. Petro Star, Inc. v. FERC*, 835 F.3d 97 (D.C. Cir. 2016); *Tesoro*, 234 F.3d at 1289). However, both of the cases on which Michigan relies involved the Commission changing course on an issue that was actually litigated in the earlier proceeding. *See Petro Star*, 835 F.3d at 101; *Tesoro*, 234 F.3d at 1289.

Here, in contrast, the issue of whether the old method would allocate Support Resource costs consistent with the cost causation principle was not raised or addressed in the earlier proceedings. *See Midland Power Coop. v. FERC*, 774 F.3d 1, 6 (D.C. Cir. 2014) (citing the principle that where the court does not "even mention" an issue, the opinion has no precedential value on that issue); *see also Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). When the Commission accepted System Operator's Support Resource program in 2004, and its modifications in 2012, the American Transmission *pro rata* method "was not at issue and there was no record evidence to suggest that pro rata allocation was not just and reasonable as applied to a particular set of circumstances." Second Order

P 77, JA 1402-03. The Commission accepted those filings because it found that the program as a whole would assign costs to beneficiaries. *See* Complaint Order P 62, JA 610; *see also Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 703-04 (D.C. Cir. 2010) (noting that the Court "give[s] deference to FERC's interpretations of its own precedents").

Similarly, when the Commission accepted the use of the old method in System Operator's first-ever Support Resource Agreement, in the 2013 Escanaba Order, the justness and reasonableness of the cost allocation provision was not raised or addressed in that proceeding. Second Order P 77, JA 1402; *see also* Complaint Order P 63, JA 610. In contrast, the sole purpose of the Wisconsin Commission's 2014 complaint in this proceeding was to challenge that method, and this proceeding "establishe[d] a record that illustrates the unjust and unreasonable application of the [American Transmission] *pro rata* cost allocation provision." Complaint Order P 63, JA 610.

Further, Michigan responds that the preliminary load-shed study is not substantial enough to constitute substantial evidence. Br. 43. It contends that the Commission found the preliminary study to be substantial evidence merely because it would produce a different cost allocation than the old method. Br. 44. But Michigan fundamentally misunderstands the Commission's order. The Commission was not concerned with whether the methods would produce different

results; it was concerned with *why* they would produce different results: the old method is not tied to reliability benefits, but the preliminary load-shed study is. *See* Complaint Order PP 59-61, JA 608-09; *see also Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("The substantial evidence inquiry turns not on how many discrete pieces of evidence the Commission relies on, but on whether that evidence adequately supports its ultimate decision.").

During the agency proceeding, Michigan made certain detailed arguments in an attempt to undermine the value of the preliminary load-shed study. *See* R.162 at 14-16, JA 790-92. But on appeal, Michigan has not challenged the validity of that study beyond noting that it was "preliminary." *See* Br. 40-47. The Commission directly addressed that argument. *See* Second Order P 74, JA 1401 ("We affirm our finding that the preliminary nature of the load-shed study does not invalidate the evidence presented by the study that the [old method] was faulty."). To the extent Michigan attempts to expand its challenge on reply, it has waived any such arguments by not including them in its opening brief. *See Rollins Envtl. Servs. (NJ) Inc. v. EPA*, 937 F.2d 649, 652 n.2 (D.C. Cir. 1991) ("Issues may not be raised for the first time in a reply brief.").

Michigan's opening brief also includes two arguments that it did not properly raise to the Commission. First, Michigan argues that the Commission failed to explain how the six-percentage point difference between the results of the

old method and the final load-shed study could support a finding that the old method "is 'entirely outside the zone of reasonableness.'" Br. 45. Second, Michigan argues that the Commission failed to explain how it can rely on the preliminary load-shed study as substantial evidence of the old method's inappropriateness, while also finding the preliminary load-shed study insufficient to set the replacement rate. *See* Br. 45.

Michigan did not raise either of those arguments on rehearing to the Commission. *See* R.162, R.164, R.165, R.171, R.173, R.490, R.491, R.492, R.493, R.495 (failing to raise the concept of the zone of reasonableness, or the Commission's alleged inconsistent use of the preliminary study). As a result, these arguments are not properly before the Court. *See Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 738-39 (D.C. Cir. 2012) (holding judicial review is limited to grounds "'set forth specifically'" in rehearing request) (quoting 16 U.S.C. § 825*l*(a)).

In any event, both arguments are without merit. The six-percentage point difference to which Michigan refers is irrelevant. It is based on the first version of the final load-shed study (based on five Local Balancing Authorities), which would have allocated approximately 86 percent of the costs to Wisconsin. *See* R.178 at 6, JA 984; *see also supra* p.17. The Commission did not rely on that version of the final load-shed study because it was superseded by an updated version (based on

six Local Balancing Authorities), thereby making it unrepresentative of how costs would be allocated under a Local Balancing Authority-based approach. *See* Second Order P 82, JA 1406.

Further, the fact that the Commission did not set the replacement rate using the load-shed studies does not render those studies unreliable for purposes of assessing the appropriateness of the old method. *See, e.g.*, *Emera*, 854 F.3d at 24-26 (explaining the "two-step procedure" that FPA section 206 requires); *see also* Second Order P 86 & n.210, JA 1408 (explaining that using these types of studies might produce just and reasonable results for other Support Resources). Indeed, the preliminary and final load-shed studies are still probative evidence of the old method's invalidity because, unlike the old method, they represent possible cost allocations that have a nexus to reliability benefits. *See* Complaint Order P 64, JA 610 (contemplating the possibility of unexpected results from the final load-shed study that would require a different approach, while continuing to rely on the preliminary load-shed study for the first prong of the section 206 analysis); *see also* Second Order P 74, JA 1401.

Michigan also makes several arguments regarding the purported intent behind the old method. *See* Br. 47-53. The Commission considered those arguments and found them to be unpersuasive. *See* Complaint Order P 65, JA 611; Second Order P 76, JA 1402. These arguments all suffer from the same fatal flaw:

they assume that a cost allocation approach that has been used for transmission assets or must-run generators must be equally just and reasonable for a Support Resource program. The Commission reasonably concluded otherwise. *See* Complaint Order P 65, JA 611 (explaining that the original intent of treating American Transmission as a single pricing zone was to promote sharing of costs "for regional transmission planning," and concluding that the old method does not further it because generation assets "are not subject to the . . . transmission planning process"); Second Order P 76, JA 1402 (same); *id.* P 78, JA 1403 (distinguishing Support Resources from "transmission reliability assets" and must-run generators).

And, even if that assumption were accurate, it would not require a different outcome. *See* Second Order P 76, JA 1402 ("the original intent in adopting" the cost allocation provision does not preclude the Commission from "adapt[ing] the Tariff when new evidence is brought to light that justifies a different approach"); Complaint Order P 65, JA 611 ("[T]he desire to serve the original intent of the [American Transmission] formation does not . . . override the requirement in [System Operator's] Tariff and Commission policy."); *id.* ("[T]hat original intent does not require *all* costs to be shared equally in perpetuity.") (emphasis added).

Finally, Michigan contends that the Commission's orders represent results-oriented, rather than reasoned, decision-making. Br. 53. The only result the

Commission seeks is fair allocation of Support Resource costs, based on the cost causation principle. At bottom, the orders reveal the Commission's commitment to the cost causation principle and its willingness to consider more accurate means of identifying beneficiaries as new solutions arise. The Court should deny Michigan's attempt to dilute that principle. *See Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 775-76 (7th Cir. 2013) (rejecting arguments from Michigan parties—including the Michigan Public Service Commission—in favor of a *more granular* assessment of benefits associated with certain types of transmission projects, in order to reduce Michigan utilities' share of the cost of those facilities).

III. THE COMMISSION REASONABLY EXERCISED ITS REMEDIAL DISCRETION TO AUTHORIZE SURCHARGES

In this case, the Commission considered the relevant equitable factors and determined that, on balance, refunds should be granted. *See* Complaint Order P 68, JA 612; Second Order PP 90-93, JA 1410-13; Fifth Order PP 40-61, JA 1725-36. Because this case involves the allocation of costs among customers, and because System Operator is a non-profit entity with no funds of its own with which to pay the refunds, the Commission also authorized surcharges—to be paid by those customers (generally in Michigan) who underpaid during the refund period—to fund the refunds to those (generally in Wisconsin) who overpaid. *See, e.g.*, Fifth Order PP 51, 79, JA 1732, 1745. The Commission has deferred the implementation of Presque Isle surcharges and refunds pending the outcome of the

ongoing agency proceedings on the compensation for that unit. *See* Second Order P 93, JA 1412-13.

Michigan does not challenge the agency's determination that refunds and surcharges are warranted based on the Commission's balancing of the equities. *See* Br. 30-40. In its view, the Commission lacks statutory authority to remedy the inequities underlying the Commission's refund decision. But Michigan fails to recognize the breadth of the Commission's remedial authority, as recently clarified by this Court in its 2016 *Xcel*, 815 F.3d 947, and 2017 *TNA*, 857 F.3d 354, decisions, to correct the particular unjust circumstances presented in this case. *See* Fifth Order PP 48-50, JA 1730-31.

A. The Commission's Refunds And Surcharges Determination

Michigan's legal challenge is narrow, but is best understood in the context provided in the Commission's Fifth Order. *See* Fifth Order PP 41-61, JA 1726-36. Briefly, in the Fifth Order, the Commission carefully explained its traditional approach to refunds and surcharges, and how that approach applies to the particular facts of this proceeding. *See id*. Cases before the Commission implicating refunds generally involve either an overcharge, where the relevant utility collected more than the just and reasonable rate during the refund period, or cost allocation. *See id*. PP 41-42, JA 1726-27. In a cost allocation case, the utility collected the proper level of revenues, but it is later determined that the revenue collection should have

been allocated differently among the utility's customers. *See id*. P 42, JA 1727. This is a cost allocation case: Michigan does not dispute that applying the just and reasonable rate during the refund period results in a set of customers (Michigan) who paid too little, and a set of customers (Wisconsin) who paid too much. *See id*. P 51, JA 1732. Further, in this case no party disputes that System Operator, "as a non-profit entity, must fund the refunds entirely through surcharges." *Id*. P 79, JA 1745; *see also, e.g.*, Second Order P 37, JA 1381 (noting agreement of petitioners Verso Corporation and the mining companies).

In cost allocation cases, such as this, the Commission often finds that equitable considerations do *not* support the award of refunds. Fifth Order P 44, JA 1728. The Commission "has cited two primary grounds for its general 'no refund' policy in cost allocation cases: (1) the unfairness that results from retroactive implementation of a new rate for both utilities and customers who cannot alter their past action in light of that new rate; and (2) the potential for under-recovery." *Id*.

In this uncommon case, however, the Commission held that "neither of these grounds applies here." *Id*. Neither the parties nor the Commission identified a past action made in reliance on the prior cost allocation method. *Id*. PP 45-46, JA 1728-29. And there is no potential for under-recovery by the public utility (System Operator) here, because it can calculate the "exact amount of [Support

Resource] costs that should be assessed to each [load-serving entity] that underpaid in order to refund [those] that overpaid." *Id*. P 47, JA 1730. In other words, because System Operator can collect exact surcharges from those who underpaid, and distribute them to those who overpaid, there is no risk of undercollection.

As the result of this threshold analysis, the Commission went on to consider the equities and determined that, on balance, the equities warrant granting refunds and allowing surcharges. Fifth Order P 50, JA 1731. As the foundation of its analysis, the Commission explained that Support Resource Agreements are unilateral agreements of short duration that must go into effect quickly to maintain reliability, and that these circumstances permit only "limited recourse for parties that are allocated" costs under an Agreement. Fifth Order PP 52-53, JA 1732-33. The allocation method is governed by System Operator's tariff, which means that a complaint under Federal Power Act section 206 is the only procedural vehicle to challenge the method. *Id*. P 53, JA 1733. Thus, if only prospective relief is available, customers would likely receive no relief at all. *Id*. This case illustrates this very problem.

The Commission also considered it significant that the refunds and surcharges remedy would have no impacts beyond customers allocated the Support Resource costs. Surcharges would be assessed "directly from [entities] that paid too little for" the service and "refunds given directly to [entities] that paid too

much for the same service." *Id*. P 51, JA 1732. Because the Agreements are out-of-market, there is no need to re-run a market and no impact on prices in System Operator's energy and other markets. *Id*. PP 51, 54, 56, 59, JA 1732, 1733, 1734, 1735. Finally, all impacted parties have been on notice from the refund effective date—the date of Wisconsin's 2014 complaint (or later, depending on the agreement)—that the allocation method could change and refunds and surcharges could be required. *Id*. PP 51, 56, 60-61, JA 1732, 1734, 1735-36.

B. In These Circumstances, The Commission Has Statutory Authority To Authorize Surcharges

Michigan fundamentally misunderstands the nature and foundation of the Commission's decision to authorize surcharges to fund refunds. *See*, *e.g*., Br. 39. On the basis of the equities highlighted above, the Commission found it appropriate to invoke its equitable authority, under both sections 206, 16 U.S.C. § 824e, and 309, 16 U.S.C. § 825h, of the Federal Power Act. *See* Fifth Order PP 40-50, JA 1725-31. Michigan's reading of these statutory provisions would leave the Commission without a remedy at all in cases involving similar equitable circumstances—a result at odds with the fundamental consumer protection purpose of the Federal Power Act.

Section 309 of the Federal Power Act vests the Commission with the "power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders . . . as it may find necessary or appropriate to carry out the provisions of this

chapter." 16 U.S.C. § 825h. As this Court long ago explained, "necessary or appropriate" provisions, like section 309, are "not restricted to procedural minutiae, and . . . authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act." *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967). This authority allows the Commission to carry out its responsibilities "in the light of new and evolving problems." *Id*.

Federal Power Act section 206 authorizes two specific types of remedies where the Commission finds that the utility's rate is unjust and unreasonable. Under section 206(a), the Commission can set a new, prospective rate, "to be thereafter observed and in force." 16 U.S.C. § 824e(a). And under section 206(b), the Commission may set a "refund effective date" no earlier than the date of a complaint and order refunds for the 15-month period starting with that effective date. 16 U.S.C. § 824e(b).

In the past two years, this Court has twice considered the breadth of the Commission's remedial authority under Federal Power Act section 309, and the relationship of that authority to the remedies provided by both sections 205, 16 U.S.C. § 824d, and 206, 16 U.S.C. 824e, of the Act. *See Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947 (D.C. Cir. 2016); *TNA Merchant Projects, Inc. v. FERC*, 857

F.3d 354 (D.C. Cir. 2017). In both cases—one (*Xcel*) issued before the Fifth Order and one (*TNA*) issued after—the Court held that the Commission's remedial authority under Federal Power Act section 309 authority was broader than the Commission thought. *Xcel*, 815 F.3d at 952-56; *TNA*, 857 F.3d at 359-62. Specifically, the Court held that the Commission "misapprehended its remedial powers and thus arbitrarily declined to weigh the equities" in ruling on the relief requested. Fifth Order P 49, JA 1731 (quoting *Xcel*, 815 F.3d at 953); *see also TNA*, 857 F.3d at 359-60, 363 (holding that FERC has authority to order recoupment, notwithstanding limits on its refund authority, and remanding for FERC to fully consider the equities). Here, acting with the Court's guidance in *Xcel*, the Commission found that it has statutory authority in these circumstances to implement refunds through retroactive surcharges. *See* Fifth Order P 49, JA 1731.

Referencing *Xcel*, the Commission explained in the Fifth Order that Federal Power Act section 206(a)—and specifically, the Court's interpretation of that provision in *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2009), discussed below—"does not bar refunds in these proceedings." Fifth Order P 49, JA 1731. In *Xcel*, the Court rejected the Commission's argument that FPA section 206(a), allowing a new rate to be fixed prospectively, barred it from exercising remedial authority under FPA section 309. 815 F.3d at 955. Distinguishing between relief under FPA sections 206 and 309, the Court explained that "no precedent is cited,

and we are aware of none, for the proposition that the Commission's equitable authority does not encompass refunds as well as surcharges." *Id*. (citing *Nat. Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992)); *see also* Fifth Order P 49, JA 1731 (same). In *TNA*, the Court followed a similar path. 857 F.3d at 359-60. There, the Court held that limits on refunds under other provisions of the Act do not constrict the Commission's authority to issue an order requiring recoupment of refunds under Federal Power Act section 309. *Id*. at 359. Those limits on *refunds*—not *recoupment*—were not "specific statutory strictures" that "plainly limit FERC's authority" to remedy legal errors of the type involved in *Xcel*, and also to "correct unjust situations." *Id*.

As in *Xcel* and *TNA*, the Court should hold here that the broad grant of remedial authority in section 309 of the Federal Power Act is not constrained by limits in section 206, in these limited circumstances where the Commission has determined that refunds under section 206 are warranted by the equities (and no party challenges those refunds), and surcharges are necessary to implement those refunds due to the nature of cost allocation cases and the non-profit status of System Operator. These provisions can, and should, be construed harmoniously, and consistent with the overall purpose of the Federal Power Act. *See Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 698-701 (D.C. Cir. 2014) (finding potentially contradictory statutory provisions "can be reasonably construed as grants of

authority that complement and overlap," *id*. at 698, and deferring to the agency's reasonable interpretation of the ambiguities created by that relationship); *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (affirming agency's construction of statutory mandates where it "harmonizes the statutes by applying [one provision] to guide agencies' existing discretionary authority, but not reading it to override express statutory mandates"); *Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1051 (9th Cir. 2006) (holding that, where a case is initiated with a section 206 complaint, but the need for additional remedies becomes apparent, the Commission may invoke its section 309 authority to order additional remedies (there, restitution for tariff violations), not subject to the time limit on refunds in section 206(b)). Here, the Commission's reliance on section 309 is consistent with the "primary aim" of the Act—"the protection of consumers from excessive rates and charges." Fifth Order P 55, JA 1734 (citing *Xcel*, 815 F.3d at 952-53 (quoting *Mun. Light Bds. v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971)); *Adirondack Med. Ctr.*, 740 F.3d at 701 (rejecting interpretation that "severely cabins the [agency's] ability to rectify a difficult and legitimate problem").

In challenging the Commission's authority, Michigan first claims that Federal Power Act section 206(a) prohibits the Commission—in any circumstances—from authorizing surcharges in order to fund refunds the

Commission directs under FPA section 206(b). *See* Br. 30-40. Michigan relies almost entirely on *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2009). In *City of Anaheim*, the Court held that FPA section 206(a) bars the Commission from retroactively imposing a rate increase sought by a utility. Fifth Order P 48, JA 1730. *City of Anaheim* involved rates for a so-called "must-offer obligation," which required California generators to offer all available capacity at rates specified in the tariff of the independent system operator for California—the equivalent of Midcontinent Independent System Operator here. 558 F.3d at 522. Before the agency, utility sellers filed a complaint, under FPA section 206, alleging that the rates they were required to charge were too low. Fifth Order P 48, JA 1730. The Commission agreed and, ultimately, after further proceedings, fixed a new rate and imposed it retroactively to a date before the initial order on the complaint. *City of Anaheim*, 558 F.3d at 523. In support, the Commission argued that its refund authority under section 206(b) allowed it to increase the rate retroactively. *See* Fifth Order P 48, JA 1730.

The Court disagreed, holding that Federal Power Act section 206(a) allows the Commission to fix the new rate only prospectively, while section 206(b), allowing refunds, was wholly inapplicable in those circumstances. *City of Anaheim*, 558 F.3d at 523-24. Section 206(b), the Court held, "applies in cases where the complainant is a *purchaser* alleging that the rates it paid were too high,"

but that "this case involves a complainant *seller* alleging that the rates it received were too low." *Id.* at 524. Because FPA section 206(b) "authorizes only retroactive refunds (rate decreases), not retroactive rate increases," it did not permit the Commission to impose the retroactive rate increases sought by the seller. *Id.*

In the orders on review here, the Commission held that *City of Anaheim* is entirely distinguishable on its facts, *see* Fifth Order P 48, JA 1730, and, in any event, *Anaheim* does not "speak[] to the Commission's power under section 309 or its equivalent."[4] *Xcel*, 815 F.3d at 955. As the Court emphasized in *City of*

[4] The Commission has acknowledged that, in some circumstances, the Court's interpretation of FPA section 206 in *City of Anaheim* may preclude the imposition of retroactive rate increases. In the orders on remand from *Black Oak*, 725 F.3d 230, the Commission relied on that interpretation in support of a decision to deny refunds (and order recoupment of refunds already paid). *See Black Oak Energy, L.L.C. v. PJM Interconnection*, 153 FERC ¶ 61,231 (2015), *reh'g denied*, 155 FERC ¶ 61,013 (2016). When a party petitioned for judicial review of those orders, the Commission sought, and this Court granted, a voluntary remand to allow the Commission to reconsider those orders in light of the orders on review here. *See Energy Endeavors v. FERC*, No. 16-1172 (D.C. Cir. Nov. 9, 2016) (order granting voluntary remand).

In another set of orders, cited by Michigan (Br. 35), the Commission acknowledged that *City of Anaheim* may preclude retroactive surcharges. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 155 FERC ¶ 61,120, *reh'g denied*, 156 FERC ¶ 61,221 (2016). Those orders are pending on review before this Court in *Louisiana Public Service Commission v. FERC*, No. 16-1382 (D.C. Cir. filed Nov. 4, 2016) (briefing completed; oral argument not scheduled). On brief in that case, the Commission explained that in the orders there on review, the Commission denied refunds on three separate bases; therefore, the Court need not necessarily reach the question of the scope of the *City of Anaheim*. *La. Pub. Serv. Comm'n v. FERC*, No. 16-1382, Br. of Resp't at 23-24 (D.C. Cir. July 17, 2017).

Anaheim, that case involved a seller complaining that its rates were too low, and a resulting order from the Commission increasing the seller's rates for the refund effective period. *See* Fifth Order P 48, JA 1730 (citing *City of Anaheim*, 558 F.3d at 524). That case thus involved the "direct imposition of retroactive surcharges to effectuate a rate increase," while in this case the Commission has not changed the Support Resource rate—only how the rate is allocated among customers. Fifth Order P 48, JA 1730. Michigan accordingly misunderstands *City of Anaheim* when it claims that "this court has already found that FERC may not order retroactive surcharges to pay for refunds." Br. 30. *City of Anaheim* did not involve "surcharges to pay for refunds" or refunds at all—just a rate increase requested by the utility complainant imposed, in error, retroactively.[5]

This important distinction goes to the nature of the remedy, not, as Michigan incorrectly asserts, the identity of the complainant. *See* Br. 34. Here, there is no

[5] *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1217 (D.C. Cir. 2009), on which Michigan relies for the first time in its opening brief, Br. 30-32, is similarly distinguishable. In *Exxon Mobil*, the Court affirmed the Commission's decision to limit refunds to the amount of the challenged rates paid during the refund effective period, as required by FPA section 206(b). 571 F.3d at 1217. The Court recognized the "potentially conflicting directives" of sections 206(a) and 206(b), *id*. at 1215, but, like *Anaheim*, *Exxon Mobil* did not address surcharges or the Commission's authority under FPA section 309. *See also City of Redding v. FERC*, 693 F.3d 828 (9th Cir. 2012), *cited in* Br. 32-33 (holding that FPA section 206(b) does "not provide FERC with retroactive rate setting authority over non-jurisdictional sellers," but not addressing surcharges or FPA section 309).

increase in the rate the utility collects, while, in *City of Anaheim*, the retroactive rate increase was for the purpose of increasing the utility's revenue. *See* Fifth Order P 48, JA 1730 (explaining that, unlike in *City of Anaheim*, in this case "the Commission has not changed the [Support Resource] rates established under the Tariff"). Just as the Court has distinguished between the remedies of refunds and recoupment, as in *TNA*, it should distinguish between an order of retroactive surcharges to *increase* a rate and an order of retroactive surcharges that does not increase a rate, but funds validly authorized refunds. *See TNA*, 857 F.3d at 359 (holding the limits of FPA section 205 inapplicable, because "[t]his case concerns recoupment, which is an entirely distinct remedy from a refund.") (citing *Black Oak*, 725 F.3d at 243-44 (distinguishing recoupment and refunds)).

Thus, a reasonable reading of section 206(a) in light of *City of Anaheim* demonstrates that it is not a "specific statutory stricture," to use the language of *TNA*, 857 F.3d at 359, which would bar the Commission from authorizing retroactive surcharges in order to implement refunds to the Wisconsin entities who overpaid during the refund period. Rather, the fashioning of this remedy, by employing all available authorities, falls well within the Commission's remedial discretion. *See Niagara Mohawk Power Corp.*, 379 F.2d at 159 ("the breadth of agency discretion is, if anything, at zenith when the action assailed relates

primarily . . . to the fashioning of policies, remedies and sanctions . . . in order to arrive at maximum effectuation of Congressional objectives").

Next, Michigan claims that the Commission may not invoke its section 309 authority in the absence of the agency's own legal error. Br. 39. Such a limit finds no support in the statute or precedent. In *Xcel*, the Court specifically used the term "legal error," 815 F.3d at 953, while in *TNA* the Court more broadly explained that FPA section 309 "affords the agency broad authority to 'remedy its errors' and *correct unjust situations*." 857 F.3d at 359 (emphasis added). In *TNA*, the Court emphasized that the Commission's precedents were confusing and that the utility did not have "good reason to know that its rate filing would . . . be subject to refunds," holding that "[t]hese circumstances offer enough, pursuant to *Xcel*, to justify an order of recoupment under [section] 309." *Id*. at 361. *TNA* thus holds particular relevance here, where Michigan does not challenge the Commission's determination that the inequitable circumstance here—or "unjust situation"—warrants refunds and surcharges.

Further, this Court has affirmed the Commission's actions taken under Federal Power Act section 309 in a broad range of factual circumstances not predicated on legal error or a court remand. *See, e.g.*, *Towns of Concord, Norwood, and Wellesley v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992) ("As to ordering refunds of amounts improperly collected in excess of the filed rate, the

Commission's authority may also be inferred from section 309 of the Act . . . ."); *Niagara Mohawk Power Corp.*, 379 F.2d at 158 (holding that section 309 authorizes agency "to establish effective dates of licenses earlier than the date of issuance"); *N. Nat. Gas Co. v. FERC*, 785 F.2d 338, 341 (D.C. Cir. 1986) (allowing Commission to make abandonment authorization retroactive, notwithstanding statute's lack of express authority to do so).

Michigan likewise misunderstands the role of notice in this case. Michigan claims that "[i]n the absence of legal error, notice cannot create jurisdiction to order surcharges." Br. 36-37. But the Commission does not claim that notice creates jurisdiction. Rather, the fact that Wisconsin's complaint put the parties on notice of the possibility that the rate could change, and the Commission could order refunds and surcharges, merely means that the imposition of those remedies does not violate the filed rate doctrine—a question distinct from whether such remedies fall within the Commission's statutory authority. *See* Fifth Order P 48, JA 1730 (citing *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001), for the proposition that, with adequate notice, "imposition of surcharges does not violate the filed rate doctrine"); *see also Anaheim*, 558 F.3d at 524-25 (finding notice irrelevant where Commission lacked statutory authority to require retroactive rate increase). Importantly, Michigan has now abandoned—and

may not revive on reply—its claim that notice was inadequate here. *See* Fifth Order PP 51, 56, 60-61, JA 1732, 1734, 1735-36; *see Rollins*, 937 F.2d at 652 n.2.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied and the Commission's orders should be affirmed.

Respectfully submitted,

James P. Danly
General Counsel

Robert H. Solomon
Solicitor

/s/ Holly E. Cafer
Holly E. Cafer
Senior Attorney

Nicholas M. Gladd
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, D.C. 20426
Phone: (202) 502-8485
Fax: (202) 273-0901
Email: holly.cafer@ferc.gov

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,186 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

/s/ Nicholas M. Gladd
Nicholas M. Gladd
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, D.C. 20426
Phone: (202) 502-8836
Fax: (202) 273-0901
Email: nicholas.gladd@ferc.gov

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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 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

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

(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.

Subsec. (g)(5). Pub. L. 109–58, § 1277(b)(1), substituted ''2005'' for ''1935''.

1992—Subsec. (g). Pub. L. 102–486 added subsec. (g).

1978—Subsec. (b). Pub. L. 95–617, § 204(b)(1), designated existing provisions as par. (1), inserted ''except as provided in paragraph (2)'' after ''in interstate commerce, but'', and added par. (2).

Subsec. (e). Pub. L. 95–617, § 204(b)(2), inserted ''(other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title)'' after ''under this subchapter''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1277(b)(1) of Pub. L. 109–58 effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such date, see section 1274 of Pub. L. 109–58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Pub. L. 95–617, title II, § 214, Nov. 9, 1978, 92 Stat. 3149, provided that:

''(a) PRIOR ACTIONS.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall apply to, or affect, any action taken by the Commission [Federal Energy Regulatory Commission] before the date of the enactment of this Act [Nov. 9, 1978].

''(b) OTHER AUTHORITIES.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title.''

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

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

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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.

[1] See References in Text note below.

individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–452 effective on 60th day following Oct. 15, 1970, and not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before 60th day following Oct. 15, 1970, see section 260 of Pub. L. 91–452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

§ 825g. Hearings; rules of procedure

(a) Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 10, 1920, ch. 285, pt. III, § 308, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

§ 825h. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 10, 1920, ch. 285, pt. III, § 309, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

COMMISSION REVIEW

Pub. L. 99–495, § 4(c), Oct. 16, 1986, 100 Stat. 1248, provided that: ''In order to ensure that the provisions of Part I of the Federal Power Act [16 U.S.C. 791a et seq.], as amended by this Act, are fully, fairly, and efficiently implemented, that other governmental agencies identified in such Part I are able to carry out their responsibilities, and that the increased workload of the Federal Energy Regulatory Commission and other agencies is facilitated, the Commission shall, consistent with the provisions of section 309 of the Federal Power Act [16 U.S.C. 825h], review all provisions of that Act [16 U.S.C. 791a et seq.] requiring an action within a 30-day period and, as the Commission deems appropriate, amend its regulations to interpret such period as meaning 'working days', rather than 'calendar days' unless calendar days is specified in such Act for such action.''

§ 825i. Appointment of officers and employees; compensation

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 10, 1920, ch. 285, pt. III, § 310, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amended Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attor-neys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employ-ees of the United States'' have been omitted as obsolete and superseded.

Such appointments are subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order No. 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

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

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

AMENDMENTS

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

REPEALS

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

§ 825j. Investigations relating to electric energy; reports to Congress

In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

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

§ 825k. Publication and sale of reports

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

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, § 1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

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

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Docu-ments.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§ 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

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D.C. Cir. Nos. 15-1098*, et al*.

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 11th day of December 2017, served the foregoing upon the counsel listed in the Service Preference Report via the Court's CM/ECF system or via U.S. Mail, as indicated below:

Sylvia Bartell Husch Blackwell LLP 750 17th Street, NW Suite 900 Washington, DC 20006	Email
Cynthia Schneider Bogorad Spiegel & McDiarmid LLP 1875 Eye Street, NW Suite 700 Washington, DC 20006	Email
Richard P. Bonnifield Stoel Rives LLP 601 13th Street, NW Suite 850N Washington, DC 20005	Email
David W. D'Alessandro Stinson Leonard Street LLP 1775 Pennsylvania Avenue, NW Suite 800 Washington, DC 20006-4605	Email

Kelly Anne Daly — Email
Stinson Leonard Street LLP
1775 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006-4605

William F. Demarest Jr. — Email
Husch Blackwell LLP
750 17th Street, NW
Suite 900
Washington, DC 20006

Lauren DuVal Donofrio — Email
Department of Attorney General
7109 W. Saginaw Hwy.
3rd Floor
Lansing, MI 48917

Robert C. Fallon — Email
Cozen O'Connor
1200 19th Street, NW
3rd Floor
Washington, DC 20036

Jeffrey C. Gerish — Email
Plunkett & Cooney, PC
38505 Woodward Avenue
Suite 2000
Bloomfield Hills, MI 48220

Jennifer Utter Heston — US Mail
Fraser Trebilcock Davis & Dunlap, PC
124 W. Allegan Street
Suite 1000
Lansing, MI 48933

Steven Donald Hughey — Email
Office of the Attorney General, State of Michigan
Public Service Division
6545 Mercantile Way
Suite 1
Lansing, MI 48911

Christopher Rhodes Jones — Email
Troutman Sanders, LLP
401 9th Street, NW
Suite 1000
Washington, DC 20004-2134

Suedeen Gibbons Kelly — Email
Jenner & Block
1099 New York Avenue, NW
Suite 900
Washington, DC 20001-4412

Phyllis G. Kimmel — Email
McCarter & English, LLP
1015 15th Street, NW
12th Floor
Washington, DC 20005-2605

Rory McGarry — Email
Public Service Commission of Wisconsin
Office of General Counsel
610 North Whitney Way
Madison, WI 53705-2729

Saulius K. Mikalonis — Email
Plunkett & Cooney, PC
38505 Woodward Avenue
Suite 2000
Bloomfield Hills, MI 48220

Patrick L. Morand — Email
Duane Morris LLP
505 9th Street, NW
Suite 1000
Washington, DC 20004-2166

Steven Allen Neeley Jr. — Email
Husch Blackwell LLP
750 17th Street, NW
Suite 900
Washington, DC 20006

Debra Ann Palmer — Email
Reed Smith LLP
1301 K Street, NW
Suite 1000, East Tower
Washington, DC 20005-3317

Stephen Charles Pearson — Email
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006

David E. Pomper — Email
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006

Alan I. Robbins — Email
Jennings, Strouss & Salmon, PLC
Suite 801
1350 I Street, NW
Suite 810
Washington, DC 20005

Debra D. Roby — Email
Jennings, Strouss & Salmon, PLC
Suite 810
1350 I Street, NW
Suite 810
Washington, DC 20005

A. Hewitt Rose III — Email
Holland & Knight LLP
800 17th Street, NW
Suite 1100
Washington, DC 20006-6801

Christine C. Ryan — Email
McCarter & English, LLP
1015 15th Street, NW
12th Floor
Washington, DC 20005-2605

Jeffrey L. Small — Email
Midcontinent Independent System Operator, Inc.
720 City Center Drive
Carmel, IN 46032

Regina Y. Speed-Bost — Email
Reed Smith LLP
1301 K Street, NW
Suite 1000, East Tower
Washington, DC 20005-3317

Francis Alvin Taylor Jr. — Email
Holland & Knight LLP
800 17th Street, NW
Suite 1100
Washington, DC 20006-6801

Justin Michael Vickers — Email
Environmental Law & Policy Center
35 E. Wacker Drive
Suite 1600
Chicago, IL 60601

Thomas James Waters — Email
Fraser Trebilcock Davis & Dunlap, PC
124 W. Allegan Street
Suite 1000
Lansing, MI 48933

Elizabeth Ward Whittle — Email
Nixon Peabody LLP
799 9th Street, NW
Suite 500
Washington, DC 20001-4501

Andrew Bradley Young — Email
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006-1101

Marie Denyse Zosa — Email
Stinson Leonard Street LLP
1775 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006-4605

/s/ Nicholas M. Gladd
Nicholas Gladd
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, D.C. 20426
Telephone: (202) 502-8836
Fax: (202) 273-0901
Email: nicholas.gladd@ferc.gov