ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 16-1027

NRG POWER MARKETING LLC,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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April 17, 2017

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

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

B. Rulings Under Review

1. *Midwest Independent Transmission System Operator, Inc.*, 139 FERC ¶ 61,199 (2012), JA 1; and

2. *Midwest Independent Transmission System Operator, Inc.*, 153 FERC ¶ 61,229 (2015), JA 112.

C. Related Cases

This case has not previously been before this Court or any other court. Originally, this case was consolidated with *Madison Gas and Electric Co., et al., v. FERC*, Docket No. 16-1019. After opening briefs were filed in the consolidated proceeding, the Court, in a January 6, 2017 order, granted respondent Federal Energy Regulatory Commission's ("Commission") January 3, 2017 motion for partial voluntary remand of the record in No. 16-1019, terminated consolidation of the petitions, and placed No. 16-1019 in abeyance pending further Commission proceedings.

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

April 17, 2017

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GLOSSARY

Commission	Federal Energy Regulatory Commission
FERC	Federal Energy Regulatory Commission
First Order	*Midwest Indep. Transmission System Operator, Inc.*, 139 FERC ¶ 61,199 (2012)
NRG	Petitioner NRG Power Marketing LLC
Rehearing Order	*Midwest Indep. Transmission System Operator, Inc.*, 153 FERC ¶ 61,229 (2015)
System Operator	Midcontinent Independent System Operator, Inc.

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FEDERAL ENERGY REGULATORY COMMISSION
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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

This proceeding involves the Federal Energy Regulatory Commission's ("FERC" or "Commission") review of a tariff filing submitted by the Midcontinent Independent System Operator, Inc. ("System Operator"), formerly called the Midwest Independent Transmission System Operator, Inc. That filing addressed the System Operator's continuing efforts to assure "resource adequacy," i.e., that its electric utility members are able to procure sufficient electric "capacity" to maintain reliable system operations. The Commission approved the portions of the

proposal it found the System Operator had shown were "just and reasonable," within the meaning of the Federal Power Act, and rejected those it found the System Operator had not. *Midwest Indep. Transmission System Operator, Inc.*, 139 FERC ¶ 61,199 (2012) ("First Order"), JA 1, *on reh'g*, 153 FERC ¶ 61,229 (2015) ("Rehearing Order"), JA 112.

The issues on appeal are:

(1) Whether the Commission reasonably found that the System Operator had not shown that two proposals – to impose buyer-side mitigation and to require capacity-deficient utilities to purchase their capacity in annual auctions – were just and reasonable; and

(2) Whether the Commission reasonably found that the System Operator had shown that its proposal to continue using a vertical demand curve was just and reasonable.

STATUTES AND REGULATIONS

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

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. The Federal Power Act

Section 201 of the Federal Power Act, 16 U.S.C. § 824, provides the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. Federal Power Act section 205, 16 U.S.C. § 824d(a) and (b), requires that rates charged by public utilities for the transmission or sale of electric energy subject to the Commission's jurisdiction are just and reasonable and not unduly discriminatory. The utility proposing tariff changes under Federal Power Act section 205 bears the burden to demonstrate that the proposed changes are just and reasonable and not unduly discriminatory. *S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 181 (D.C. Cir. 2013); *Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 282–83 (D.C. Cir. 2006). (citing 16 U.S.C. § 824d(a) and (b)).

B. Electric Capacity

"An abiding concern in regulating electricity supply is the need for adequate reserve capacity." *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 38 (1st Cir. 2001).

"The goal is for [load-serving entities[1]] to purchase sufficient capacity to easily meet expected peaks in electricity demand on their transmission systems." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009). "'Capacity' is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties – generally, generators – who can either produce more or consume less when required." *Id. See also Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 467 (D.C. Cir. 2008), *rev'd in part sub nom. NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010) ("In a 'capacity market' – as opposed to a wholesale electricity market – the [transmission provider] compensates the generator for the *option* of buying a specified quantity of power irrespective of whether it ultimately buys the electricity.") (internal quotation omitted; alteration by Court).

C. Demand Curves

In a capacity market, the available quantity of capacity and the price for this capacity are established by the intersection of a predetermined demand curve and a supply curve constructed from the supply offers of resource owners. *TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 114 (D.C. Cir. 2013). Demand curves

[1] A "load-serving entity" is a utility obligated by law or contract to provide electricity service to end-use customers or to a distribution utility. *S. Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 90 n.12 (D.C. Cir. 2014) (citing FPA section 217(a)(2)-(3), 16 U.S.C. § 824q(a)(2)-(3)).

may be vertical or downward-sloping, with vertical curves setting a specific capacity requirement irrespective of price, and sloped curves plotting different price and quantity combinations. *See, e.g.*, First Order P 238 & n.335, JA 82; *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1234-35 (D.C. Cir. 2005) (describing differences between vertical and sloped demand curves in New York's capacity market).

D. The Orders Approving The System Operator's Original Capacity Provisions

The System Operator operates the transmission facilities of utilities in fifteen states and one Canadian province. *See Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1059 (D.C. Cir. 2008) (describing System Operator's region). It also administers markets, including auctions, to ensure that its utility members procure sufficient energy, capacity and ancillary services to meet system demands. *See FERC, Energy Primer: A Handbook of Energy Market Basics* 59-61, 84-85 (Nov. 2015) (available at https://www.ferc.gov/market-oversight/guide/energy-primer.pdf).

In 2008, the Commission conditionally approved the System Operator's original resource adequacy, or capacity, tariff provisions. *Midwest Indep. Transm. Sys. Operator, Inc.*, 122 FERC ¶ 61,283, *on reh'g*, 125 FERC ¶ 61,061 (2008). Under those provisions, each load-serving entity (local utility) must have sufficient capacity resources to ensure that any event causing an involuntary loss of load

occurs only once in ten years. *Midwest Indep. Transm. Sys. Operator*, 122 FERC ¶ 61,283 P 11; *see also* First Order P 238, JA 81.

The 2008 orders required the System Operator to include provisions in its tariff assessing a financial settlement, or deficiency, charge on load-serving entities that do not meet their capacity requirements. *Midwest Indep. Transm. Sys. Operator*, 122 FERC ¶ 61,283 P 179; *see also* First Order P 2, JA 3. The Commission later approved the System Operator's proposed deficiency charge provisions, finding that they created appropriate incentives for load-serving entities to obtain adequate capacity. *Midwest Indep. Transm. Sys. Operator, Inc.*, 125 FERC ¶ 61,060 P 96 (2008), *on reh'g*, 127 FERC ¶ 61,054 (2009), *on reh'g*, 137 FERC ¶ 61,213 (2011). Furthermore, the Commission rejected requests that it require the System Operator to adopt a downward-sloping demand curve. *Midwest Indep. Transm. Sys. Operator, Inc.*, 125 FERC ¶ 61,060 P 39.

II. The System Operator's Filing Here And Parties' Protests

On July 20, 2011, the System Operator submitted a Federal Power Act section 205, 16 U.S.C. § 824d, filing with the Commission regarding its capacity tariff provisions. The filing included a number of proposals, only a few of which are relevant to the issues raised on appeal.

A. Buyer-Side Mitigation

The System Operator proposed to introduce a mechanism to mitigate the possibility that capacity purchasers might exercise market power. The System Operator's concern was that capacity purchasers might attempt to artificially depress the auction clearing price by constructing a new resource and then making below-competitive level capacity offers from that resource. R.1, Transmittal Letter at 8, 13-14, 17, JA 234, 239-40, 243; *see also* First Order P 44, JA 17.

Under the proposed minimum offer price provisions, capacity offers from non-exempted resources would be subject to mitigation only if the market monitor determined both that the offer is at a less-than-competitive price and that it represents an attempt to improperly reduce the auction clearing price. R.1, Transmittal Letter at 15-17, JA 241-43. Numerous resources were exempted from the minimum offer price provisions: (1) resources included in a load-serving entity's auction opt-out fixed resource adequacy plan; (2) resources needed to meet a load-serving entity's capacity requirement; (3) resources sold bilaterally to another load-serving entity to meet its capacity requirement; (4) resources that are self-certified as qualifying facilities of 20 megawatts or less pursuant to the Public Utilities Holding Company Act of 2005; (5) resources other than those from a combustion turbine or combined cycle generation unit powered by natural gas; (6) resources that were in service or approved for construction prior to July 15,

2011; (7) resources for which the owner is unable to recover capacity costs for the resource through a regulated rate; and (8) resources that previously submitted offers that cleared in any prior auction. *Id.* at 16-17, JA 242-43; *see also* First Order P 46, JA 18.

Various parties protested the minimum offer price provisions. *See* First Order PP 49-65, JA 19-25. Protesters asserted, for example, that the System Operator had not shown the proposed provisions were necessary since its region, unlike other regions, is comprised predominantly of vertically-integrated utilities that have to meet state resource planning mandates, which determine when additional resources are developed. *See id.* at P 49, JA 19. Protestors also asserted that the proposed exemptions would render the provisions ineffective. *See id.* at PP 51, 57, JA 20, 22. Parties also argued about the appropriateness of the provisions' intent requirement. *See id.* at PP 52, 57, JA 21, 22.

B. Three Ways To Meet Capacity Requirements

The System Operator proposed that a load-serving entity would be able to meet its capacity requirements in any of three ways: (1) by purchasing capacity in the auction; (2) by self-scheduling all or part of its capacity requirements in the auction, i.e., offering capacity resources into the auction at a zero price and bidding to purchase the same amount of resources; or (3) by opting out of the auction for all or part of its capacity requirements, by submitting a fixed resource adequacy

plan establishing that it owns or has contractual rights in sufficient resources to cover all or a portion of its capacity requirements. R.1, Transmittal Letter at 8, 10, 13-14, 19-20, JA 234, 236, 239-40, 245-46; *see also* First Order PP 18-19, 292, JA 9-10, 97. If a load-serving entity only partially self-schedules or partially opts-out, the remainder of its capacity would be obtained in the auction. R.1, Transmittal Letter at 10, JA 236.

Some parties protested the opt-out proposal, asserting that it could be used to exercise buyer-side market power by load-serving entities opting out with expensive resources and bidding lower cost ones into the market, suppressing prices. *See* First Order P 26, JA 12. The System Operator responded, however, that these gaming concerns were speculative, that markets work best when participation is voluntary, that forcing reluctant parties to participate in the market creates a financial incentive for them to game the system, and that allowing the proposed opt-out will promote a more efficient market. R.72, System Operator's Answer to Protests at 56, 59, JA 375, 376; *see also* First Order P 30, JA 13.

C. Vertical Demand Curve

The System Operator proposed that its capacity auction would continue using a vertical demand curve, i.e., a "fixed reliability target" expressed as a single megawatt value. *See* Rehearing Order P 147, JA 178; First Order PP 3 & n.13, 238, JA 5, 8; *see also* R.1, Larson Affidavit at 19-20, JA 256-57; R. 72, System

Operator's Answer to Protests at 37-38, JA 365-66. The System Operator explained that it uses a fixed reliability target because "a certain amount of resource capacity is necessary to meet an assumed level of reliability." R. 72, System Operator's Answer to Protests at 37, JA 365. A downward-sloping demand curve, by contrast, may force load-serving entities to either pay for more reliability or receive less reliability than necessary. R.1, Larson Affidavit at 19-20, JA 256-57; R. 72, System Operator's Answer to Protests at 37-38, JA 365-66.

Some parties, including petitioner NRG Power Marketing LLC ("NRG"), opposed the continued use of a vertical demand curve. They favored adoption of a downward-sloping demand curve that would, in their view, reduce price volatility, discourage withholding of capacity by sellers, and increase system reliability at a low overall cost. *See* First Order P 239, JA 82.

Other parties, including state regulatory representatives, opposed adoption of a sloped demand curve. These parties argued that using a sloped curve would force load-serving entities to purchase more capacity than necessary and undermine states' rights to determine their own individual resource adequacy and planning reserve requirements. *See id*. at P 240, JA 82; *see also* R.70, Org. of MISO States Answer at 5-6, JA 361-62. Parties further claimed that using a downward-sloping demand curve could result in excess capacity clearing at above-market prices. *See* First Order P 244, JA 84.

III. The Challenged Orders

A. Buyer-Side Mitigation

The Commission determined, on alternative bases, that the System Operator had not shown that the proposed minimum offer price provisions were just and reasonable. First Order PP 66-70, JA 25-27; Rehearing Order PP 6, 105-20, JA 117, 162-67.

First, agreeing with NRG (*see* Br. at 10, 16-17) and other protesters (*see* First Order PP 51-52, JA 20-21), the Commission found that the proposed provisions would be ineffective. First Order PP 68-70, JA 26-27. To be effective, minimum offer price provisions must include an obligation to bid capacity into the auction at or above a specified minimum price, but the System Operator's proposal would require little capacity to be offered into the auction. *Id.* at P 68, JA 26. Moreover, contrary to Commission precedent, the proposed minimum offer price provisions would apply only if the market monitor found there was an intent to depress the auction clearing price. *Id.* at P 69, JA 27. As the Commission previously determined, it is not reasonable for buyer-side mitigation to depend on intent because an artificially low offer price can unreasonably suppress market prices regardless of intent. *Id.*

Alternatively, agreeing with a number of protesters, *see* First Order P 49, JA 19, the Commission found that the System Operator had not shown that there

was a need at this time to introduce buyer-side mitigation in this region. First Order PP 66-67, JA 25-26; Rehearing Order PP 105-20, JA 162-67. As the record showed, most of the capacity in the System Operator's region is owned by traditionally-regulated utilities that do not need to purchase a significant amount of capacity through the auction and, therefore, would not benefit significantly from lower auction prices. First Order P 66, JA 25; Rehearing Order P 105, JA 162. The record further showed that, while some capacity in this region is owned by merchant (independent) generators rather than traditionally-regulated utilities, most merchant capacity had been sold under long-term contracts rather than through the auction and, therefore, the buyers of that capacity likewise would not benefit significantly from lower auction prices. Rehearing Order P 105, JA 162.

B. Three Ways To Meet Capacity Requirements

The Commission found that it was just and reasonable for load-serving entities to be able to meet their capacity requirements by purchasing capacity in the auction, by self-scheduling their capacity requirements in the auction, or by opting out of the auction by submitting a fixed resource adequacy plan. First Order PP 38-39, 41-42, JA 15-17. This provided appropriate flexibility in meeting capacity requirements and, as the System Operator had pointed out, concerns about possible buyer-side market manipulation were speculative. *Id.* at PP 38-39, 41-42, JA 15-17; Rehearing Order PP 127-29, JA 170-71.

C. Vertical Demand Curve

The Commission found that it was just and reasonable for the System Operator to continue using a "fixed reliability target" vertical demand curve. First Order P 245, JA 84; Rehearing Order PP 147, 154-61, JA 178, 181-83. While the Commission acknowledged that there also are benefits to using a sloped demand curve, the Commission explained that there is not a single just and reasonable method for determining and satisfying capacity obligations, and system operators have substantial flexibility in determining the methods appropriate for their regions. First Order P 245, JA 84; Rehearing Order PP 147, 155, 159, JA 178, 181, 183.

SUMMARY OF ARGUMENT

In this Federal Power Act section 205 proceeding, the System Operator had the burden to show that its proposals were just and reasonable. The Commission appropriately approved those proposals for which the System Operator met that burden, and rejected those for which the System Operator did not.

Buyer-Side Mitigation

The Commission rejected the proposed buyer-side mitigation provisions on two alternative bases. First, the Commission reasonably found that they would have been ineffective, since they did not include an obligation to bid capacity into

the auction at or above a minimum price and would have applied only if the market monitor found the buyer intended to depress the auction price.

Alternatively, the Commission reasonably determined that there was no need for the System Operator to introduce buyer-side mitigation in its region at this time. There was no evidence of price suppression in the auction or in bilateral contracts. Furthermore, there was no evidence showing that capacity buyers in this region could profitably engage in uneconomic investment to suppress prices. Most of the capacity there is self-supplied or obtained through long-term contracts rather than through the auction. And, it would take a substantial amount of costly uneconomic capacity over many years to significantly affect bilateral contract prices.

The Commission did not exceed its statutory authority in rejecting these provisions. As this Court has held, the Commission may revise a Federal Power Act section 205 proposal if, as occurred here, the proposing utility accepts that revision. The System Operator did not seek rehearing of the Commission's determination that the proposed minimum offer price provisions were not needed at this time, declined the Commission's invitation to withdraw its FPA section 205 filing, and complied with the Commission's determination that these provisions should not be added to the tariff.

Capacity-Deficient Utilities

Likewise, the Commission reasonably determined that the System Operator's proposal to require capacity-deficient local utilities (load-serving entities) to purchase their capacity resources in the auction was not just and reasonable. This proposal conflicted with the System Operator's intent that load-serving entities would continue to meet their capacity requirements predominantly through self-supply and bilateral contracts and that auction participation would remain voluntary. Additionally, other options, including the then-effective deficiency charge would provide sufficient incentive for load-serving entities to satisfy their capacity requirement.

There is no merit to NRG's claim that it is unduly discriminatory to require sellers that choose to participate in the auction to offer their available capacity into that auction. Capacity buyers and sellers in the System Operator's region are not similarly situated for market power purposes. Capacity buyers in that region do not have an incentive to exercise market power, making buyer-side market power mitigation through mandatory auction participation unnecessary. Seller market power, by contrast, is far easier to execute, providing capacity sellers the incentive to exercise market power.

Moreover, contrary to NRG's claim, independent merchant generators, like vertically-integrated utilities, have a reasonable opportunity to recover their costs.

Merchant generators recover costs not only from capacity sales, but also from energy and ancillary services sales. In addition, merchant generators typically sell capacity to local utilities through long-term contracts, the costs of which are recovered by those utilities in their state-regulated cost-of-service filings. In either case, to be just and reasonable, market prices do not have to ensure the viability of merchant generators' resources; rather, they must, as they do here, reflect the region's supply and demand conditions.

Vertical Demand Curve

Finally, the Commission reasonably determined that the System Operator's proposal to continue setting each load-serving entity's capacity obligation using a fixed reliability target (or vertical demand curve) was just and reasonable. As the Commission explained, using a vertical demand curve would ensure that sufficient capacity is procured, would produce reasonable prices, and would provide appropriate price signals for new development.

The Commission also correctly recognized that it is not required to adopt a one-size-fits-all approach to capacity markets in different regions. While NRG asserts that Commission precedent shows a preference for sloped demand curves, none of the cited orders set a generally applicable policy favoring sloped demand curves. Instead, each order addressed that regional entity's Federal Power Act section 205 filing proposing to replace its use of a vertical demand curve with a

downward-sloping demand curve. In those other orders, as here, the Commission fulfilled its statutory duty to assess whether the region-specific proposal before it was just and reasonable.

The Commission reasonably found no merit in NRG's assertion that it should have rejected continued use of a vertical demand curve in the System Operator's region because sloped demand curves produce more accurate and less volatile auction prices. The record showed that the System Operator's auction produced accurate prices. Furthermore, any price volatility might simply reflect underlying supply and demand conditions. And, in any event, capacity in the System Operator's region is capped at a price the Commission already has determined is just and reasonable.

ARGUMENT

I. Standard of Review

The Commission's determinations are reviewed under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Review under this standard is narrow. *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id.* "Rather, the court must uphold a rule if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,]

including a rational connection between the facts found and the choice made.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)) (alterations by Court); *Aera Energy LLC v. FERC*, 789 F.3d 184, 190 (D.C. Cir. 2015). "The Commission's factual findings are conclusive if supported by substantial evidence." *S. Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires more than a scintilla but less than a preponderance of evidence." *Id.* (internal quotation and citation omitted).

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

II. The Commission Reasonably Determined That The System Operator Had Not Shown Its Proposed Minimum Offer Price Provisions Were Just And Reasonable

Under Federal Power Act section 205, the burden of proof to show that a rate proposal is just and reasonable is on the filing utility. *S. Cal. Edison*, 717 F.3d at 181; *see also* First Order P 37, JA 15 (explaining that the System Operator had the burden to show that its FPA section 205 proposal was just and reasonable). The Commission reasonably determined, on alternative bases, that the System Operator did not satisfy its burden to show that its minimum offer price provisions proposal was just and reasonable.

A. The Minimum Offer Price Provisions Would Be Ineffective

The Commission found that the proposed minimum offer price provisions would be ineffective for two reasons. First Order PP 68, 70, JA 26-27. First, they did not include an obligation to bid capacity into the auction at or above a specified minimum price. *Id.* at P 68, JA 26. And, second, contrary to Commission precedent, they would apply only if the market monitor found there was an intent to depress the auction clearing price. *Id.* at P 70, JA 27.

NRG agrees that the proposed minimum offer price provisions would have been ineffective. Br. at 10, 16-17, 35 (explaining that the Commission agreed with NRG and other parties that the minimum offer price provisions had flaws that would make them ineffective). NRG asserts, however, that the Commission

should have addressed arguments regarding how to improve that proposal. Br. at 35. As the Commission explained, however, its task here was to determine whether the System Operator's proposal was just and reasonable, not whether alternative proposals were just and reasonable. Rehearing Order PP 129, 201, JA 171, 203. In any event, as discussed next, the Commission found there was no need to introduce buyer-side mitigation in this region at this time.

B. Minimum Offer Price Provisions Were Not Needed At This Time

The Commission found, alternatively, that, while the System Operator had premised its proposal to introduce buyer-side mitigation on the need for such mitigation (*see* R.1, Transmittal Letter at 8, 13-14, 17, JA 234, 239-40, 243), it had not shown there was a need for such mitigation at this time. First Order PP 66-67, JA 25-26; Rehearing Order PP 105-20, JA 162-67.

Most of the capacity in the System Operator's region is owned by traditionally-regulated utilities who self-supply their capacity requirements or bilaterally contract for them and, therefore, do not need to purchase much capacity through the auction. First Order P 66, JA 25; Rehearing Order PP 105, 108, JA 162, 163. Most of the remaining capacity, owned by merchant generators, had been sold under long-term contracts rather than through the auction. Rehearing Order PP 105, 108, JA 162, 163. There was no record evidence showing that capacity buyers in the System Operator's region could profitably engage in

uneconomic investment to suppress capacity prices. *Id.* at P 108, JA 163. Rather, the evidence showed that capacity buyers in this region would not significantly benefit from lower auction prices. *Id.* at P 105, JA 162. The Commission found, therefore, that there was no need for the System Operator to introduce buyer-side mitigation measures in its region at this time. First Order P 66, JA 25; Rehearing Order PP 105, 107-08, JA 162-63.

NRG raises several challenges to the Commission's determination. Br. at 36-45. None of its challenges has merit.

1. The Commission Acted Within Its Statutory Authority

NRG first argues that the Commission exceeded its authority under Federal Power Act section 205, 16 U.S.C. § 824d, by rejecting the minimum offer price provisions as not just and reasonable because the System Operator had not shown that it was necessary at this time to introduce buyer-side mitigation in the region. Br. at 36-40; *see also* Br. at 31-33. As the Commission pointed out, however, this Court has found that the Commission appropriately can revise a proposal under FPA section 205 provided that, as occurred here, the proposing utility accepts the revision. Rehearing Order P 39, JA 131 (citing *City of Winnfield, La. v. FERC*, 744 F.2d 871, 875 (D.C. Cir. 1984), and *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1579 (D.C. Cir. 1993)); *see also id.* at PP 37-44, JA 130-34.

In *City of Winnfield*, this Court explained that the Commission cannot "impose under [FPA] § 205 a sort of rate which *the utility* (as opposed to one of its customers) does not desire. For in that circumstance the agency is effectively using § 205, which is intended for the benefit of the utility . . . for the quite different purpose of *depriving the utility* of the statutory protection contained in [FPA] § 206," 16 U.S.C. § 824e, i.e., that the Commission must first find the existing rate unjust and unreasonable before it can require that rate to be changed. *City of Winnfield*, 744 F.2d at 875. But "the structural elements of the Act designed to protect the utility are not affected . . . when the Commission prescribes under section 205 a system of rates similar to that previously in effect, and the utility acquiesces." *Id.* at 876. *See also Western Resources*, 9 F.3d at 1579 (explaining that the Commission acts under Natural Gas Act section 4, 15 U.S.C. § 717c (FPA section 205's Natural Gas Act equivalent), in approving different provisions than those proposed, provided the proponent consents).

The filing utility here is the System Operator, not NRG. NRG is not the beneficiary of the statute's filing protections and, therefore, NRG's lack of consent is beside the point. *See Grand Council of the Crees v. FERC*, 198 F.3d 950, 954, 956 (D.C. Cir. 2000). Consistent with and citing to the applicable precedent, the Commission found that it appropriately acted under Federal Power Act section 205 because the System Operator consented to its determination that the proposed

minimum offer price provisions were not needed at this time and should not be added to the System Operator's tariff. Rehearing Order PP 37-44, JA 130-34; *see also id.* at P 44, JA 133 (noting that the System Operator had neither sought rehearing of the First Order or submitted a request to withdraw its FPA section 205 filing, and had submitted its filing in compliance with the First Order). NRG's Brief neither acknowledges nor challenges this finding and, as a result, has waived its opportunity to challenge it on appeal. *Xcel Energy Servs. Inc. v. FERC*, 510 F.3d 314, 318 (D.C. Cir. 2007) (petitioner waives argument by failing to raise it in its opening brief (citing *Power Co. of Am. v. FERC*, 245 F.3d 839, 845 (D.C. Cir. 2001)).

2. The Commission Reasonably Determined That Buyer-Side Mitigation Was Not Needed In The System Operator's Region At This Time

The Commission alternatively found that the System Operator had not shown there was a need at this time to introduce buyer-side mitigation in this region. First Order PP 66-67, JA 25-26; Rehearing Order PP 105-20, JA 162-67. First, there was no evidence in the record of any price suppression in the auctions or in bilateral contracts. Rehearing Order PP 49, 109, JA 136, 164.

Second, there is little incentive in the System Operator's region to suppress capacity auction prices, whether through use of the opt-out mechanism or otherwise. Rehearing Order PP 105-06, 108, 127, JA 162-63, 170; First Order

PP 66-67, JA 25. The vast majority of capacity in the System Operator's region is acquired through ownership (self-supply) or long-term contracts rather than through the auction. Rehearing Order P 106, JA 163; *see also* First Order PP 66-67, JA 25, and Rehearing Order PP 105, 108, JA 162, 163 (most of the capacity sold in this region, whether owned by load-serving entities or merchant generators, is sold through long-term contracts rather than through the auction). Since little capacity is purchased in the auction in this region, buyers are unlikely to be able to recoup the substantial expenses they would incur in subsidizing new resources to reduce auction prices, and have little incentive to engage in auction price suppression. Rehearing Order PP 105, 108, JA 162, 163.

This remains true even when auction prices' effects on bilateral contract prices are considered, *see* Br. at 42-44. Rehearing Order PP 107-08, JA 163. While acknowledging that contracting parties likely will consider expected future auction prices when determining the prices they will accept in long-term contracts, the Commission noted that expected future auction prices cannot affect existing long-term contracts; any effect, therefore, would occur only slowly over time as contracts expire and new contracts are negotiated. *Id.*

Moreover, the Commission pointed out, because capacity contracts are generally for longer terms than the System Operator's one-year-term capacity auction, parties considering auction prices in negotiating long-term contracts likely

will consider auction prices over time rather than in any one year. *Id.* at PP 107-08, JA 163. Furthermore, any bill reductions due to lower contract prices would have to be discounted, since they would occur only in the future. *Id.* at P 108, JA 163.

In addition, the overall amount of bilateral capacity contracting in this region is relatively small since most capacity resources here are owned by load-serving entities that self-supply their capacity requirements. Rehearing Order P 108, JA 163. This further diminishes the amount of resources whose prices might be influenced by auction price changes. *Id.* The Commission reasonably concluded, in light of all of this, that it would take a substantial amount of costly uneconomic capacity over many years to significantly affect bilateral contract prices. *Id.*

NRG asserts that the Commission erred in requiring the System Operator to show that buyer-side mitigation measures were needed. Br. at 38. In NRG's view, a Commission order issued after the orders challenged here (*ISO New England Inc.*, 155 FERC ¶ 61,029 (2016), *reh'g pending*), did not require a system operator to show that proposed seller-side mitigation measures were needed. Br. at 38. But NRG cannot rely on an order issued after the challenged orders to show error here. *See Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005) ("We will not reach out to examine a decision made after the one actually under review

. . . . An agency's decision is not arbitrary and capricious merely because it is not followed in a later adjudication.").

In any event, contrary to NRG's claim, the system operator in *ISO New England* showed there was a need for its proposed seller-side mitigation measures. The New England region no longer had excess capacity, and the existing seller-side mitigation scheme there would have allowed resource owners to engage in physical withholding of capacity by retiring profitable capacity resources at any time to suppress auction prices. *ISO New England*, 155 FERC ¶ 61,029 PP 5, 32. Moreover, as the Commission explained here, it is easier to exercise market power on the seller side than the buyer side because the former does not require a multi-year time horizon or upfront investment, but only the withholding of existing resources. Rehearing Order P 114, JA 165.

Next, NRG argues that, because one other system operator's region (PJM Interconnection in the mid-Atlantic region) "includes a number of states that have not restructured their retail markets," the System Operator's region is not different from other regions in which the Commission has approved buyer-side mitigation. Br. at 38-39. But, whether some of the states that comprise the PJM region, *see Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1293 (2016), have or have not restructured their retail markets does not undercut the Commission's finding that the System Operator's region is different from other regions because, unlike

those regions, it is *predominantly* comprised of vertically-integrated load-serving entities. First Order P 38, JA 15; Rehearing Order PP 52, 111, 138, JA 136, 164, 175; *see also id.* at P 142, JA 176 (in PJM the vast majority of generation resources are not owned by utilities). Furthermore, NRG does not challenge the other bases on which the Commission found the System Operator's region different -- i.e., that there is far less capacity purchased in auctions, and far more long-term bilateral contracting for capacity, than in the other regions (First Order PP 38, 67, JA 15, 26; Rehearing Order PP 52, 112, JA 136, 164); and that the System Operator's region does not face the same degree of transmission and generation constraints that other regions face (First Order P 38, JA 15).

NRG also complains that "the Commission did not say that buyer-side market power would *never* be a concern in the [System Operator's] region." Br. at 39. The Commission found, however, as discussed above, that there was no need to introduce buyer-side mitigation in the System Operator's capacity market because buyers there lack the incentive to suppress auction prices. Rehearing Order P 105, JA 162; *see also id.* at P 115, JA 165 (there was no demonstration that buyer-side mitigation was necessary at this time); *id.* at P 120, JA 167 (buyer-side mitigation is not needed to ensure just and reasonable rates in this region as it is in other regions). The System Operator did not seek rehearing of this (or of any other) Commission determination. *See* Rehearing Order P 8, JA 118 (noting

numerous other parties that did seek rehearing on various issues). If a real risk of buyer-side market power were to develop in the System Operator's region as it has in other regions, the System Operator can file under Federal Power Act section 205, or the Commission or another party can act under FPA section 206, at that time to introduce buyer-side mitigation measures in this region. *See, e.g.*, *TC Ravenswood, LLC v. FERC*, 705 F.3d 474, 478 (D.C. Cir. 2013) (agency can proceed on an iterative, step-by-step basis, as circumstances dictate).

For the first time on appeal, NRG contends (Br. at 40-42) that the Commission's determination in the First Order (P 66, JA 25) that buyer-side mitigation is not needed in the System Operator's region because buyers there do not have an incentive to suppress capacity market prices, conflicts with its determination elsewhere in the First Order (P 69, JA 27) that artificially low prices can unreasonably suppress market prices regardless of intent. NRG did not raise this argument in its petition for rehearing to the Commission (R.111, JA 383-97) and, therefore, has waived its opportunity to raise it on appeal. *See, e.g.*, *Ind. Util. Reg. Comm'n v. FERC*, 668 F.3d 735, 739–40 (D.C. Cir. 2012) ("We must, of course, decline any invitation to exceed the jurisdiction conferred upon the court by statute; here, the relevant constraint limits our review to the grounds for objection 'set forth specifically' in the petitioner's request for Commission rehearing. 16 U.S.C. § 825*l*(a)."); *Xcel Energy Servs. Inc. v. FERC*, 510 F.3d 314,

319 (D.C. Cir. 2007) (petitioner's "failure to raise the objection in an application for rehearing deprives us of jurisdiction under § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b)").

In any case, there is no conflict. The Commission's point in the First Order P 69, JA 27, was simply that, where the record shows buyer-side mitigation is needed, such mitigation measures should apply regardless of whether a party intends to suppress market prices. As the Commission found (and NRG (*see* Br. at 10, 16-17) and other parties argued below), the proposed provisions, which exempted numerous resources from their application and would have required a finding of intent to suppress auction prices, would have been ineffective and, thus, were not just and reasonable. First Order PP 68-69, JA 26-27. This is precisely the type of decision, based on "both technical understanding and policy judgment," and "on which reasonable minds can differ," that is entrusted to the Commission, not to the reviewing Court. *Elec. Power Supply Ass'n*, 136 S. Ct. at 784.

III. The Commission Reasonably Determined That The System Operator Had Failed To Justify Its Proposal To Require Capacity-Deficient Utilities To Purchase Their Capacity In The Auction

Under the System Operator's previously-approved voluntary capacity construct, sellers and buyers could contract for capacity under long-term bilateral agreements or participate in the auction. *Midwest Indep. Transm. Sys. Operator*, 125 FERC ¶ 61,060 PP 18, 36. Sellers that chose to participate in the auction were

not permitted to withhold capacity from the auction to manipulate capacity prices; thus, once a capacity seller chose to participate in the auction, it was required to offer its available capacity (i.e., capacity not already being used to meet capacity requirements) into the auction. *Midwest Indep. Transm. Sys. Operator*, 137 FERC ¶ 61,213 P 20. Load-serving entities (local utilities) were obligated to meet their capacity requirements, which they could meet through self-supply, bilateral contracting, or the auction, and were charged financial penalties if they did not. *Id.* at P 120; First Order P 39, JA 16.

Under the proposal approved here, sellers and buyers can still contract for capacity under long-term bilateral agreements or participate in the auction. *See* First Order P 39, JA 16. Sellers that choose to participate in the auction are still required to offer available capacity into the auction. *Id.* at PP 252, 259-60, JA 86, 88.[2] Load-serving entities are still obligated to meet their capacity requirements, and can still meet them through self-supply, bilateral contracting, or the auction. *Id.* at P 39, JA 16.

[2] The threshold at which the market monitor will investigate whether a market participant is physically withholding capacity decreased from the prior level of 500 megawatts to 50 megawatts of capacity because the System Operator's proposal split its region into locational zones, which increased the impact an individual participant's withholding can have on auction capacity prices. *Id.* at PP 252, 259-60, JA 86, 88. NRG does not challenge this threshold change.

The System Operator proposed, however, that, rather than charging capacity-deficient load-serving entities a penalty, they be required to purchase their capacity resources in the auction. *See* First Order P 40, JA 16. The Commission found that the System Operator had not shown this proposal was just and reasonable since the System Operator intended that load-serving entities would continue to meet their capacity requirements predominantly through self-supply and bilateral contracts, with the auction continuing to play only a residual balancing role. *Id.*; Rehearing Order PP 36, 43, 46, JA 129, 133-35. Moreover, other options, such as the then-effective deficiency charge, would provide sufficient incentive for load-serving entities to satisfy their capacity requirements. First Order P 40, JA 16; Rehearing Order PP 36, 43, 46, 47, JA 129, 133-35. *See also New England Power Gen. Ass'n v. FERC*, 757 F.3d 283, 293 (D.C. Cir. 2014) (court "defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions") (quoting *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 541-42 (D.C. Cir. 2010)).

NRG contends that the Commission exceeded its authority in rejecting this proposal. Br. at 31-33. As already explained (*supra* Argument section II.B.1), however, because the System Operator consented to the Commission's determination that the proposed mandatory auction requirement for capacity deficient load-serving entities was not needed, the Commission acted within its

Federal Power Act section 205 authority. Rehearing Order PP 37-45, JA 130-34; *see also id.* at P 44, JA 133 (the System Operator neither sought rehearing of the First Order nor submitted a request to withdraw its FPA section 205 filing, and submitted a compliance filing to retain its previous just and reasonable deficiency charge). And, again, since NRG's Brief neither acknowledges nor challenges this finding, it has waived its opportunity to challenge it on appeal. *See Xcel*, 510 F.3d at 318.

Next, NRG complains that the auction is mandatory for sellers but not for buyers. This asymmetry, it claims, will cause auction prices to be very low or zero, which will deny merchant generators, such as NRG, a reasonable opportunity to recover their fixed costs and a fair rate of return on their investments. Br. at 28-31, 33-34.

In fact, however, the auction is not mandatory for either sellers or buyers. Sellers, like buyers, continue to have the option to enter into long-term bilateral contracts for capacity or to participate in the auction. *See* First Order P 39, JA 16. Also as before, only sellers that choose to participate in the auction are required to offer capacity not being used for self-supply or contracted-for into the auction to ensure they are not withholding capacity to manipulate prices. *Id.* at PP 252, 259-60, JA 86, 88; *Midwest Indep. Transm. Sys. Operator*, 137 FERC ¶ 61,213 P 20.

It is not unduly discriminatory to require sellers that choose to participate in the auction to offer their available capacity into that auction. Capacity buyers and sellers in the System Operator's region are not similarly situated for market power purposes. Rehearing Order P 114, JA 165; *see also NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 958 (D.C. Cir. 2013) ("To prevail on an undue discrimination challenge, NRG must demonstrate that it and ConEd are similarly situated for purposes of the approved settlement."); *Transm. Agency of N. Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010) ("The court will not find a Commission determination unduly discriminatory if the entity claiming discrimination is not similarly situated to others."). Capacity buyers in the System Operator's region do not have an incentive, whether through the opt-out provision or otherwise, to exercise market power, rendering buyer-side market power mitigation through mandatory auction participation unnecessary. Rehearing Order PP 105-06, 108, 127, JA 162-63, 170; First Order PP 66-67, JA 25-26. By contrast, capacity sellers in this region have an incentive to exercise market power, since doing so does not require a multi-year time horizon or upfront investment, only the withholding of existing resources and, therefore, is far easier to execute. Rehearing Order P 114, JA 165.

Furthermore, the Commission explained, the System Operator's region has had, and may continue to have, low auction prices because those market prices

reflect the region's significant capacity surplus. Rehearing Order PP 51, 110, JA 136, 164.[3] Nonetheless, as the Commission found, merchant generators, like vertically-integrated utilities, have a reasonable opportunity to recover their costs. *Id.* at PP 46, 53, JA 134, 136.

Merchant generators recover costs not only from their capacity sales, but also from their energy and ancillary services sales. *Id.* at P 46, JA 134. Moreover, as the record showed, merchant generators typically sell capacity to local utilities through long-term contracts, the costs of which are recovered by those utilities in their cost-of-service filings with state regulators. *Id.* at P 53, JA 136 (citing R.162, Midwest TDUs Initial Br. at 15-18, JA 527-30). Merchant generators can choose to sell their capacity through long-term contracts, thereby locking in a level of capacity revenues based on their expected value over the life of the contract, or through the auction. *Id.* at P 110, JA 164. In either case, to be just and reasonable market prices do not have to assure the viability of such resources; rather, market prices must, as here, reflect the region's supply and demand conditions. *Id.*; *see also Hughes*, 136 S. Ct. at 1290 (a capacity market that efficiently balances supply and demand produces a just and reasonable clearing price).

[3] In contrast, high capacity prices have resulted where, as in the New England region, there has been a capacity shortage. *See Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016).

IV. The Commission Reasonably Determined That The System Operator's Proposal To Continue Using A Vertical Demand Curve Was Just And Reasonable

The System Operator proposed to continue using a vertical demand curve, i.e., a fixed reliability target expressed as a single megawatt value, so that its market would continue to procure the exact amount of capacity needed to achieve the appropriate level of reliability. System Operator Answer to Protests at 37, JA 365; First Order P 238, JA 81.

The Commission, in accordance with its obligations under the Federal Power Act, assessed that proposal and found it just and reasonable. As the Commission explained, continued use of the same vertical demand curve in the System Operator's region (First Order P 245, JA 84) would: ensure that load-serving entities procure sufficient capacity (Rehearing Order P 155, JA 181); produce reasonable prices that reflect supply and demand conditions (*id.*); and provide appropriate price signals for new development (*id.* at PP 155, 160, JA 181, 183).

The Commission acknowledged that it has approved sloped demand curves as appropriate in other regions. First Order P 245, JA 84; Rehearing Order PP 159, 161, JA 183. As the Commission noted, however, its "task here is not to choose among several reasonable alternatives." Rehearing Order P 155 & n.298, JA 182 (citing cases); *see also* First Order P 187 & n.300 (same), JA 68; *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) (finding that a methodology approved by

the Commission as just and reasonable "need not be the only reasonable methodology, or even the most accurate one"); *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 ("A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives."). Rather, "FPA section 205 allows utilities to file changes to their rates at any time and requires FERC to approve them as long as the new rates are 'just and reasonable.'" *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 254 (D.C. Cir. 2007).

Moreover, the Commission rightly recognized that it is not required to adopt a one-size-fits-all approach in different regions, and that it appropriately provides regional entities substantial flexibility in determining their capacity construct demand curves. First Order P 245, JA 84; Rehearing Order P 159, JA 183; *cf. S. Carolina*, 762 F.3d at 58, 89 (affirming Commission orders providing regional flexibility in transmission planning). Thus, the Commission's approval of the use of sloped demand curves in other regions did not "*de facto* require a sloped demand curve" in the region here. Rehearing Order P 159, JA 183.

NRG disagrees, arguing that, in prior orders regarding other regions, the Commission determined that sloped demand curves are clearly superior to vertical demand curves. Br. at 46-53. But, each of those orders addressed a regional entity's Federal Power Act section 205 filing proposing to replace its use of a vertical demand curve with a downward-sloping demand curve to determine

capacity prices in that region. *See N.Y. Indep. Sys. Operator, Inc.*, 103 FERC ¶ 61,201 PP 1-2, 5, *reh'g denied*, 105 FERC ¶ 61,108 PP 1-3 (2003); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 P 25 (2006); *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318 P 3 (2007); *ISO New England Inc.*, 146 FERC ¶ 61,038 PP 1, 16 (2014); *ISO New England Inc.*, 147 FERC ¶ 61,173 PP 1, 5 (2014). The Commission's discussion of the particular proposals before it in those cases did not set a generally applicable policy preference for sloped demand curves. Rather, the Commission there (as here) fulfilled its statutory obligation under the Federal Power Act to assess whether the proposal before it—applicable to a single capacity market and tailored to the unique attributes of a single region—was just and reasonable.

NRG fares no better in pointing to a Commission order regarding another region that was decided after the orders on review here. Br. at 51-52 (citing *ISO New England Inc.*, 153 FERC ¶ 61,338 (2015)). Apparently acknowledging that "[a]n agency's decision is not arbitrary and capricious merely because it is not followed in a later adjudication," *Brooklyn Union Gas*, 409 F.3d at 406, NRG asserts that the Court can consider this post-record case because it "confirms what was implicit in its prior orders: that the advantages of sloped demand curves are so dramatic and unambiguous that there can be no legitimate justification for using a vertical demand curve" and, thus, "is 'part of a pattern of arguably inconsistent

Commission decision-making that began before the challenged action.'" Br. at 51-52 (quoting *AT&T Inc. v. FCC*, 452 F.3d 830, 839 (D.C. Cir. 2006))

As just discussed, however, the previously cited orders did not adopt a general policy in favor of sloped demand curves. *ISO New England* does not establish otherwise. Rather, it stands only for the proposition that the Commission found it was not just and reasonable for the region there to use a vertical demand curve in constrained capacity zones. *See ISO New England*, 153 FERC ¶ 61,338 PP 1, 11-15. NRG does not contend that the System Operator's region has constrained capacity zones and, in fact, the record shows that its region has a significant capacity surplus. Rehearing Order PP 51, 110, JA 136, 164; *see also* First Order P 38, JA 15 (the System Operator's region does not face the same degree of constraints other regions face). In any event, the Commission found that the System Operator's proposal, with a separate demand curve in each "local resource zone," would provide appropriate price signals indicating the supply-demand balance in each zone, taking into account any deliverability constraints. Rehearing Order at P 160, JA 183.

Even if the Commission had a general policy favoring the use of a sloped demand curve, that general policy would not apply here. The Commission found that using a sloped demand curve in this region would conflict with provisions in the System Operator's tariff allowing individual states to determine the capacity

market demand curve "based on their own reserve requirements." *See* Rehearing Order P 155, JA 181. NRG does not dispute this.

NRG asserts that the Commission should have rejected the System Operator's proposal because sloped demand curves purportedly produce more accurate and less volatile prices. Br. at 44, 46-50. The Commission found, however, that the 2013/2014 auction, which used the vertical demand curve here, produced accurate prices. Rehearing Order P 155, JA 181; *see also* First Order P 245, JA 84 (accepting the System Operator's proposal to continue using a vertical demand curve in part because it uses the same fixed reliability target and the same methodology to determine the capacity requirement as before). Moreover, the Commission found, the possibility that capacity prices might be more volatile than they would be under a sloped demand curve was not a sufficient basis to reject continued use of a vertical demand curve here. Rehearing Order P 157, JA 182. Capacity in the System Operator's region is capped at the cost of new entry, a price the Commission already has determined is just and reasonable. *Id.*; *see also TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 115 (D.C. Cir. 2013) ("[C]ost of new entry equals the hypothetical plant's total cost of producing a unit of electricity—the cost of constructing and operating a plant divided by its expected lifetime energy output—minus what the plant will receive for selling this electricity."). Furthermore, as the Commission pointed out, price volatility might

simply reflect underlying supply and demand conditions. Rehearing Order P 145, JA 177.

CONCLUSION

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

Respectfully submitted,

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April 17, 2017

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 8,956 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 2010.

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April 17, 2017

ADDENDUM

STATUTES

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Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statu-tory review proceeding is applicable, the action for ju-dicial review may be brought against the United States, the agency by its official title, or the appro-priate officer as defendant.

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

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

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 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*, 824*o*–1, 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*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

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

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

(g) Books and records

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

(June 10, 1920, ch. 285, pt. II, §201, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 847; amended Pub. L. 95–617, title II, §204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102–486, title VII, §714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109–58, title XII, §§1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985; Pub. L. 114–94, div. F, §61003(b), Dec. 4, 2015, 129 Stat. 1778.)

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

2015—Subsec. (b)(2). Pub. L. 114–94, §61003(b)(1), inserted ''824*o*–1,'' after ''824*o*,'' in two places.

Subsec. (e). Pub. L. 114–94, §61003(b)(2), inserted ''824*o*–1,'' after ''824*o*,''.

2005—Subsec. (b)(2). Pub. L. 109–58, §1295(a)(1), substituted ''Notwithstanding subsection (f), 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 provi-sions 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

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

§ 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; amend-ed 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), in a proceeding commenced under this section involving two or more electric utility companies of a reg-

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

Pub. L. 109–58, § 1285, in second sentence, substituted ''the date of the filing of such complaint nor later than 5 months after the filing of such complaint'' for ''the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period'', in third sentence, substituted ''the date of the publication'' for ''the date 60 days after the publication'' and ''5 months after the publication date'' for ''5 months after the expiration of such 60-day period'', and in fifth sentence, substituted ''If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision'' for ''If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision''.

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–473, § 4, Oct. 6, 1988, 102 Stat. 2300, provided that: ''The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such

[1] See References in Text note below.

(i) Interstate compacts

(1) The consent of Congress is given for three or more contiguous States to enter into an interstate compact, subject to approval by Congress, establishing regional transmission siting agencies to—

(A) facilitate siting of future electric energy transmission facilities within those States; and

(B) carry out the electric energy transmission siting responsibilities of those States.

(2) The Secretary may provide technical assistance to regional transmission siting agencies established under this subsection.

(3) The regional transmission siting agencies shall have the authority to review, certify, and permit siting of transmission facilities, including facilities in national interest electric transmission corridors (other than facilities on property owned by the United States).

(4) The Commission shall have no authority to issue a permit for the construction or modification of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement and the Secretary makes, after notice and an opportunity for a hearing, the finding described in subsection (b)(1)(C).

(j) Relationship to other laws

(1) Except as specifically provided, nothing in this section affects any requirement of an environmental law of the United States, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Subsection (h)(6) shall not apply to any unit of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Trails System, the National Wilderness Preservation System, or a National Monument.

(k) ERCOT

This section shall not apply within the area referred to in section 824k(k)(2)(A) of this title.

(June 10, 1920, ch. 285, pt. II, § 216, as added Pub. L. 109–58, title XII, § 1221(a), Aug. 8, 2005, 119 Stat. 946.)

REFERENCES IN TEXT

The National Forest Management Act of 1976, referred to in subsec. (h)(6)(D)(i), is Pub. L. 94–588, Oct. 22, 1976, 90 Stat. 2949, as amended, which enacted sections 472a, 521b, 1600, and 1611 to 1614 of this title, amended sections500, 515, 516, 518, 576b, and 1601 to 1610 of this title, repealed sections 476, 513, and 514 of this title, and enacted provisions set out as notes under sections 476, 513, 528, 594–2, and 1600 of this title. For complete classi-fication of this Act to the Code, see Short Title of 1976 Amendment note set out under section 1600 of this title and Tables.

The Endangered Species Act of 1973, referred to in subsec. (h)(6)(D)(ii), is Pub. L. 93–205, Dec. 28, 1973, 87 Stat. 884, as amended, which is classified principally to chapter 35 (§ 1531 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of this title and Tables.

The Federal Water Pollution Control Act, referred to in subsec. (h)(6)(D)(iii), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (§ 1251 et seq.) of Title 33, Navigation and Navigable Wa-ters. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

The National Environmental Policy Act of 1969, referred to in subsecs. (h)(6)(D)(iv) and (j), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) 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 4321 of Title 42 and Tables.

The Federal Land Policy and Management Act of 1976, referred to in subsec. (h)(6)(D)(v), is Pub. L. 94–579, Oct. 21, 1976, 90 Stat. 2743, as amended, which is classified principally to chapter 35 (§ 1701 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1701 of Title 43 and Tables.

§ 824q. Native load service obligation

(a) Definitions

In this section:

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

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

(3) The term ''service obligation'' means a requirement applicable to, or the exercise of authority granted to, an electric utility under Federal, State, or local law or under long-term contracts to provide electric service to end-users or to a distribution utility.

(4) The term ''State utility'' means a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or a corporation that is wholly owned, directly or indirectly, by any one or more of the foregoing, competent to carry on the business of developing, transmitting, utilizing, or distributing power.

(b) Meeting service obligations

(1) Paragraph (2) applies to any load-serving entity that, as of August 8, 2005—

(A) owns generation facilities, markets the output of Federal generation facilities, or holds rights under one or more wholesale contracts to purchase electric energy, for the purpose of meeting a service obligation; and

(B) by reason of ownership of transmission facilities, or one or more contracts or service agreements for firm transmission service, holds firm transmission rights for delivery of the output of the generation facilities or the purchased energy to meet the service obligation.

(2) Any load-serving entity described in paragraph (1) is entitled to use the firm transmission rights, or, equivalent tradable or financial transmission rights, in order to deliver the output or purchased energy, or the output of other generating facilities or purchased energy to the extent deliverable using the rights, to the extent required to meet the service obligation of the load-serving entity.

(3)(A) To the extent that all or a portion of the service obligation covered by the firm transmission rights or equivalent tradable or finan-

cial transmission rights is transferred to another load-serving entity, the successor load-serving entity shall be entitled to use the firm transmission rights or equivalent tradable or financial transmission rights associated with the transferred service obligation.

(B) Subsequent transfers to another load-serving entity, or back to the original load-serving entity, shall be entitled to the same rights.

(4) The Commission shall exercise the authority of the Commission under this chapter in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.

(c) Allocation of transmission rights

Nothing in subsections (b)(1), (b)(2), and (b)(3) of this section shall affect any existing or future methodology employed by a Transmission Organization for allocating or auctioning transmission rights if such Transmission Organization was authorized by the Commission to allocate or auction financial transmission rights on its system as of January 1, 2005, and the Commission determines that any future allocation or auction is just, reasonable and not unduly discriminatory or preferential, provided, however, that if such a Transmission Organization never allocated financial transmission rights on its system that pertained to a period before January 1, 2005, with respect to any application by such Transmission Organization that would change its methodology the Commission shall exercise its authority in a manner consistent with the[1] chapter and that takes into account the policies expressed in subsections (b)(1), (b)(2), and (b)(3) as applied to firm transmission rights held by a load-serving entity as of January 1, 2005, to the extent the associated generation ownership or power purchase arrangements remain in effect.

(d) Certain transmission rights

The Commission may exercise authority under this chapter to make transmission rights not used to meet an obligation covered by subsection (b) available to other entities in a manner determined by the Commission to be just, reasonable, and not unduly discriminatory or preferential.

(e) Obligation to build

Nothing in this chapter relieves a load-serving entity from any obligation under State or local law to build transmission or distribution facilities adequate to meet the service obligations of the load-serving entity.

(f) Contracts

Nothing in this section shall provide a basis for abrogating any contract or service agreement for firm transmission service or rights in effect as of August 8, 2005. If an ISO in the Western Interconnection had allocated financial transmission rights prior to August 8, 2005, but had not done so with respect to one or more load-serving entities' firm transmission rights held under contracts to which the preceding sentence applies (or held by reason of ownership or future ownership of transmission facilities), such load-serving entities may not be required, without their consent, to convert such firm transmission rights to tradable or financial rights, except where the load-serving entity has voluntarily joined the ISO as a participating transmission owner (or its successor) in accordance with the ISO tariff.

(g) Water pumping facilities

The Commission shall ensure that any entity described in section 824(f) of this title that owns transmission facilities used predominately to support its own water pumping facilities shall have, with respect to the facilities, protections for transmission service comparable to those provided to load-serving entities pursuant to this section.

(h) ERCOT

This section shall not apply within the area referred to in section 824k(k)(2)(A) of this title.

(i) Jurisdiction

This section does not authorize the Commission to take any action not otherwise within the jurisdiction of the Commission.

(j) TVA area

(1) Subject to paragraphs (2) and (3), for purposes of subsection (b)(1)(B), a load-serving entity that is located within the service area of the Tennessee Valley Authority and that has a firm wholesale power supply contract with the Tennessee Valley Authority shall be considered to hold firm transmission rights for the transmission of the power provided.

(2) Nothing in this subsection affects the requirements of section 824k(j) of this title.

(3) The Commission shall not issue an order on the basis of this subsection that is contrary to the purposes of section 824k(j) of this title.

(k) Effect of exercising rights

An entity that to the extent required to meet its service obligations exercises rights described in subsection (b) shall not be considered by such action as engaging in undue discrimination or preference under this chapter.

(June 10, 1920, ch. 285, pt. II, § 217, as added Pub. L. 109–58, title XII, § 1233(a), Aug. 8, 2005, 119 Stat. 957.)

FERC Rulemaking on Long-Term Transmission Rights in Organized Markets

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

[1] So in original. Probably should be ''this''.

(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), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

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

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

(b) Writs of mandamus

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

(c) Employment of attorneys

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

(d) Prohibitions on violators

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

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

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

(A) electric energy; or

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

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

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial

gations to the appropriate Federal agency, which shall take appropriate action and notify the State commission.

(e) Emergency Response Plan

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

(2) A cost-sharing plan developed under paragraph (1) shall include a description of any direct cost reimbursements that the applicant agrees to provide to any State and local agencies with responsibility for security and safety—

(A) at the LNG terminal; and

(B) in proximity to vessels that serve the facility.

(June 21, 1938, ch. 556, § 3A, as added Pub. L. 109–58, title III, § 311(d), Aug. 8, 2005, 119 Stat. 687.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (a), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) 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 4321 of Title 42 and Tables.

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas 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 declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas 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) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) 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 transportation 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) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty 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 thirty 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) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, 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 natural-gas company 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 the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision 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 natural-gas company, 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) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

(June 21, 1938, ch. 556, § 4, 52 Stat. 822; Pub. L. 87–454, May 21, 1962, 76 Stat. 72; Pub. L. 109–58, title III, § 312, Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsec. (f)(1), is Pub. L. 95–621, Nov. 9, 1978, 92 Stat. 3350, as amended, which is classified generally to chapter 60 (§ 3301 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of this title and Tables.

AMENDMENTS

2005—Subsec. (f). Pub. L. 109–58 added subsec. (f).

1962—Subsec. (e). Pub. L. 87–454 inserted ''or gas distributing company'' after ''State commission'', and struck out proviso which denied authority to the Commission to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only.

ADVANCE RECOVERY OF EXPENSES INCURRED BY NATURAL GAS COMPANIES FOR NATURAL GAS RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROJECTS

Pub. L. 102–104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, development and demonstration activities by Gas Research Institute for projects on use of natural gas in motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102–486, title IV, § 408(c), Oct. 24, 1992, 106 Stat. 2882.

§ 717c–1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, § 4A, as added Pub. L. 109–58, title III, § 315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, 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: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

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 transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

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D.C. Cir. No. 16-1027

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 17th day of April 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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