ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 16-1176

NORTHWESTERN CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: FEBRUARY 27, 2017

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties to the underlying agency proceedings and in this Court are identified in the brief of Petitioner NorthWestern Corporation.

B. Rulings Under Review

1. *NorthWestern Corp.*, 137 FERC ¶ 61,248 (Dec. 30, 2011), R. 82, JA 77;
2. *NorthWestern Corp.*, 140 FERC ¶ 61,020 (July 12, 2012), R. 279, JA 89;
3. *NorthWestern Corp.*, Op. No. 530, 147 FERC ¶ 61,049 (Apr. 17, 2014), R. 323, JA 199; and
4. *NorthWestern Corp.*, 155 FERC ¶ 61,158 (May 10, 2016), R. 342, JA 227.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel is not aware of any other cases related to this case currently pending in this Court or in any other court.

/s/ Holly E. Cafer
Holly E. Cafer

February 27, 2017

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Federal Power Act

GLOSSARY

Br.	Opening brief of Petitioner NorthWestern Corporation
Commission or FERC	Federal Energy Regulatory Commission
FPA or the Act	Federal Power Act
Hearing Order	*NorthWestern Corp*., 133 FERC ¶ 61,046 (Oct. 15, 2010), R. 15, JA 66
Initial Decision	*NorthWestern Corp*., 140 FERC ¶ 63,023 (Sept. 21, 2012), R. 306, JA 101
JA	Joint Appendix
NorthWestern	Petitioner NorthWestern Corporation
Opinion	*NorthWestern Corp*., Op. No. 530, 147 FERC ¶ 61,049 (Apr. 17, 2014), R. 323, JA 199
P	Denotes a paragraph number in a Commission order
R.	Indicates an item in the certified index to the record
Rehearing Order	*NorthWestern Corp*., 155 FERC ¶ 61,158 (May 10, 2016), R. 342, JA 227
Second Hearing Order	*NorthWestern Corp*., 137 FERC ¶ 61,248 (Dec. 30, 2011), R. 82, JA 77

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STATEMENT OF THE ISSUES

This appeal arises from a traditional cost-of-service ratemaking case filed by a transmission-owning utility to revise its rates for certain ancillary—or grid support—services it provides to customers, typically load-serving entities and generators, taking transmission service under its tariff on file with the Federal Energy Regulatory Commission ("FERC" or "Commission"). The utility, Petitioner NorthWestern Corporation, upon approval from its state regulator, planned and constructed a generating plant, intending to use it solely to provide "regulation" services, one type of ancillary service. In the orders on review, the

Commission fully affirmed the decision of the presiding administrative law judge, issued after a four-day hearing, finding that NorthWestern had not demonstrated that recovering all the plant costs from customers taking regulation service would be appropriate—but that some costs could be recoverable elsewhere. Before this Court on appeal, Petitioner NorthWestern raises the following issues:

1. Whether the Commission reasonably rejected NorthWestern's proposal to charge regulation service customers for costs that are not required to serve them, and to charge them for more regulation service than they require, where at least some of those costs properly may be recovered elsewhere; and

2. Whether the Commission reasonably exercised its remedial discretion by requiring refunds of the amounts that NorthWestern has overcharged its customers, where NorthWestern was on notice that its proposed rates were made effective "subject to refund."

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY FRAMEWORK

A. Federal Power Act

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the

transmission and wholesale sale of electric energy in interstate commerce. Section 205 of the Act mandates that "[a]ll 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 . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 16 U.S.C. § 824d(a).

Section 205(e) empowers the Commission to investigate the lawfulness of a rate in a newly filed schedule, and to suspend the effectiveness of the changed schedule. *Id*. § 824d(e). The Commission may also order that increased rates and charges be collected subject to refund so that when the rate schedule goes into effect after suspension, the "interested public utility or public utilities" must refund the amount of the increased rates or charges "found not justified" by the Commission. *Id*.; *see also Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 953 (D.C. Cir. 2016) (describing the Commission's practice for suspending rate filings under section 205).

In 2005, in the aftermath of a wide-ranging blackout, Congress amended the Federal Power Act to address a wide-range of issues, ranging from transmission siting and operation to market transparency and consumer protection. *See generally S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 50-51 (D.C. Cir. 2014) (summarizing new provisions). In a new section 215 of the Federal Power Act,

Congress authorized the Commission to certify and oversee an Electric Reliability Organization, to develop and enforce reliability standards for the bulk-power system. FPA § 215(c)-(g), 16 U.S.C. § 824o(c)- (g).

In 2006, the Commission certified the North American Electric Reliability Corporation ("NERC"), an organization that had previously developed a series of voluntary standards for the industry, as the Electric Reliability Organization. *See New York v. FERC*, 783 F.3d 946, 951 (2d Cir. 2015) (describing 2005 amendments and certification of NERC). Generally, NERC is responsible for developing proposed standards, and filing them for Commission approval. *See id*. at 950 (affirming FERC orders approving NERC reliability standards and procedures). FERC's Reliability Primer provides an overview of FERC's role in overseeing grid reliability, including the development and enforcement of reliability standards. *See* FERC Reliability Primer, *available at* https://www.ferc.gov/legal/staff-reports/2016/reliability-primer.pdf.

B. Regulation Service

This proceeding concerns a transmission provider's obligation to provide ancillary services to customers taking transmission service under the provider's FERC-jurisdictional tariff, known as the Open Access Transmission Tariff (referenced elsewhere as the OATT). Ancillary services are described in more

detail in the Commission's landmark rulemaking, Order No. 888,[1] which ordered functional unbundling of wholesale generation and transmission services, requiring utilities to provide open, non-discriminatory access to their transmission facilities to competing suppliers. *See New York*, 535 U.S. at 11-13 (summarizing Order No. 888). Among other things, Order No. 888 also generally required transmission providers to offer six types of ancillary services to transmission customers. Order No. 888 at 31,703. As most relevant here, these services include "regulation and frequency response service," governed by Schedule 3 to the *pro forma* Open Access Transmission Tariff, and energy imbalance service, governed by Schedule 4 of the tariff. *Id*.

NERC reliability standards established under Federal Power Act section 215 address frequency control, among other issues inherent in the continuous balancing of supply and demand necessary to maintain grid reliability. *See* Reliability Primer at 23. Generally, the "frequency" of the power system in the United States is set at 60 cycles per second, or 60 Hertz. *Id*. Small variations in frequency are normal,

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[1] *Promoting Wholesale Competition through Open Access Non-discriminatory Transmission Servs. by Pub. Utils. and Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd*, *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd*, *New York v. FERC*, 535 U.S. 1 (2002).

but large deviations can jeopardize system reliability and equipment integrity. *Id*. Regulation service, sometimes referred to as load-following service, helps to maintain frequency control, and is essentially "extra generating capacity, called regulating margin, to follow the moment-to-moment variations in the load located in the control area." Order No. 888 at 31,707; *see also Frequency Regulation Compensation in the Organized Wholesale Power Markets*, Order No. 755, FERC Stats. & Regs. ¶ 31,324, P 4 (2011), *reh'g denied*, Order No. 755-A, 138 FERC ¶ 61,123 (2012) (describing regulation service as the "injection or withdrawal of real power by facilities capable of responding appropriately to a transmission system's frequency deviations or interchange power imbalance").

Frequency deviations are measured by the Area Control Error. NERC standards require balancing authority areas, like Petitioner NorthWestern, to maintain the average Area Control Error for each of the six ten-minute periods during the hour within specific limits, 90 percent of the time. *See Mandatory Reliability Standards for the Bulk-Power Sys*., Order No. 693, FERC Stats. & Regs. ¶ 31,242, P 309 (2007) (describing standards); *see also* Large Customer Group Exh. LCG-3, R. 217, JA 758 (appending NERC standard). The Commission has made these standards mandatory and enforceable, *id*. P 308, and violations are subject to civil penalties. *See* Federal Power Act § 316A, 16 U.S.C. § 825o-1; *see also Sw. Power Admin. v. FERC*, 763 F.3d 27, 29-30 (D.C. Cir.

2014) (describing enforcement provisions of the Federal Power Act relating to reliability standards).

II. The Commission's Proceedings And Orders

A. NorthWestern's Regulation Service

NorthWestern owns and operates electric and natural gas transmission and distribution facilities primarily in Montana and South Dakota. *NorthWestern Corp*., Opinion No. 530, 147 FERC ¶ 61,049, P 2 (2014), R. 323, JA 199 ("Opinion"). NorthWestern's proposed tariff revisions at issue in this case only impact its transmission services in Montana, where it owns and operates more than 7,000 miles of transmission lines and terminal facilities. *Id*.

NorthWestern acquired the Montana transmission facilities in 2002, from the former Montana Power Company, as part of Montana's electric restructuring process. NorthWestern operates these facilities as a balancing authority area in Montana, and as such is subject to the reliability requirements of FERC and NERC. *See Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 524 n.2 (D.C. Cir. 2010) (explaining that a balancing authority area, or control area, is the "collection of generation, transmission, and end-users" within a bounded area, under common control if not ownership).

NorthWestern maintains that it does not have generating facilities within the balancing authority area that are capable of providing regulation service required,

under FERC and NERC rules, to maintain reliability. *See* Opinion P 4, JA 200. Thus, it had previously obtained such services from third-party providers. Through 2007, it contracted with Idaho Power Company for regulation service. NorthWestern Initial Filing, R. 1, Exh. NWE-4 at 12, JA 345 ("Initial Filing"). From 2008 through January 1, 2011, the effective date of the changes NorthWestern proposed in this proceeding, NorthWestern obtained regulation service from other third-parties. *See NorthWestern Corp.*, 121 FERC ¶ 61,204 (2007) (approving contract for 2008 with Powerex); *see also, e.g.*, *Powerex Corp.*, 125 FERC ¶ 61,179 (2008) (approving a 2009 contract). In approving the 2008 contract, with Powerex, the Commission noted the interim nature of the arrangement, referencing both NorthWestern's ongoing consideration of whether to construct or obtain generating capacity to provide ancillary services, and certain Commission initiatives exploring the technical feasibility of allowing customers to self-supply regulation service. *See NorthWestern*, 121 FERC ¶ 61,204, PP 23, 29 & n.22.

NorthWestern's Schedule 3 in effect prior to this proceeding provided for the pass-through, at cost, of NorthWestern's costs for obtaining regulation service from third-parties, to Schedule 3 customers. *See* Initial Filing, Attachment B, Redlines of Schedule 3, JA 268 (showing, in redline, pre-existing Schedule 3 marked-up to reflect changes proposed in this proceeding). This included a

$45,800 fixed rate demand charge added to the numerator for calculating regulation service rates, resulting from a 2008 settlement in a general rate case where NorthWestern proposed changes to Schedule 3. *See NorthWestern Corp.*, 122 FERC ¶ 63,008, P 16 (2008) (certifying uncontested settlement), and 125 FERC ¶ 61,066 (2008) (approving settlement).

Around 2007, as third-party contract rates for regulation service rose, NorthWestern began pursuing plans to construct a generating station to provide regulating services. *See* Initial Filing at 2, 4, JA 252, 254. In May 2009, NorthWestern received approval from the Montana Public Service Commission ("Montana Commission") to construct the facility now known as the Dave Gates Generating Station ("Gates Station").[2] Opinion P 4, JA 200. Gates Station has three natural gas-fired turbine generators with a nameplate capacity of 50 megawatts ("MW") each. *Id*. P 5, JA 200. It commenced commercial operations in January 2011. *See id*.

On January 31, 2012, NorthWestern unexpectedly needed to shut down Gates Station due to significant equipment damage. *Id.* While Gates Station remained out-of-service, NorthWestern contracted with Powerex for regulation service. *See Powerex Corp.*, 138 FERC ¶ 61,136, P 5 (2012) (approving interim

[2] The facility was previously known as the Mill Creek Generating Station. *See* Opinion P 4 n.4, JA 200.

contract); *see also* NorthWestern Request for Rehearing of Opinion No. 530, R. 331, at 47-48, JA 937-38.

B. NorthWestern's Proposal

On April 29, 2010, NorthWestern filed, under section 205 of the Federal Power Act, revisions to Schedule 3 to its tariff, governing regulation service. Where NorthWestern had previously passed through the costs of third-party provided regulation service, NorthWestern now proposed to recover the costs of providing regulation service from its Gates Station through traditional cost-of-service rates. *See NorthWestern Corp.*, 133 FERC ¶ 61,046, P 4 (2010), R. 15, JA 67 ("Hearing Order"). Specifically, NorthWestern proposed a monthly demand rate, to cover the fixed costs of providing regulation service, and a monthly energy rate, to cover the fuel (natural gas) and variable operation and maintenance costs of providing regulation service, from Gates Station. *See id.* PP 4, 7, JA 67, 68; *see also Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009) (summarizing "FERC's traditional two-part rate structure, composed of a demand charge and an energy charge"). NorthWestern explained that the total revenue requirement for Gates Station is $42,632,122, and it proposed to recover $24,361,212 of that revenue requirement from Schedule 3 customers, reflecting the fixed costs of Gates Station attributable to Schedule 3 service, plus a return on equity of 10.25 percent. Hearing Order PP 4-5, JA 67-68; *see also* Initial Filing,

Exh. NWE-1 at 17-18, JA 291-92. The demand rate also includes a component to recover the cost of third-party regulation service, if NorthWestern determines that such service is more cost-effective than operating Gates Station. *Id*. P 6, JA 68.

The energy rate recovers the variable costs, including fuel costs, of regulation service provided by Gates Station. *Id*. P 7, JA 68. NorthWestern proposed to credit against the total variable costs recovered in the energy rate the energy that NorthWestern expects to sell from Gates Station, for purposes other than regulation service, during the month. *Id*.

NorthWestern proposed to use an allocation factor of 57 percent (60/105 MW) for both the energy rate and the demand rate. *Id*.; *see also* Large Customer Group Initial Post-Hearing Brief, R. 286, at 6-7, JA 815-16 (summarizing the steps in using the allocation factor to calculate the monthly demand rate). NorthWestern asserted in its initial filing that the numerator of 60 reflected NorthWestern's traditional need for 60 MW of regulation service under Schedule 3, while the denominator of 105 reflected the amount of regulation capacity which Gates Station was capable of providing from its total 150 MW nameplate capacity. *See* Initial Filing, Exh. NWE-1 at 7, 15, JA 281, 289. Further, NorthWestern claimed that because the Montana Commission had authorized it to allocate 45 MW to retail ratepayers, out of a total of 105 MW of regulation service it asserts is available from Gates Station, the revenue requirement associated with the

remaining 60 MW should be recovered from customers taking service under the FERC-jurisdictional Schedule 3. Hearing Order P 10, JA 69; Opinion P 20, JA 206.

Several entities objected to all or parts of NorthWestern's proposal, including the Montana Consumer Counsel, the Montana Large Customer Group, and Central Montana Electric Power Cooperative, Inc. *See* Hearing Order P 13, JA 70. Among other concerns, the Consumer Counsel noted that customers requiring up to 21 MW of regulation service are entitled to self-supply, and the Large Customer Group noted that NorthWestern's proposed rate is three times its then-current rate for regulation service. *Id*. PP 16-17, JA 71-72.

C. The Commission's Hearing Orders

On October 15, 2010, the Commission accepted NorthWestern's Initial Filing and suspended it, to become effective January 1, 2011, subject to refund. Hearing Order P 1, JA 66. The Commission found that NorthWestern's proposal had not be shown to be just and reasonable, and that it raised issues of material fact warranting a hearing. *Id*. P 21, JA 74. The Commission designated a list of issues for the hearing, including, but not limited to "the proposed [Gates Station] annual revenue requirement and associated return on common equity, the allocation of [Gates Station's] fixed and variable costs, the propriety of charging an energy rate to regulation service customers, the propriety of using the $7.00 market

differential in the derivation of the energy value, the level of regulation service purchase obligations for customers, inclusion of third party regulation purchases in the proposed demand rate, and lack of ceiling rates for regulation service." *Id.* P 21, JA 74.

The Commission specifically addressed NorthWestern's proposal to charge Schedule 3 customers for 60 MW of regulation service, as reflected in its proposal to use 60 MW as the numerator in the allocator factor. In the absence of any data supporting the asserted demand, the Commission has held that a company "would only be required to provide, on average, adequate generation capacity to cover the portion of the hour when a customer's load is above the amount of generation it has block-scheduled." *Id*. P 23, JA 75 (citing *Kentucky Utils*. *Co*., 85 FERC ¶ 61,274, at 62,108–62,109 (1998); *Allegheny Power Serv*. *Corp*., 85 FERC ¶ 61,275, at 62,120–62,121 (1998)). The Commission held that NorthWestern's proposal "does not appear to be consistent with" this precedent. *Id*.

Before the hearing could be held, NorthWestern filed, on November 1, 2011, additional revisions to its Schedule 3, seeking an effective date of December 31, 2011. *See* NorthWestern Second Filing, R. 49, JA 444. There, NorthWestern proposed to revise its Schedule 3 to, among other things, provide that self-supplying customers may be subject additional Schedule 3 charges, and recover operation and maintenance costs through the demand rate instead of the energy

rate. *See id.* at 4, JA 447; *see also NorthWestern Corp.*, 137 FERC ¶ 61,248, P 5 (2011), R. 82, JA 78 ("Second Hearing Order"). NorthWestern argued that self-supplying customers should pay additional charges, because regulation service from Gates Station acts as a backstop should the self-supplying customer's arrangements fail or become inadequate. Second Hearing Order P 30, JA 85. The Commission rejected NorthWestern's "novel proposal," *id.*, as inconsistent with Commission precedent, including its Order No. 888 open access rulemaking. *Id.* P 33, JA 87. The Commission set NorthWestern's other proposals for hearing to be consolidated with the pending Schedule 3 case. *Id.* P 34, JA 87.

NorthWestern sought rehearing of the Second Hearing Order, which the Commission denied. *See NorthWestern Corp.*, 140 FERC ¶ 61,020, P 1 (2012), R. 279, JA 89. In this appeal, NorthWestern does not challenge the Commission's rejection of its proposal to charge self-supply customers under Schedule 3.

D. The Hearing And Initial Decision

FERC Administrative Law Judge Judith A. Dowd presided over discovery, pre-trial proceedings and a four-day hearing in the consolidated cases, held in June 2012. The Judge issued her Initial Decision on September 21, 2012, rejecting the basis for most of NorthWestern's proposals. *NorthWestern Corp.*, 140 FERC ¶ 63,023 (2012), R. 306, JA 101 ("Initial Decision"). For purposes of the fixed

revenue requirement for Gates Station, Judge Dowd adopted an unopposed stipulation between NorthWestern and FERC staff, establishing a total revenue requirement of $38,161,353, prior to the assignment of costs to Schedule 3 service. *Id*. PP 15-17, JA 108-09.

As to the allocation factor, Judge Dowd found that NorthWestern had not carried its burden of showing that its proposed allocation factor of 60/105 MW is just and reasonable. *Id*. PP 75, 83, JA 133, 135. As to the numerator, i.e., the total required regulation service under Schedule 3, the Judge found that while NorthWestern's evidence is a "reliable starting point," the numerator should be decreased to reflect the removal of "regulation down," the sharing of diversity benefits between Schedule 3 customers and retail ratepayers, and a revised target for compliance with NERC standards. *Id*. P 83, JA 135. "Regulation down" reflects the concept that NorthWestern must operate Gates Station at a point—a "set point"—above its minimum required, in order to be prepared to ramp down. *Id*. P 90, JA 138. The Judge held that NorthWestern had not shown that it would be unable to use the energy produced from operating at that set point for non-regulation purposes, such as off-system sales. *Id*. With the exclusions noted, Judge Dowd found that a numerator of 19 MW would result in a just and reasonable rate. *Id*. P 83, JA 135.

As to the denominator used for the allocation factor, Judge Dowd again found that NorthWestern had not carried its burden, this time to show that Gates Station is only capable of providing 105 MW of regulation service. Initial Decision PP 148-51, JA 159-61. NorthWestern primarily argued that it must keep one of the three Gates Station 50 MW turbines as a "spare" in order to provide "firm" regulation service, but the Judge found this assertion undercut by other, uncontroverted evidence. *Id*. P 148, JA 159. Moreover, NorthWestern cited no legal precedent for using less than nameplate capacity (150 MW), while FERC staff's expert witness testified that nameplate capacity has been used to develop ancillary service rates since Order No. 888. *Id*. PP 149-50, JA 160.

As relevant to the issues raised in this appeal, Judge Dowd also determined on the record that allowing the recovery of fuel costs under Schedule 3 would be inconsistent with Commission precedent. *Id*. PP 181-85, JA 170-72. While the Commission had not prohibited fuel cost recovery under Schedule 3, no party contradicted FERC staff's testimony that fuel costs associated with regulation service are typically recovered under Schedule 4, governing Energy Imbalance Service. *Id*. PP 182-83, JA 171.

Finally, in response to NorthWestern's proposal to recover unlimited costs of third-party-provided regulation service, Judge Dowd found that such costs should be passed through only if they are lower than the variable costs of operating

Gates Station. *Id*. PP 223-25, JA 186. During the hearing, NorthWestern argued that it also should be permitted to recover costs incurred as a result of an outage at Gates Station, and that it need only seek approval of contracts for a term of one year or more, as it previously had. *Id*. P 223, JA 186. Ultimately, the Judge required NorthWestern to file all contracts for third-party regulation service for Commission approval under FPA section 205, before allowing costs to be included in the monthly demand rate. *Id*. PP 224-25, JA 186. As to the costs of the 2012 Gates Station outage, the Judge found that NorthWestern should, upon completion of studies to determine the causes and costs associated with the outage, file to recover those costs in a separate proceeding. *Id*. P 224, JA 186.

E. The Commission Affirms The Judge's Decision

On April 17, 2014, the Commission summarily affirmed the Judge's decision, on seven of the eight issues decided, and affirmed the remaining issue—exclusion of regulation down—with further discussion. Opinion PP 1, 16-18, JA 199, 205-06. Before turning to regulation down, the Commission addressed NorthWestern's argument that "this case presents an issue of first impression," cost recovery for a generation facility dedicated exclusively to regulation service, and its premise that the full Gates Station revenue requirement should be recovered through Schedule 3 rates. *Id*. PP 23-24, JA 207-08. The Commission rejected NorthWestern's premise, agreeing with Judge Dowd that the purpose of the

hearing was to determine whether NorthWestern's proposed Schedule 3 rate was just and reasonable, "not to ensure that NorthWestern collects the total revenue requirement for the Gates Station through regulation service rates." *Id*. P 24, JA 208.

On the issue of regulation down, the Commission affirmed the Judge's decision, offering "reasons in addition to those given in the Initial Decision." *Id*. P 18, JA 206; *contra* Br. 36, 37 (asserting that the Commission "rejected" the Judge's decision on this issue). The Commission explained that its precedent did not appear to directly address NorthWestern's situation, where it intended to use Gates Station exclusively to provide regulation service. Opinion PP 46-47, JA 218. Thus, the Commission held that "circumstances might exist where a transmission provider with no generation other than that used for regulation service may be able to make the case that it should be compensated for capacity it must hold in reserve solely to allow for regulation down." *Id*. P 47, JA 218. Such a provider would need to demonstrate, for example, "that based on the location of the generating facility, there are no accessible markets into which it could sell energy generated by its regulation down capacity, and that it had no retail or other load that could be served with such energy." *Id*. Here, the Commission found, NorthWestern has not made such a showing and, in particular, has not shown that

the costs attributed to regulation down are unrecoverable by other means. *Id*. P 48, JA 219.

The Commission directed NorthWestern to refund to its Schedule 3 customers the difference between the proposed rate and the just and reasonable rate, as of the January 1, 2011 effective date. At NorthWestern's request, by separate order not on review here, the Commission subsequently extended the time for making refunds to 30 days after the date of the Commission's order on rehearing. *See NorthWestern Corp*., Notice of Extension of Time (May 14, 2014), R. 328, JA 222.

NorthWestern sought rehearing, which the Commission denied in the final order on review before this Court. *NorthWestern Corp*., 155 FERC ¶ 61,158 (2016), R. 342, JA 227 ("Rehearing Order"). With the exception of its objections to the refund requirement, the Commission noted that the issues raised in NorthWestern's rehearing request had already been addressed in the Judge's decision and/or the Commission's Opinion. *Id*. P 11, JA 232; *see also id*. PP 12-50, JA 232-46 (addressing non-refund issues). On the issue of refunds, the Commission found that it properly ordered refunds here, where NorthWestern has over-collected its cost of service and has not shown that equitable considerations weighed against refunds. *Id*. PP 55-57, JA 248-49.

This appeal followed.

SUMMARY OF ARGUMENT

Underlying NorthWestern's challenges to the Commission's ratemaking decisions at issue in this case are two flawed assumptions. First, NorthWestern assumes that, because it *intended* to use Gates Station solely for regulation service, it is *entitled* to recover the full revenue requirement for the plant through regulation service rates. NorthWestern's intent, however, does not displace traditional cost-of-service ratemaking principles, which the Commission applied here to determine the appropriate rate for regulation service provided under Schedule 3 of NorthWestern's FERC-jurisdictional tariff.

Second, NorthWestern assumes that the costs the Commission found NorthWestern may not recover from Schedule 3 customers are necessarily foisted upon shareholders and unrecoverable anywhere else. At best, such assertions are premature; as things stand today, they are simply inaccurate. The Commission repeatedly identified for NorthWestern potential alternative avenues for recovery of Gates Station costs. NorthWestern even acknowledged that it could possibly sell some Gates Station output to recover certain costs, and that it would consider seeking authorization to recover fuel costs under another part of its tariff. And yet, more than four years after the Judge's Initial Decision, and nearly three years after the Commission affirmed the Judge, NorthWestern has not, to the Commission's knowledge, taken action to limit any losses.

On the merits of NorthWestern's ratemaking challenges, the Commission reasonably determined that NorthWestern did not carry its burden of proof to demonstrate that its proposed Schedule 3 rate is just and reasonable. NorthWestern overstated the numerator and understated the denominator in its revised rate, with the result that Schedule 3 customers would both pay more per unit of regulation service, and pay for more units of regulation service than required to serve them. As to the numerator, the Commission properly excluded NorthWestern's cost of maintaining generation at a set point, to allow for the ramping down sometimes required to provide regulation service, because NorthWestern has not shown that it cannot sell that capacity, or otherwise recover its costs. Since NorthWestern had not previously allocated Schedule 3 costs based on a numerator of 60 MW, but had simply passed-through its contract costs, NorthWestern bore the burden to demonstrate its proposal was just and reasonable. It did not.

NorthWestern does not dispute that it had the burden of proof to demonstrate that other aspects of its revised rate are just and reasonable, and its claims that the Commission erred likewise lack merit. The Commission appropriately relied on longstanding practice and precedent—unrefuted by NorthWestern—in determining that the denominator should be based on nameplate capacity. As to fuel costs, the Commission denied recovery of these costs under Schedule 3, but explained that such costs may be recoverable under Schedule 4. Likewise, the Commission did

not deny recovery of costs NorthWestern could incur under third-party contracts to replace Gates Station costs, but held that NorthWestern must file with the Commission for approval of such costs at the appropriate time.

NorthWestern also challenges the Commission's decision to require refunds of the overcharges paid by its customers from the effective date of its filing in this case, January 1, 2011, until April 17, 2014, the date of the Opinion. In requiring refunds, the Commission reasonably determined that NorthWestern has over-collected its cost-of service, thus invoking the Commission's long-standing practice to grant refunds of over-collections, consistent with the purpose of the Federal Power Act to protect consumers from excessive rates and charges. And here, where NorthWestern's rates were placed into effect "subject to refund," precisely as contemplated by the Act, there can be no claim of surprise.

Ultimately, NorthWestern's arguments to this Court that this case is somehow controlled by Commission precedent are belied by its own assertions, before the Commission, that this is a case of first impression, presenting novel issues concerning cost recovery for regulation service. *See* Opinion P 23, JA 207. To be sure, the Commission drew heavily on its precedent and underlying policy in evaluating NorthWestern's proposal, but ultimately decided the case based on the particular facts and circumstances in the record, making policy judgments in keeping with the goals of the Federal Power Act where warranted.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews Commission orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Indep. Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). As the Supreme Court has recently explained, "[t]he 'scope of review under the 'arbitrary and capricious standard is narrow.'" *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id*. Rather, the court must uphold an agency's decision "if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id*. (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43); *see also South Carolina*, 762 F.3d at 54. "And nowhere is that more true than in a technical area like electricity rate design: '[W]e afford great deference to the Commission in its rate decisions.'" *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (quoting *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)); *see also Oxy USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) (finding that, as long as the Commission

finds a rate methodology to be just and reasonable, that methodology "need not be the only reasonable methodology, or even the most accurate one").

The Court also gives substantial deference to FERC's interpretation of its own precedent. *See Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 703-04 (D.C. Cir. 2010); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007). Moreover, the Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b). "Substantial evidence 'is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *South Carolina*, 762 F.3d at 54 (quoting *Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011)) (internal quotation marks omitted). It "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

The Court "will set aside FERC's remedial decision only if it constitutes an abuse of discretion." *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999) (affirming Commission orders denying refunds). "In general, [this Court] defer[s] to FERC's decisions in remedial matters, respecting that the difficult problem of balancing competing equities and interests has been given by Congress to the FERC with full knowledge that this judgment requires a great deal

of discretion." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998) (internal quotation marks omitted).

II. THE COMMISSION REASONABLY FOUND THAT NORTHWESTERN DID NOT DEMONSTRATE THAT ITS PROPOSED RATES WERE JUST AND REASONABLE

A. The Final Rate Is Just And Reasonable, Not Confiscatory

Much of NorthWestern's challenge to the Commission's orders here stems from its belief that because it intended to use Gates Station solely for regulation service, the entire Gates Station revenue requirement should be recovered through regulation service rates. *See*, *e.g.*, Br. 26-27, 32, 44. Both the Judge and the Commission squarely rejected this premise; NorthWestern's intent is not controlling. The purpose of "the hearing was to determine whether NorthWestern's Schedule 3 rate was just and reasonable," an issue the Commission evaluates through traditional cost-of-service ratemaking principles. Opinion P 24, JA 208. Those principles, and not NorthWestern's assumption that it is entitled to recover its full revenue requirement under Schedule 3, govern the Commission's determinations here.

This proceeding addresses only the just and reasonable regulation service rates under Schedule 3 by determining how much regulation service capacity NorthWestern needs to support Schedule 3 service, not by determining "how much of the Gates Station revenue requirement would be collected by NorthWestern."

Opinion P 24, JA 208. The Commission has neither held that Gates Station costs excluded from Schedule 3 are unrecoverable, nor has it allocated those costs to shareholders or another other set of customers. Indeed, the Commission identified other ways in which NorthWestern could seek to recover additional Gates Station costs, by making off-system sales, and by potentially recovering opportunity costs and fuel costs under other provisions of its FERC-jurisdictional tariff. *See id*. PP 30, 48, 50, JA 210, 219, 220; *see also* Rehearing Order PP 36-37, 43, 45, JA 241, 244, 245. To the Commission's knowledge, NorthWestern has not attempted to recover any additional Gates Station costs through further filings with FERC or the Montana Commission. Thus, it is premature to insist, *cf.* Br. 42-43, that the Schedule 3 rates approved in this proceeding are confiscatory because they do not permit recovery of the entire Gates Station revenue requirement. *See FPC v. Hope Nat. Gas Co*., 320 U.S. 591 (1944) (holding that a utility must have an opportunity to recover its costs); *see also TC Ravenswood, LLC v. FERC*, 705 F.3d 474, 478 (D.C. Cir. 2013) (affirming FERC orders where the Court "not only ha[s] no reason to think that 'the total effect of the rate order' is unjust and unreasonable . . . but [has] affirmative reason to believe that Ravenswood will have an adequate opportunity to pursue remedies" for its claims of inadequate cost recovery, in other proceedings) (quoting *Hope*, 320 U.S. at 602).

NorthWestern is correct that the Commission expressed concern that allowing NorthWestern to over-recover its Gates Station costs might encourage other transmission providers to "build generation facilities solely to provide ancillary services at cost-of-service rates without regard to the economic value of such facilities." Opinion P 25, JA 208. In other words, the approval of rates that are higher than just and reasonable levels could reasonably be expected to encourage utilities to file for rates that are higher than just and reasonable levels. NorthWestern itself recognized that Commission ratemaking decisions can impact industry-wide incentives, arguing that allowing NorthWestern to recover anything less than the full Gates Station will discourage the construction of facilities that could provide ancillary services required to integrate wind and solar generation. *Id*. P 23, JA 207. In response, the Commission appropriately considered how its decision here might impact transmission providers' incentives industry-wide. *See id*. P 25, JA 208. The Commission's judgment should not be second-guessed, for "[t]he disputed question here involves both technical understanding and policy judgment. The Commission addressed that issue seriously and carefully, providing reasons in support of its position and responding to the principal alternative advanced." *Elec. Power Supply Ass'n*, 136 S. Ct. at 784.

Finally, NorthWestern makes little effort to conceal that its proposed Schedule 3 rate is based on the Montana Commission's determinations concerning

the costs that NorthWestern can recover from retail ratepayers. But the Commission has exclusive jurisdiction over Schedule 3 transmission rates. *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374 (1988). And the Commission cannot, consistent with the scope of its jurisdiction, or the requirements of reasoned decision-making, simply rubber-stamp a state's ratemaking choices. *Id*. at 373 ("A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority."). To the contrary, principles of federal preemption require that to the extent NorthWestern ultimately faces "trapped costs"—those allowed by a Commission-jurisdictional tariff, but deemed unrecoverable by a state regulatory authority—it is the state's ratemaking decisions, not FERC's, that must yield. *See Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 42 (2003) (applying *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), and *Miss. Power & Light*, 487 U.S. 354, in holding that a FERC tariff that delegates discretion to the regulated entity to determine the precise cost allocation preempts a state order disallowing those costs). Of course, NorthWestern does not presently face "trapped costs" because it has yet to even attempt to recover the costs excluded from Schedule 3 through other means.

B. The Commission Reasonably Calculated The Amount Of Capacity Dedicated To Regulation Load (Numerator)

The Commission reasonably rejected NorthWestern's proposal to require Schedule 3 customers to pay for 60 MW of regulation service. In its opening brief, NorthWestern claims that the Commission lacked authority to set any demand figure other than 60 MW, Br. 40-42, and that it erred in finding that regulation down service should be excluded from the calculation of demand. Br. 36-40. As discussed below, both claims lack merit. The Court should affirm the Commission's decision that NorthWestern had the burden of proof, and failed to carry it, in support of its proposed numerator.

1. The Commission Reasonably Rejected NorthWestern's Proposal To Base Its Regulation Service Rate On A Numerator Of 60 MW

NorthWestern proposed to charge wholesale transmission customers taking regulation service under Schedule 3 for 60 MW of that service (the numerator in the proposed 60/105 MW allocation factor). Here, NorthWestern challenges the Commission's determination that NorthWestern did not carry its burden to show that so-called "regulation down" should be included in its rates, ultimately reducing the numerator to 19 MW. Initial Decision PP 83-102, JA 135-43; Opinion PP 45-50, JA 217-20; Rehearing Order PP 32-39, JA 239-42. "Regulation down" reflects the concept that a utility must operate a generating resource used for regulation service at a point above its minimum, in order to be prepared to

ramp down in case demand drops instantaneously. Initial Decision P 90, JA 138; *see also* Rehearing Order P 36, JA 241.

The Commission reasonably excluded regulation down from the demand for regulation service, based on Commission precedent and policy. In the Hearing Order, the Commission identified its decisions in *Kentucky Utilities* and *Allegheny Power* as providing that "in the absence of any data supporting a transmission provider's regulation requirement, the most accurate way to determine the regulation obligation applicable to transmission customers was by calculating the average of [all] hourly load variations" on the system. Hearing Order P 23, JA 75 (citing *Kentucky Utilities*, 85 FERC ¶ 61,274, at 62,108–62,109; *Allegheny Power*, 85 FERC ¶ 61,275, at 62,120–62,121). Following the hearing, Judge Dowd agreed with Commission staff that there is not an absence of "any" data here, Initial Decision P 87, JA 137, and thus held that the cited cases are "not factually on all fours with this case." *Id*. P 91, JA 139. Nonetheless, the Judge held that the Commission's underlying "policy to exclude regulation down is still applicable here." *Id*. While NorthWestern contends that the Commission "rejected" that rationale, Br. 36, 37, the Commission actually affirmed it, offering "reasons in addition to those" offered by the Judge. Opinion P 18, JA 206.

The additional reasons offered by the Commission center on the policy underlying the exclusion of regulation down. *See id*. PP 47-48, JA 218-19;

Rehearing Order PP 34-36, JA 240-41. As the Commission explained, *Kentucky Utilities* and *Allegheny Power* both involved vertically-integrated utilities, those which operate both fleets of power plants and the associated transmission facilities. Opinion P 46, JA 218. As such, those utilities operate their generating plants as needed to serve scheduled load. Thus, as needed, the utility could ramp down a generating plant to provide regulation service with assurance that "the capacity costs were being recovered from customers for whom power was already scheduled." *Id*.

The Commission acknowledged that NorthWestern "*may be* in a situation different from most other suppliers of regulation service," but ultimately held that NorthWestern had not demonstrated this to be true. *Id*. P 47, JA 218 (emphasis added). In order to avoid exclusion of regulation down, the Commission explained, a "transmission provider with no generation other than that used for regulation service" could potentially "justify compensation for regulation down capacity." *Id*. For example, the Commission offered,

> such a transmission provider may be able to justify compensation for regulation down capacity if it demonstrates that, based on the location of the generating facility, there are no accessible markets into which it could sell energy generated by its regulation down capacity, *and* that it had no retail or other load that could be served with such energy.

Id. (emphasis added). In other words, consistent with Commission precedent and policy, NorthWestern must demonstrate that it is unable to recover regulation

down costs elsewhere. *Id*. P 48, JA 219. *See*, *e.g*., *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 957 (D.C. Cir. 2013) (deferring to FERC's interpretation of its own precedent, including Order No. 888 rulemaking, where prior cases were not directly on point).

Looking to NorthWestern's evidentiary submissions, the Commission agreed with Judge Dowd, the finder-of-fact, that NorthWestern has failed to provide evidence that its regulation down costs are unrecoverable. *See* Initial Decision P 90, JA 138; Opinion P 48, JA 219. As the Judge explained, NorthWestern did not provide "any evidence showing why it would be unable to use this energy for non-regulation purposes, such as off-system sales." Initial Decision P 90, JA 138. The Commission agreed, pointing to NorthWestern's witness who "stated rather vaguely that the energy produced by that reserved capacity would be scheduled 'off of the system' and 'absorbed into the system.'" Opinion P 48, JA 219 (citing Hearing Transcript, R. 179, pp. 154-55, JA 668-69 (quoting NorthWestern witness Mr. Cashell)); *see also* Initial Decision P 147 n.298, JA 159 (noting that NorthWestern holds market-based rate authority "that permits it to sell any service into many organized markets and to any third party"). As the Judge notes, NorthWestern agrees that energy absorbed into the system "has value." Initial Decision P 90 n.201, JA 138 (citing Tr. 154:20-155:3, JA 668-69 (NorthWestern witness explaining that extra megawatts get "absorbed into the

system"); Exh. LCG-19, R. 164, JA 548 (In response to a data request, NorthWestern explained that additional energy "will be absorbed into the system as the regulation occurs and thus has value.")).

NorthWestern counters the Judge's and the Commission's factual findings with the assertion that it cannot count on revenue from other sales of regulation down capacity to "cover the Gates Station revenue requirement." Br. 39; *see also* NorthWestern Rehearing Request at 21-24, JA 911-14. But that is not the standard. Opinion PP 47-48, JA 218-19. Rather, the Commission held that NorthWestern would need to show that the costs were "unrecoverable" or "so low as to require regulation service customers to pay its full revenue requirement." *Id*. P 48, JA 219. Again, this proceeding is not about ensuring NorthWestern's full recovery of its revenue requirement, but about determining the just and reasonable Schedule 3 regulation service rate charged to regulation service customers. *Id*. P 24, JA 208. Thus, it bears repeating that the Commission has suggested—since the Initial Decision in 2012—that NorthWestern pursue recovery of certain costs, at least going forward, under Schedule 10[3] and Schedule 4. *See* Rehearing Order

[3] In Order No. 764, the Commission "acknowledged that a resource used to provide generator regulation service is often dispatched in the middle of its operating range to allow the generator to provide regulation-up as well as regulation-down and, as a result, forego other opportunities." Opinion P 50, JA 220 (citing *Integration of Variable Energy Resources*, Order No. 764, FERC Stats. & Regs.¶ 31,331, P 316 (2012)). Such costs may be recovered, in Schedule 10, if the transmission provider can demonstrate that it in fact "has forgone

P 37, JA 242 (holding that NorthWestern is not precluded from seeking to recover regulation down capacity costs under Schedule 10) (citing Opinion P 17, JA 206); *see also* Rehearing Order PP 42-46, JA 244-45 (denying recovery of fuel costs under Schedule 3, without prejudice to a filing to recover such costs under Schedule 4). Unless and until NorthWestern attempts to recover such costs under Schedule 4, 10, or otherwise—and is denied—"the Commission could not determine what portion, if any, of the regulation down capacity costs were otherwise unrecovered by NorthWestern." Rehearing Order P 36, JA 241. The Commission's decision, in these circumstances, to exclude regulation down costs appropriately reflects the principle that "all approved rates reflect to some degree the costs actually caused by the customer who must pay them." *E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1303 (D.C. Cir. 2007) (internal quotation marks omitted).

NorthWestern relies heavily on cases where the Commission has permitted revenue from energy sales to be credited back to firm customers. Br. 34-35, 38. Here, the Commission, summarily affirming the Judge's decision, reasonably declined to address the credit, where it was designed to apply against the fuel charge component of the energy rate, both of which had been rejected. *See* Initial

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opportunities associated with its obligation to provide Schedule 3 service." Opinion P 50, JA 220. Here, NorthWestern has not made such a showing, but the Commission explained that it could seek to recover such costs in a separate proceeding. *Id*.

Decision P 186, JA 172; *see also* Br. 38 (noting that the "ALJ found no need to explore" the credit "after denying NorthWestern's fuel costs outright"). NorthWestern's credit proposal again reflects the misconception that it is entitled to recover its full revenue requirement from regulation service customers. *See* Opinion P 24, JA 208. The Commission rejected this approach, *id*., and NorthWestern does not explain how the credit overcomes the Commission's findings that it is unjust and unreasonable to impose regulation down capacity costs or fuel costs on Schedule 3 regulation service customers. *See id*. P 48, JA 219; *see also* Rehearing Order PP 43-45, JA 244-45 (fuel costs); *see also* Large Customer Group Brief Opposing Exceptions, R. 313, at 8, JA 864 (explaining that crediting is utilized where it is not feasible to allocate costs). Thus, NorthWestern's alternative crediting proposal is irrelevant unless the Commission finds that it would be just and reasonable to require Schedule 3 customers to pay for those costs in the first instance. *See* Initial Decision P 186, JA 176. NorthWestern offers no explanation for how its proposed credit remains relevant or viable in this light, and has not proposed a revised crediting mechanism that would be consistent with the Commission's findings.

2. NorthWestern Had The Burden Of Proof To Support Its Proposed 60 MW Numerator

The Commission reasonably determined that NorthWestern, having initiated this case with a proposal to revise its existing Schedule 3 rates under section 205 of

the Federal Power Act, 16 U.S.C. § 824d, bore the burden to demonstrate that each element of its proposed rate is just and reasonable. *See* Initial Decision PP 76-80, JA 133-35; Rehearing Order PP 27-30, JA 237-38. Under section 205 of the Act, the filing utility bears the burden of proof to show that new or revised rates or charges are just and reasonable. *See* 16 U.S.C. § 824d(e) ("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[.]"); *see also Anaheim v. FERC*, 669 F.2d 799 (D.C. Cir. 1981) (same). But, under section 206 of the Act, 16 U.S.C. § 824e, if the Commission finds—or a complainant demonstrates—that an existing rate is unjust and reasonable, the Commission bears the burden to demonstrate that the rate ultimately set is just and reasonable. *See FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014) (clarifying that the Commission always bears the burden, under FPA section 206, to demonstrate that a replacement rate is just and reasonable).

NorthWestern claims that the Commission erred in rejecting its proposal to set the total demand for regulation service at 60 MW because, it asserts, the Commission had previously approved NorthWestern's contracts for 60 MW of regulation service under Schedule 3. Br. 40-42. Thus, in NorthWestern's view, in reducing NorthWestern's demand numerator to 19 MW, the Commission was required to act under section 206 of the Federal Power Act, and to bear the burden

of proof accordingly. *Id*. NorthWestern is incorrect; this case concerns only Commission action under section 205 of the FPA.

In this proceeding, NorthWestern has proposed a wholly *revised* rate for an *existing* service. As Judge Dowd explained, "NorthWestern has not previously allocated the costs of the newly-constructed [Gates Station] to any customers, nor has it allocated any of its Schedule 3 costs based on a numerator of 60 MW in any proceedings before the Commission." Initial Decision P 77, JA 133; Rehearing Order P 28, JA 238 (affirming same). Previously, NorthWestern passed through 60 MW worth of third-party-provided regulation service, but the 60 MW figure represented only the total amount procured, and was not a rate determinant. *See* Initial Decision P 77, JA 133 (noting that the prior Schedule 3 recovery simply allowed pass-through of costs for contracted-for service); *see* Initial Filing, Exh. NWE-1 at 5, JA 279 (describing pass-through).

The Commission's determination that NorthWestern's proposal to use 60 MW as the numerator in the allocation factor is a change from its existing rate is consistent with this Court's precedent. In *Public Service Commission of New York v. FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1980), the Court held that if a rate proposal represented a "departure from the status quo," the proponent utility would bear the burden of proof, but if the part of the rate at issue was a "constant element" of the prior rate, the Commission would bear the burden of proof. *Id*.

Later, in *Kansas Gas & Elec. Co. v. FERC,* 758 F.2d 713 (D.C. Cir. 1985), the Court noted that a lack of clarity in whether the rate element was part of the status quo weighs in favor of placing the burden of proof on the utility. *Id*. at 720 (explaining that, in *Public Service Commission of New York*, "the Commission had *clearly* approved the part of the rate representing the status quo in prior proceedings," but that in *Kansas*, the Commission had not "squarely addressed" the rate element at issue). Placing the burden on the rate proponent in such circumstances, the Court explained, "yields improvements in reasoned decisionmaking" and "furthers FERC's ability to serve the public interest and determine whether rates are just and reasonable." *Id*.

NorthWestern cites generally to four Commission orders approving various contracts for Schedule 3 services as support for its position that the Commission previously had approved allocating 60 MW of regulation service to Schedule 3 customers. Br. 40 (citing cases). None of the cited orders demonstrates that the Commission "squarely addressed," *Kansas Gas & Elec.*, 758 F.2d at 720, and approved the use of 60 MW of demand as a numerator for allocation purposes. In the first two, the Commission approved contracts for 60 MW of regulation service, emphasizing the temporary nature of the arrangement, and without reference to allocation. Br. 40 (citing *NorthWestern Corp*., 121 FERC ¶ 61,204, and *NorthWestern Corp*., 122 FERC ¶ 61,120 (2008)). In the last two, an

administrative law judge certified and the Commission later approved, a settlement which revised NorthWestern's Schedule 3 rates, without including an allocation based on 60 MW of regulation service demand. Br. 40 (citing *NorthWestern Corp*., 122 FERC ¶ 63,008 (certifying uncontested settlement), and 125 FERC ¶ 61,066 (approving settlement)). The Commission's orders thus reasonably determined that the proposed use of 60 MW as a numerator to determine the Gates Station revenue requirement attributed to Schedule 3 service, as one element of the rate, departs from the status quo. *See* Initial Decision P 76, JA 133.

As a practical matter, while NorthWestern is determined to summon a dispute on the allocation of the burden, under this Court's precedent there is no dispute that the Commission has the authority and responsibility to "review[] a revised rate completely to assure that all its parts—old and new—operate in tandem to insure a 'just and reasonable' result and [to] order[] refunds if the previously approved [rate provision] operates with new provisions to produce an over-recovery." *Cities of Batavia v. FERC*, 672 F.2d 64, 77 (D.C. Cir. 1982). Moreover, even if the Commission was wrong on the burden here, the Commission in fact made the requisite findings—and supported them with substantial evidence. *See* Rehearing Order P 24, JA 237 ("The Commission also affirmed the Presiding Judge's finding that NorthWestern's proposed allocation based on a numerator of 60 MW was not just and reasonable, and that its proposed allocation based on a

denominator of 105 MW was also not just and reasonable."); *see supra* pp. 29-35 (showing that the exclusion of regulation down from the allocation numerator is just and reasonable).

C. The Commission Reasonably Rejected NorthWestern's Proposed Denominator, Based On 105 MW Of Demand, As Unsupported

The Initial Decision, as affirmed by the Commission, reasonably determined that NorthWestern's proposal to set the denominator at 105 was inappropriately low. NorthWestern claims that 105 MW is the appropriate denominator, because any other denominator would not allow it to recover the full revenue requirement for Gates Station. Br. 32-35.

In rejecting NorthWestern's proposal to set the denominator at 105 MW, Judge Dowd relied on uncontroverted record evidence demonstrating that Gates Station is capable of providing more than 105 MW of regulation service, and perhaps even more than its 150 MW nameplate capacity. Initial Decision P 148, JA 159. This includes a report prepared for the Montana Commission, showing that the Gates Station turbines actually exceed their nameplate capacity, and NorthWestern's data reported to the Commission, showing that Gates Station had 140 MW or more available to provide service during every month of 2011. *See id.* P 148, JA 160 (citing Exh. S-34, R. 211, at 13, JA 747, and Exh. S-29, R. 207, at 3, JA 734). In determining whether it is appropriate to use nameplate capacity as the denominator, the Judge accepted the testimony of expert Commission staff, who

explained that "nameplate capacity has consistently been used in developing ancillary service charges since" Order No. 888. Initial Decision P 149, JA 160; *see also id*. P 142, JA 157; Staff Initial Brief, R. 283, at 30, JA 805. By way of example, the Judge referenced an earlier case where the Commission required the utility to set its ancillary service rate based on a denominator of nameplate capacity. *See* Initial Decision P 149, JA 160 (citing *Westar Energy, Inc*., 130 FERC ¶ 61,215, P 40 (2010)). NorthWestern does not dispute the evidence of Gates Station capacity, or the Commission's reliance on *Westar Energy* as corroborating FERC expert staff's testimony. *See* Br. 32-34.

Rather than challenge the Commission's holdings, NorthWestern asserts that the Commission should have applied other principles to reach NorthWestern's desired result (a lower denominator). First, NorthWestern argues that, by setting the denominator based on capacity, instead of demand, the Commission contradicts precedent providing that the numerator and denominator in a cost allocation factor must "match," *i.e*., they must measure the same thing. Br. 32 (citing *Midwest Indep. Transmission Sys. Operator, Inc*., 125 FERC ¶ 61,156, P 30 (2008) ("*Midwest ISO*") (clarifying that there "is no mismatch" since the definition of the summed components in the numerator and denominator were the same)). Judge Dowd, as affirmed by the Commission, explained that *Midwest ISO* "is

distinguishable on its facts,"[4] invoking the reasoning offered in one of the parties' briefs. Initial Decision P 149 n.302, JA 160 (citing Large Customer Group Reply Brief,[5] R. 301, at 19, JA 847). As the Large Customer Group explained, that case involved a proposed rate for generators, in an organized wholesale energy market, specifically intended to allow them to recover costs dedicated to the service at issue, which would otherwise be unrecoverable. Large Customer Group Reply Brief at 19, JA 847 (citing *Midwest ISO*, 125 FERC ¶ 61,156, P 3). By comparison, as the Commission repeatedly emphasized, this case does not involve a rate proposed to keep NorthWestern whole, and NorthWestern has other opportunities to recover its costs. *See* Opinion PP 24-25, JA 206; Rehearing Order PP 17-18, JA 234.

Second, NorthWestern argues that by basing the denominator on capacity, instead of demand, the Commission is effectively allocating costs to interruptible customers. Br. 33-34. But the Commission did not allocate the disallowed costs to

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[4] NorthWestern also cites, Br. 32, *Golden Spread Elec. Coop., Inc. v. Southwest Pub. Serv. Co.*, Op. No. 501, 123 FERC ¶ 61,047, P 97 (2008), which is likewise distinguishable on its facts. *Golden Spread* does not state that the numerator and denominator of a cost allocation factor must match. *Golden Spread* stands only for the proposition that if an adjustment to test period data is made for one of the three rate elements (total expenses, allocation to wholesale services, and wholesale billing determinants—the three "parameters" the Commission referenced), the same adjustment must be made to the other rate elements. *Id*. P 96.

[5] The Initial Decision cites page 19 of the Large Customer Group *Initial* Brief, but it appears the correct cite is to page 19 of the Large Customer Group *Reply* Brief, which responds to NorthWestern's arguments on this point.

interruptible customers, effectively or otherwise. The Commission rejected NorthWestern's proposed rate because it would require Schedule 3 regulation service customers to pay costs not required to serve them. Whether NorthWestern may recover its entire revenue requirement is not part of the cost-of-service ratemaking analysis for Schedule 3 rates, and has not been decided in this case. *See supra* pp. 25-26. Further, NorthWestern argues that Commission precedent requires the Gates Station revenue requirement be allocated to firm customers. Br. 33. But there is no indication in the agency record or NorthWestern's opening brief that NorthWestern has pursued recovery of its Gates Station costs from other firm customers, through other schedules of its FERC-jurisdictional tariff, or from retail ratepayers.

D. The Commission Reasonably Determined That Fuel Costs Are An Energy Cost, Recoverable Under Schedule 4, Not Schedule 3

The Commission reasonably rejected NorthWestern's proposal to recover fuel costs through its Schedule 3 energy rate costs as inconsistent with Commission precedent and policy. *See* Initial Decision PP 181-85, JA 170-72; Opinion P 17, JA 206 (summarily affirming); Rehearing Order PP 42-45, JA 244-45. NorthWestern claims that the Commission did not adequately respond to its arguments on this point. Br. 47.

In her Initial Decision on this issue, Judge Dowd explained that "[n]o party has contradicted" testimony from FERC trial staff that, "in general, the fuel costs

associated with the provision of Regulation service have been recovered through Schedule 4 since Order No. 888 first issued." Initial Decision P 181, JA 170 (citing Staff Reply Br., R. 297 at 26-27, JA 836-37); *see also* Staff Reply Brief at 27, JA 837 (citing Staff Exh. S-13, R. 252 at 14-15, JA 792-93). Schedule 3 regulation service is a capacity service that is "energy neutral since it is absorbing [as] well as providing generation to balance load." Initial Decision P 182, JA 171; *see also id*. P 181, JA 170. Schedule 4, on the other hand, governs recovery for an energy service, specifically energy imbalance service. *See supra* p. 5 (describing energy imbalance service as another type of ancillary service).

In response to NorthWestern's citation to two cases where the Commission assertedly allowed fuel cost recovery under Schedule 3, the Judge appropriately relied on arguments of the opposing parties to refute these cases. *See* Initial Decision P 181 & n.359, JA 171 (citing Staff Reply Brief at 22-24, JA 832-34; Large Customer Group Reply Brief at 23, JA 851; Central Montana Electric Power Cooperative Reply Brief, R. 295, at 20-21, n.16, JA 822-23). In summary, the Judge adopted the parties' reasoning that the cases cited by NorthWestern did not involve an energy rate and were distinguishable on their facts as involving highly anomalous market conditions, and interim measures. *See*, *e.g.*, Staff Reply Brief at 22-24, JA 832-34. Nonetheless, the Judge recognized that while the Commission had consistently approved fuel costs under Schedule 4, it had not expressly

prohibited recovery of fuel costs under Schedule 3. Initial Decision P 185, JA 172. Thus, the Judge prudently left the question of whether to reach such an exception to the Commission here. In the Rehearing Order, the Commission expressly declined, stating that it was not "persuaded" that "recovery of fuel costs through Schedule 3 charges is just and reasonable." Rehearing Order P 45, JA 245.

Moreover, both Judge Dowd and the Commission emphasized that the denial of fuel cost recovery under Schedule 3 was "without prejudice to NorthWestern's ability to make a future section 205 filing with the appropriate evidentiary support to recover these costs" under Schedule 4. Rehearing Order P 45, JA 245; *see also* Initial Decision P 182, JA 171. Judge Dowd further noted NorthWestern's intention to "evaluate the idea of revising its Schedule 4" to include the fuel costs at issue. Initial Decision P 183, JA 171; *see* NorthWestern Post-Hearing Reply Brief, R. 298, at 24, JA 842.

NorthWestern makes little effort to challenge the Commission's holdings on this issue, confining its argument to a citation to its request for rehearing of the Opinion, and assertions that the Commission did not adequately respond. Br. 47. The Commission's reasoning, detailed above, is adequate. *See Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008) (noting that the Court applies a "deferential standard of review [under which] we uphold orders in which we can 'discern a reasoned path' to the decision") (citing *FPL Energy Marcus*

Hook, L.P. v. FERC, 430 F.3d 441, 449 (D.C. Cir. 2005)). NorthWestern's request for rehearing did not challenge the Judge's finding that the two cases on which it relied were distinguishable. *See* Rehearing Request at 42-44, JA 932-34. Thus, it was not incumbent upon the Commission to offer further analysis in the Rehearing Order to justify not creating an exception to its general fuel cost recovery policy.

Moreover, NorthWestern's assertion, Br. 47, that the Commission inadequately considered the possibility that it would not be permitted to recover fuel costs—in any proceeding to revise Schedule 4—retroactively to the effective date of its revised Schedule 3 (January 1, 2011) lacks merit. NorthWestern bears the risk of its own choices. *See* Rehearing Order P 24, JA 237 ("NorthWestern's arguments in its efforts to secure full recovery of the Gates Station costs without any risks are unpersuasive."). It has now been over 4 years since the Initial Decision, where NorthWestern was advised to pursue alternate cost-recovery opportunities and reasonably should have realized that its strategy might not be successful. NorthWestern's protestations about the potential for under-recovery due to the bar on retroactive ratemaking simply lack credibility where NorthWestern has refused to mitigate any losses by seeking to recover the costs in a Schedule 4 filing.

E. The Commission Reasonably Limited NorthWestern's Proposal To Recover Replacement Costs

Before filing the revisions to Schedule 3 at issue in this case, NorthWestern secured regulation service by third-party contract and, each time it entered into such a contract with a duration of one year or more, filed that contract for prior Commission review under Federal Power Act section 205. *See* Exh. NWE-1 at 5-6, JA 279-80 (describing process). Here, notwithstanding the development of Gates Station, NorthWestern proposed to continue to pass-through costs of services procured by third-party contract "as the need arose." *See* Initial Decision PP 207, 223, JA 180, 186. During the hearing, NorthWestern agreed to limit its pass-through of costs of third-party-provided regulation service to situations where the third-party-contract costs are less than the variable operating costs of Gates Station, or where costs result from an outage at Gates Station. *Id*. P 223, JA 186; *see also id*. P 211, JA 181. No party objected to the first category—where third-party-contract costs are less than the variable costs of operating Gates Station. *See id*. P 224, JA 186. But parties argued that a separate filing should be required to recover costs associated with the 2012 Gates Station outage, and that prior Commission review should be required for all third-party contracts (regardless of duration). *Id*. P 224, JA 186; *see also* NorthWestern Rehearing Request at 45, JA 935 (acknowledging that contracts for one year or more continued to require prior Commission review). Ultimately, the Judge authorized pass-through of third-

party contract costs where those costs are less than the variable costs of operating Gates Station, but required NorthWestern to file all such contracts for prior Commission review. Initial Decision PP 224-25, JA 186.

On appeal, NorthWestern raises only two arguments concerning replacement costs. *See* Br. 47-48. First, NorthWestern asserts that the Commission "irrationally directed" it not to purchase additional regulating capacity when the system needs it, contrary to the Commission's Order No. 764 rulemaking. Br. 48; *see supra* n.3 (discussing Order No. 764). This is simply wrong. The Commission's order does not preemptively deny recovery of replacement regulation costs, but directs NorthWestern to file for approval of third-party contracts. *See* Initial Decision PP 224-45, JA 186.

Second, NorthWestern claims, in particular, that the Commission's orders bar it from recovering costs of the Gates Station 2012 outage. Br. 48. But Judge Dowd held that NorthWestern should file, under Federal Power Act section 205, to recover the costs associated with the outage once the necessary studies are complete and the total costs are established. *See* Initial Decision P 224, JA 186. At the time of the Initial Decision, the Gates Station outage was continuing. *See* Opinion P 5, JA 201.

NorthWestern flatly states that a section 205 rate filing would not have allowed it to recover past costs, dating back to the start of the outage. Br. 48. But

Commission trial staff and others disagreed with this assessment. *See* Initial Decision PP 214, 219, 222, JA 183, 184, 185. After noting the contrasting positions of the parties, the Judge concluded that the proceeding was limited to the issues the Commission set for hearing—before the 2012 outage—and that any recovery of those costs should be handled in a different proceeding. *Id*. P 225, JA 185; *see also* Opinion P 5 n.7, JA 201. The decision to address this issue in a separate proceeding, upon completion of the necessary studies, is well within the Commission's discretion. *See Tenn. Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) (noting the Commission's "broad discretion to determine when and how to hear and decide the matters that come before it") (citing, *e.g.*, *Mobil Oil Expl. v. United Distribution Cos*., 498 U.S. 211, 230 (1991)). More than four years from the Initial Decision, NorthWestern continues to assert that it should be permitted to recover these costs, but has not filed with the Commission to do so.

III. THE COMMISSION REASONABLY EXERCISED ITS DISCRETION TO REQUIRE REFUNDS

The Commission, acting under section 205(e) of the Federal Power Act, 16 U.S.C. § 824d(e), directed NorthWestern to refund to its Schedule 3 customers the difference between its proposed rate and the FERC-approved rate, as of the effective date of NorthWestern's Initial Filing. NorthWestern does not dispute that the Commission followed the appropriate procedures under section 205 of the Act,

by suspending NorthWestern's proposed rate and making it effective, as of the date NorthWestern requested, but subject to refund. S*ee* Br. 62 (acknowledging that the Commission follows this statutory procedure in "virtually every Section 205 filing that is set for hearing"); *cf*. Br. 41-42 (acknowledging that its rate filing was not an "initial rate" which is not subject to suspension). NorthWestern challenges aspects of the Commission's refund determination, but ultimately does not demonstrate that the Commission abused its discretion in determining the appropriate remedy. *See Towns of Concord, Norwood, and Wellesley, Mass. v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992) (noting that the Federal Power Act "quite clearly confers" on FERC remedial discretion with respect to refunds).

A. The Commission Reasonably Determined That NorthWestern's Overcharges Should Be Refunded

Briefly, the Commission's approach to refunds is made up of two separate lines of precedent, each of which applies to different fact patterns. In general, in cases involving overcharges resulting in an over-collection of revenues, the Commission follows a general practice of requiring refunds. Rehearing Order P 56, JA 248 (citing *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003) (Commission has a "'general policy of granting full refunds' for overcharges"); *see also Towns of Concord*, 955 F.2d at 76 ("The Commission's general policy of granting full refunds remains in effect."). NorthWestern does not dispute that this is the Commission's policy. On the other hand, in cases "where

the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds." *La. Pub. Serv. Comm'n v. Entergy Corp.*, 155 FERC ¶ 61,020, P 25 (2016), *appeal docketed*, No. 16-1382 (D.C. Cir. Nov. 4, 2016) (internal citation omitted). The categorization of a given case thus turns on whether or not the utility over-collected the charges at issue. *See id*. P 20.

The Commission reasonably determined, applying its own policy and precedent, that this case involves an overcharge, not cost allocation and rate design. *See* Rehearing Order PP 55-57, JA 248-49; *cf*. NorthWestern Rehearing Request at 59-61, JA 949-51 (On rehearing, NorthWestern did not argue that this is a rate design case.). This is neither a reach nor, as NorthWestern puts it, a "gambit." Br. 59. Simply put, the Commission allowed the recovery of some costs under Schedule 3, and disallowed recovery of other costs, all from the same group of Schedule 3 customers. Because the Commission had permitted NorthWestern to collect its proposed rate—"subject to refund"—from the effective date forward, NorthWestern in fact "over-collected its cost of service." Rehearing Order P 56, JA 248.

As the Commission explained, Schedule 3 rates apply only to one set of customers—Schedule 3 customers. *Id*. P 55, JA 248. NorthWestern here sought to revise its Schedule 3 rates on a cost-of-service basis, and proposed to recover a set

amount (here, the portion of Gates Station costs that are not being recovered from retail ratepayers by order of the Montana Commission) from Schedule 3 customers. *Id*. ("NorthWestern sought to justify its cost-based Schedule 3 rate by assigning to Schedule 3 customers a calculated portion of the Gates Station revenue requirement."). The Commission ultimately determined that only some, but not all, of those costs should be recovered in Schedule 3.

NorthWestern's own argument demonstrates that the mere use of the word "allocation" by the Commission does not justify application of the Commission's refund policy applicable to cost allocation and rate design cases. As NorthWestern notes, the Commission and parties before it use—or perhaps overuse—the word "allocation" to refer to a wide array of circumstances and rate features. Br. 56-58 (citing cases). Moreover, NorthWestern suggests that the Commission is somehow allocating costs to entities other than Schedule 3 customers, including retail ratepayers and shareholders. This is incorrect. *See* Br. 30, 33, 40 (recognizing that the Commission allocated the disallowed costs "to no one"). Indeed, the Commission offered other potential avenues for NorthWestern to recover additional Gates Station costs. *See supra* pp. 33-34 (noting suggestions, as yet unheeded, to file for recovery under Schedule 4 or Schedule 10). NorthWestern's view that a reduction in the "cost-based foundation for Schedule 3 rates," Rehearing Order P 55, JA 248, is in fact a "cost allocation" or "rate design" matter,

would wholly undermine the statutory provision for refunds, under Federal Power Act section 205(e), following a hearing to determine the lawful, just and reasonable rate.

NorthWestern errs in asserting that cases involving over-collection are limited to those involving a tariff violation or a violation of the filed rate. Br. 60-61. Indeed, NorthWestern acknowledges that it is standard, statutorily-based practice for the Commission, when it sets a rate proposed under section 205 for hearing, to suspend the rate and make it effective subject to refund. *Id*. at 61. This Court and others have affirmed the Commission's decision to order refunds—following the procedure contemplated by the statute—in cases just like this one, where a hearing produces a rate lower than the rate originally proposed and put in effect subject to refund. *See, e.g*., *Westar Energy, Inc. v. FERC*, 568 F.3d 985 (D.C. Cir. 2009) (affirming FERC orders requiring refunds of rates filed under section 205, suspended and made effective subject to refund, where the rate ultimately found lawful was lower than the proposed rate); *see also FPC v. Tenn. Gas Transmission Co.*, 371 U.S. 145, 154-55 (1962) (affirming Commission order to require immediate refunds, notwithstanding ongoing proceeding concerning other issues in case, where proposed rate of return filed under section 4 of the Natural Gas Act—a parallel to section 205 of the Federal Power Act—was rejected as "excessive" following a hearing).

B. The Commission Properly Followed Its Practice Of Refunding Overcharges

NorthWestern next argues that, even if this is an over-collection case, the Commission improperly balanced the equities in deciding to follow its general policy of providing refunds. Br. 51-52. The Commission's general policy of ordering full refunds in overcharge cases reflects the inequity inherent in charging customers a rate in excess of the just and reasonable rate, as NorthWestern has here. *See* Rehearing Order P 56, JA 248 (citing *La. Pub. Serv. Comm'n*, 155 FERC ¶ 61,020 at P 21). This flows from the statute itself, which has as its "primary aim . . . the protection of consumers from excessive rates and charges." *Mun. Light Bds. of Reading & Wakefield, Mass. v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971). "This statutory structure 'not only gives the [utility] opportunity to increase its rates where justified but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases.'" *Id*. at 1349 (quoting *Atl. Refining Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 389 (1959)); *see also Tenn. Gas Transmission*, 371 U.S. at 152-153 ("The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate."). These statutorily-derived equities underlie the Commission's general practice to grant refunds of overcharges, and its exercise of

that practice here. *See* Rehearing Order P 56, JA 249 (finding that NorthWestern has not "demonstrated any reason for the Commission to deviate from its policy of granting full refunds to remedy overcharges").

In addition, the Commission found that "NorthWestern clearly was on notice that its rates were subject to refund." *Id*. P 57, JA 249 (citing hearing orders making rates effective "subject to refund"). Because the Commission accepted the rates only on the condition of refund, NorthWestern was not entitled to rely on the collection of those charges. *See Westar Energy*, 568 F.3d at 989 (rejecting arguments of reliance where utility was on notice that its proposed rate was made effective subject to refund). And the Commission appropriately determined that prior notice weighed in favoring of following its general policy to require refunds in cases involving overcharges. *See* Rehearing Order P 57, JA 249.

The fundamental purpose of the Federal Power Act, the Commission's long-standing practice of granting refunds in overcharge cases, and this Court's precedent all support the Commission's reasonable exercise of its discretion to order refunds in this case. *See La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008) ("We owe FERC great deference in reviewing its selection of a remedy, for 'the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and

sanctions.'") (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)).

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the Commission's orders should be affirmed in their entirety.

Respectfully submitted,

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February 27, 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 12,885 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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ADDENDUM

STATUTES

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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; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

Notwithstanding subsection (b), 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.

garding formation and operation of regional transmission organizations.

§ 824o. Electric reliability

(a) Definitions

For purposes of this section:

(1) The term ''bulk-power system'' means—

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

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

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

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

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

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

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

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

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

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

(b) Jurisdiction and applicability

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

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

(c) Certification

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

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

(2) has established rules that—

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

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

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

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

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

(d) Reliability standards

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

(2) The Commission may approve, by rule or order, a proposed reliability standard or modification to a reliability standard if it determines that the standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest. The Commission shall give due weight to the technical expertise of the Electric Reli-

ability Organization with respect to the content of a proposed standard or modification to a reliability standard and to the technical expertise of a regional entity organized on an Interconnection-wide basis with respect to a reliability standard to be applicable within that Interconnection, but shall not defer with respect to the effect of a standard on competition. A proposed standard or modification shall take effect upon approval by the Commission.

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

(4) The Commission shall remand to the Electric Reliability Organization for further consideration a proposed reliability standard or a modification to a reliability standard that the Commission disapproves in whole or in part.

(5) The Commission, upon its own motion or upon complaint, may order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out this section.

(6) The final rule adopted under subsection (b)(2) of this section shall include fair processes for the identification and timely resolution of any conflict between a reliability standard and any function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission applicable to a transmission organization. Such transmission organization shall continue to comply with such function, rule, order, tariff, rate schedule or agreement accepted, approved, or ordered by the Commission until—

(A) the Commission finds a conflict exists between a reliability standard and any such provision;

(B) the Commission orders a change to such provision pursuant to section 824e of this title; and

(C) the ordered change becomes effective under this subchapter.

If the Commission determines that a reliability standard needs to be changed as a result of such a conflict, it shall order the ERO to develop and file with the Commission a modified reliability standard under paragraph (4) or (5) of this subsection.

(e) Enforcement

(1) The ERO may impose, subject to paragraph (2), a penalty on a user or owner or operator of the bulk-power system for a violation of a reliability standard approved by the Commission under subsection (d) of this section if the ERO, after notice and an opportunity for a hearing—

(A) finds that the user or owner or operator has violated a reliability standard approved by the Commission under subsection (d) of this section; and

(B) files notice and the record of the proceeding with the Commission.

(2) A penalty imposed under paragraph (1) may take effect not earlier than the 31st day after the ERO files with the Commission notice of the penalty and the record of proceedings. Such penalty shall be subject to review by the Commission, on its own motion or upon application by the user, owner or operator that is the subject of the penalty filed within 30 days after the date such notice is filed with the Commission. Application to the Commission for review, or the initiation of review by the Commission on its own motion, shall not operate as a stay of such penalty unless the Commission otherwise orders upon its own motion or upon application by the user, owner or operator that is the subject of such penalty. In any proceeding to review a penalty imposed under paragraph (1), the Commission, after notice and opportunity for hearing (which hearing may consist solely of the record before the ERO and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the penalty), shall by order affirm, set aside, reinstate, or modify the penalty, and, if appropriate, remand to the ERO for further proceedings. The Commission shall implement expedited procedures for such hearings.

(3) On its own motion or upon complaint, the Commission may order compliance with a reliability standard and may impose a penalty against a user or owner or operator of the bulk-power system if the Commission finds, after notice and opportunity for a hearing, that the user or owner or operator of the bulk-power system has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a reliability standard.

(4) The Commission shall issue regulations authorizing the ERO to enter into an agreement to delegate authority to a regional entity for the purpose of proposing reliability standards to the ERO and enforcing reliability standards under paragraph (1) if—

(A) the regional entity is governed by—

(i) an independent board;

(ii) a balanced stakeholder board; or

(iii) a combination independent and balanced stakeholder board.

(B) the regional entity otherwise satisfies the provisions of subsection (c)(1) and (2) of this section; and

(C) the agreement promotes effective and efficient administration of bulk-power system reliability.

The Commission may modify such delegation. The ERO and the Commission shall rebuttably presume that a proposal for delegation to a regional entity organized on an Interconnection-wide basis promotes effective and efficient administration of bulk-power system reliability and should be approved. Such regulation may provide that the Commission may assign the ERO's authority to enforce reliability standards under paragraph (1) directly to a regional entity consistent with the requirements of this paragraph.

(5) The Commission may take such action as is necessary or appropriate against the ERO or a regional entity to ensure compliance with a reliability standard or any Commission order affecting the ERO or a regional entity.

(6) Any penalty imposed under this section shall bear a reasonable relation to the seriousness of the violation and shall take into consideration the efforts of such user, owner, or operator to remedy the violation in a timely manner.

(f) Changes in Electric Reliability Organization rules

The Electric Reliability Organization shall file with the Commission for approval any proposed rule or proposed rule change, accompanied by an explanation of its basis and purpose. The Commission, upon its own motion or complaint, may propose a change to the rules of the ERO. A proposed rule or proposed rule change shall take effect upon a finding by the Commission, after notice and opportunity for comment, that the change is just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of subsection (c) of this section.

(g) Reliability reports

The ERO shall conduct periodic assessments of the reliability and adequacy of the bulk-power system in North America.

(h) Coordination with Canada and Mexico

The President is urged to negotiate international agreements with the governments of Canada and Mexico to provide for effective compliance with reliability standards and the effectiveness of the ERO in the United States and Canada or Mexico.

(i) Savings provisions

(1) The ERO shall have authority to develop and enforce compliance with reliability standards for only the bulk-power system.

(2) This section does not authorize the ERO or the Commission to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services.

(3) Nothing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard, except that the State of New York may establish rules that result in greater reliability within that State, as long as such action does not result in lesser reliability outside the State than that provided by the reliability standards.

(4) Within 90 days of the application of the Electric Reliability Organization or other affected party, and after notice and opportunity for comment, the Commission shall issue a final order determining whether a State action is inconsistent with a reliability standard, taking into consideration any recommendation of the ERO.

(5) The Commission, after consultation with the ERO and the State taking action, may stay the effectiveness of any State action, pending the Commission's issuance of a final order.

(j) Regional advisory bodies

The Commission shall establish a regional advisory body on the petition of at least two-thirds of the States within a region that have more than one-half of their electric load served within the region. A regional advisory body shall be composed of one member from each participating State in the region, appointed by the Governor of each State, and may include representatives of agencies, States, and provinces outside the United States. A regional advisory body may provide advice to the Electric Reliability Organization, a regional entity, or the Commission regarding the governance of an existing or proposed regional entity within the same region, whether a standard proposed to apply within the region is just, reasonable, not unduly discriminatory or preferential, and in the public interest, whether fees proposed to be assessed within the region are just, reasonable, not unduly discriminatory or preferential, and in the public interest and any other responsibilities requested by the Commission. The Commission may give deference to the advice of any such regional advisory body if that body is organized on an Interconnection-wide basis.

(k) Alaska and Hawaii

The provisions of this section do not apply to Alaska or Hawaii.

(June 10, 1920, ch. 285, pt. II, § 215, as added Pub. L. 109–58, title XII, § 1211(a), Aug. 8, 2005, 119 Stat. 941.)

STATUS OF ERO

Pub. L. 109–58, title XII, §1211(b), Aug. 8, 2005, 119 Stat. 946, provided that: ''The Electric Reliability Organization certified by the Federal Energy Regulatory Commission under section 215(c) of the Federal Power Act [16 U.S.C. 824*o*(c)] and any regional entity delegated enforcement authority pursuant to section 215(e)(4) of that Act [16 U.S.C. 824*o*(e)(4)] are not departments, agencies, or instrumentalities of the United States Government.''

ACCESS APPROVALS BY FEDERAL AGENCIES

Pub. L. 109–58, title XII, §1211(c), Aug. 8, 2005, 119 Stat. 946, provided that: ''Federal agencies responsible for approving access to electric transmission or distribution facilities located on lands within the United States shall, in accordance with applicable law, expedite any Federal agency approvals that are necessary to allow the owners or operators of such facilities to comply with any reliability standard, approved by the [Federal Energy Regulatory] Commission under section 215 of the Federal Power Act [16 U.S.C. 824*o*], that pertains to vegetation management, electric service restoration, or resolution of situations that imminently endanger the reliability or safety of the facilities.''

§ 824p. Siting of interstate electric transmission facilities

(a) Designation of national interest electric transmission corridors

(1) Not later than 1 year after August 8, 2005, and every 3 years thereafter, the Secretary of Energy (referred to in this section as the ''Secretary''), in consultation with affected States, shall conduct a study of electric transmission congestion.

(2) After considering alternatives and recommendations from interested parties (including an opportunity for comment from affected States), the Secretary shall issue a report, based on the study, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that

(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

§ 825*o*–1. Enforcement of certain provisions

(a) Violations

It shall be unlawful for any person to violate any provision of subchapter II or any rule or order issued under any such provision.

(b) Civil penalties

Any person who violates any provision of subchapter II or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than $1,000,000 for each day that such violation continues. Such penalty shall be assessed by the Commission, after notice and opportunity for public hearing, in accordance with the same provisions as are applicable under section 823b(d) of this title in the case of civil penalties assessed under section 823b of this title. In determining the amount of a proposed penalty, the Commission shall take into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner.

(June 10, 1920, ch. 285, pt. III, § 316A, as added Pub. L. 102–486, title VII, § 725(b), Oct. 24, 1992, 106 Stat. 2920; amended Pub. L. 109–58, title XII, § 1284(e), Aug. 8, 2005, 119 Stat. 980.)

AMENDMENTS

2005—Pub. L. 109–58 substituted ''subchapter II'' for ''section 824j, 824k, 824*l*, or 824m of this title'' in subsecs. (a) and (b) and ''$1,000,000'' for ''$10,000'' in subsec. (b).

STATE AUTHORITIES; CONSTRUCTION

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

§ 825p. Jurisdiction of offenses; enforcement of liabilities and duties

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 exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

(June 10, 1920, ch. 285, pt. III, § 317, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 862; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107.)

CODIFICATION

As originally enacted, this section contained reference 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 Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of Title 28 which states that ''the District of Columbia constitutes one judicial district''.

''Sections 1254, 1291, and 1292 of title 28'', referred to in text, were substituted for ''sections 128 and 240 of the Judicial Code, as amended (U.S.C. title 28, secs. 225 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

§ 825q. Repealed. Pub. L. 109–58, title XII, § 1277(a), Aug. 8, 2005, 119 Stat. 978

Section, act June 10, 1920, ch. 285, pt. III, § 318, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 863, related to conflict of jurisdiction.

EFFECTIVE DATE OF REPEAL

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

§ 825q–1. Office of Public Participation

(a)(1) There shall be an office in the Commission to be known as the Office of Public Participation (hereinafter in this section referred to as the ''Office'').

(2)(A) The Office shall be administered by a Director. The Director shall be appointed by the Chairman with the approval of the Commission. The Director may be removed during his term of office by the Chairman, with the approval of the Commission, only for inefficiency, neglect of duty, or malfeasance in office.

(B) The term of office of the Director shall be 4 years. The Director shall be responsible for the discharge of the functions and duties of the Office. He shall be appointed and compensated at a rate not in excess of the maximum rate prescribed for GS–18 of the General Schedule under section 5332 of title 5.

(3) The Director may appoint, and assign the duties of, employees of such Office, and with the concurrence of the Commission he may fix the compensation of such employees and procure temporary and intermittent services to the same extent as is authorized under section 3109 of title 5.

(b)(1) The Director shall coordinate assistance to the public with respect to authorities exercised by the Commission. The Director shall also coordinate assistance available to persons

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 27th day of February 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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