ORAL ARGUMENT NOT YET SCHEDULED

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

No. 16-1305

ARKANSAS PUBLIC SERVICE COMMISSION,
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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June 12, 2017

CIRCUIT RULE 28(A)(1) CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying docket are as stated in the Brief of Petitioner.

B. Rulings Under Review

1. *Entergy Servs., Inc*., Opinion No. 547, 154 FERC ¶ 61,173 (2016), JA 46; and

2. *Entergy Servs., Inc.*, 156 FERC ¶ 61,112 (2016), JA 81.

C. Related Cases

This case has not previously been before this Court or any other court. This case concerns the ramifications of Entergy Arkansas' withdrawal from the Entergy System Agreement, which was previously at issue in *Council of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012) (concerning operating companies' obligations under the Entergy System Agreement upon withdrawal), and is currently at issue in *Arkansas Public Service Commission v. FERC*, No. 16-1193 (concerning Entergy Arkansas' obligation to make finally-calculated bandwidth remedy payments from 2005 following its withdrawal) (briefing completed).

/s/ *Lona T. Perry*
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GLOSSARY

Arkansas	Petitioner Arkansas Public Service Commission
Commission or FERC	Respondent Federal Energy Regulatory Commission
Entergy or Entergy Services	Intervenor Entergy Services, Inc.
[Entergy] Operating Company/ies	Individually or collectively, Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Entergy Gulf States Louisiana, LLC; and Entergy Texas, Inc.
Hearing Order	*Entergy Servs., Inc.*, 145 FERC ¶ 61,247 (2013), JA 419
Initial Decision	*Entergy Servs., Inc.*, 149 FERC ¶ 63,022 (2014), JA 1192
Order Affirming Initial Decision	*Entergy Servs., Inc.*, Opinion No. 547, 154 FERC ¶ 61,173 (2016), JA 46
Rehearing Order	*Entergy Servs., Inc.*, 156 FERC ¶ 61,112 (2016), JA 81
Union Pacific	Union Pacific Railroad Company
Withdrawal Notice Order	*Entergy Servs., Inc.*, 129 FERC ¶ 61,143 (2009)
Withdrawal Notice Proceeding	Proceeding accepting Entergy Arkansas' notice of withdrawal from the Entergy System Agreement, *Entergy Servs., Inc.*, 129 FERC ¶ 61,143 (2009), *on reh'g*, 134 FERC ¶ 61,075 (2011), *aff'd*, *Council of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012)
Withdrawal Notice Rehearing Order	*Entergy Servs., Inc.*, 134 FERC ¶ 61,075 (2011)

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BRIEF FOR RESPONDENT
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STATEMENT OF THE ISSUES

In 2005 and 2006, the Union Pacific Railroad Company (Union Pacific) breached a transportation contract to supply coal at favorable rates to two Entergy Arkansas, Inc. generation plants. Because the multi-state Entergy system dispatches power according to cost regardless of plant ownership, this contract breach increased costs not only for Entergy Arkansas but also for other affiliated Entergy power companies purchasing Entergy Arkansas power.

In 2008, Entergy Arkansas and Intervenor Entergy Services, Inc. (Entergy or Entergy Services) (a service company acting on behalf of the affiliated Entergy companies) settled breach of contract claims against Union Pacific in exchange for Union Pacific extending Entergy Arkansas' below-market rate transportation service from June 2011 (the expiration of the then-current contract) to June 2015. From June 2011 through December 2013, the affiliated Entergy power companies benefitted from the below-market rate transportation through the Entergy system centralized dispatch of the lowest-cost power. However, following Entergy Arkansas' withdrawal from the Entergy system in December 2013, the Entergy affiliates ceased to receive settlement benefits.

This proceeding concerns Entergy Arkansas' filing under section 205 of the Federal Power Act, 16 U.S.C. § 824d, of successor arrangements to effectuate its withdrawal from the Entergy system. In the challenged orders, *Entergy Servs., Inc.*, 154 FERC ¶ 61,173 (2016) (Order Affirming Initial Decision), JA 46, *on reh'g*, 156 FERC ¶ 61,112 (2016) (Rehearing Order), JA 81, the Commission affirmed an Initial Decision, *Entergy Servs., Inc.*, 149 FERC ¶ 63,022 (2014) (Initial Decision), JA 1192, that found that Entergy Arkansas' successor arrangements would be unreasonable unless Entergy Arkansas shared the post-withdrawal benefits of the Union Pacific settlement with the affiliated entities until

the settlement benefits expired in 2015. The Initial Decision also adopted a methodology for calculating the post-withdrawal settlement benefits.

This appeal presents the issues of whether the Commission possessed jurisdiction to require Entergy Arkansas to share the post-withdrawal settlement benefits, whether the Commission reasonably could conclude that the required payments do not constitute an unauthorized "exit fee" under the Entergy system agreement, and whether the Commission's remedial methodology was reasonable.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum.

STATEMENT OF FACTS

I. THE ENTERGY SYSTEM AND THE SYSTEM AGREEMENT

Prior to 2013, the Entergy System comprised six Operating Companies selling electricity in Arkansas, Louisiana, Mississippi, and Texas.[1] *See La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 383 (D.C. Cir. 2008). Transactions among the Entergy Operating Companies are governed by the Entergy System Agreement. *See Council of New Orleans v. FERC*, 692 F.3d 172, 174 (D.C. Cir. 2012) (The

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[1] Prior to Entergy Arkansas' withdrawal in 2013, the Operating Companies were: Entergy Arkansas, Inc.; Entergy Mississippi, Inc.; Entergy Louisiana, LLC; Entergy New Orleans, Inc.; Entergy Gulf States Louisiana, LLC; and Entergy Texas, Inc.

Entergy System Agreement "which has been a feature of many cases before this Court, establishes the operating framework for the six Entergy companies servicing Arkansas, Louisiana, Mississippi, and Texas"); *La. Pub. Serv. Comm'n*, 522 F.3d at 383; *Miss. Indus. v. FERC*, 808 F.2d 1525, 1529 (D.C. Cir.), *vacated and remanded in other part,* 822 F.2d 1103 (D.C. Cir. 1987).

The Entergy System Agreement has provided the contractual basis for planning and operating the Operating Companies' generation and bulk transmission facilities on a coordinated, single-system basis since 1951. *Entergy Servs., Inc.*, 145 FERC ¶ 61,247 P 2 (2013) (Hearing Order), JA 420. The System Agreement is a Commission-approved tariff that requires that the Operating Companies' generation and transmission facilities be operated as a single, integrated system. *See La. Pub. Serv. Comm'n*, 522 F.3d at 383. The System Agreement allocates among the participating Operating Companies the benefits and costs of coordinated operation of the Operating Companies' generation and bulk transmission facilities. Hearing Order P 2, JA 420. The System Agreement is appended by seven service schedules that provide the basis of compensation for the use of the facilities and for the supply of capacity and energy among Operating Companies: Service Schedules MSS-1 through MSS-7. *Id.*

II. THE 2008 UNION PACIFIC SETTLEMENT

Entergy Arkansas operates and partially owns two coal-fired generation plants, the White Bluff Electric Station and the Independence Steam Electric Station. Brief on Exceptions of Entergy Services, Inc. at 9, JA 1275. A significant part of the cost of Entergy Arkansas' coal generation is the cost of transporting the coal. *Id*. The majority of Entergy Arkansas' coal transportation has historically been provided by Union Pacific. *Id*. Beginning in 2002, Entergy Arkansas had a 9.5-year contract with Union Pacific, expiring in June 2011, that was referred to as a "legacy contract" because it provided for favorable rates and terms of service compared to current market rates. *Id*. at 9-10, JA 1275-76.

From May 2005 through June 2006, Union Pacific failed to deliver the coal for White Bluff and Independence required under its transportation contract with Entergy Arkansas. Initial Decision P 1 n.1, JA 1193. As a result of this shortfall, Entergy Arkansas was required to purchase more expensive coal from other sources, and to run the two plants at lower output during off-peak hours to conserve coal and maintain higher generation output during peak hours. *Id*. P 234, JA 1245. The Entergy System also purchased replacement power to make up for the reduced peak period generation at the affected plants. *Id*. P 235, JA 1245.

The increased cost to generate power caused by the contract breach was passed on to the other Entergy Operating Companies through the System

Agreement's Energy Exchange provision in Service Schedule MSS-3. Order Affirming Initial Decision P 48, JA 67; Initial Decision PP 236-39, JA 1245-46. Under the Entergy System Agreement, the Operating Companies' generation and transmission facilities were operated as a single integrated system. Hearing Order P 2, JA 420. Power plants were dispatched economically to meet customer demand, without regard to ownership. Initial Decision P 236, JA 1245.

Under Service Schedule MSS-3, on an hourly basis, each Operating Company retains its lowest cost resources to meet its own customers' demand, and excess energy is allocated at cost to other Operating Companies. Initial Decision P 239, JA 1246. *See generally City of New Orleans v. FERC*, 67 F.3d 947, 948-49 (D.C. Cir. 1995) (describing operation of Service Schedule MSS-3). Entergy Arkansas sold excess generation into the MSS-3 Energy Exchange most hours because it owned a number of low cost resources, including White Bluff and Independence. Initial Decision PP 236, 239, JA 1245, 1246. White Bluff and Independence typically were dispatched at full output around the clock and often provided more energy than Entergy Arkansas required to meet its customers' demand. *Id*. P 236, JA 1245. The other Operating Companies benefitted from that low-cost energy under Service Schedule MSS-3. *Id*.

As a result of the contract breach, Entergy Arkansas and Entergy Services (acting on behalf of the Operating Companies) filed claims against Union Pacific

in Arkansas state court, seeking compensation for damages associated with buying more costly coal, generating power from more expensive plants, and purchasing replacement power. *Id*. P 235, JA 1245. In the state court litigation, the other Operating Companies also claimed specific damages arising from Union Pacific's contract breach. Order Affirming Initial Decision P 48, JA 67.

In 2008, the case was settled for the benefit of all the Operating Companies. *Id*.; Rehearing Order P 6, JA 84; Initial Decision P 277, JA 1254. The settlement consisted of transportation contracts with Entergy Arkansas and Entergy Services that locked in below-market coal transportation rates for June 2011 (the expiration of the then-current Union Pacific contract) through June 2015. Order Affirming Initial Decision P 34, JA 61; Initial Decision PP 215, 223, JA 1241, 1243. The other Operating Companies benefitted from the below-market settlement rates through power purchases made in the MSS-3 Energy Exchange. Order Affirming Initial Decision P 50, JA 68.[2]

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[2] While certain of the Operating Companies also benefitted from the settlement because they held ownership shares in White Bluff and Independence, or purchased power from those plants under purchased power agreements, those Operating Companies continued to receive settlement benefits through those ongoing arrangements after Entergy Arkansas' withdrawal and therefore those arrangements are not at issue in this appeal. *See* Arkansas Brief at 8.

III. ENTERGY ARKANSAS' WITHDRAWAL FROM THE SYSTEM AGREEMENT

In 2005 and 2007 respectively, Entergy Arkansas and Entergy Mississippi notified the other Operating Companies of their intent to withdraw from the System Agreement under the Agreement's 96-month termination provision. Hearing Order P 3, JA 420. In 2009, Entergy, on behalf of Entergy Arkansas and Entergy Mississippi, filed with the Commission Notices of Cancellation to terminate their participation in the System Agreement, to be effective in 2013 for Entergy Arkansas and 2015 for Entergy Mississippi.

The Commission accepted the Notices of Cancellation in *Entergy Servs., Inc.*, 129 FERC ¶ 61,143 (2009) (Withdrawal Notice Order), *reh'g denied*, 134 FERC ¶ 61,075 (2011) (Withdrawal Notice Rehearing Order) (collectively the Withdrawal Notice Proceeding). In those orders, the Commission determined that, under the Entergy System Agreement, the withdrawing companies were not required to pay exit fees, could keep their generation facilities, and would not be required to continue participating in the bandwidth remedy approved by this Court in *La. Pub. Serv. Comm'n*, 522 F.3d 378. *See* Withdrawal Notice Rehearing Order, 134 FERC ¶ 61,075 P 3.

The Commission found, however, that it retained jurisdiction to review the reasonableness of any successor arrangements. *Id*. The Commission further found that "legitimate concerns regarding the structure of the post-withdrawal Entergy

System will be addressed by the Commission when considering Entergy's filing on transition measures," including concerns regarding the proper allocation of post-withdrawal Union Pacific settlement benefits and Ouachita Generating Station transmission upgrade costs.[3] *Id*. P 37 & n.54.

This Court affirmed the Withdrawal Notice Proceeding orders, holding that the Commission reasonably interpreted the Operating Companies' obligations under the System Agreement. *See Council of New Orleans*, 692 F.3d at 174-77. The Court observed that its holding concerned only the obligations of the withdrawing companies under the System Agreement, and recognized that FERC "must still review the post-withdrawal arrangements to ensure that they are just, reasonable and not unduly discriminatory." *Id*. at 177.

The System Agreement and all of its service schedules terminated on August 31, 2016. *See Entergy Arkansas, Inc.*, 153 FERC ¶ 61,347 (2015) (approving settlement agreement to terminate System Agreement). All of the Entergy

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[3] The Ouachita Generating Plant is owned by Entergy Arkansas and Entergy Gulf States Louisiana. Hearing Order P 55, JA 438. In 2007, Entergy determined that $ 70 million in transmission upgrades were required to treat Ouachita as a network resource. *Id*. P 56, JA 439. Entergy Louisiana and Entergy Mississippi assumed the costs because the upgrades were located in their service areas. *Id*. However, following Entergy Arkansas' withdrawal, its portion of the Ouachita plant would no longer be a system resource, and therefore a portion of the remaining capital costs of the Ouachita plant should be reallocated to Entergy Arkansas. *See Entergy Mississippi, Inc.*, 145 FERC ¶ 61,217 P 10 (2013).

Operating Companies joined the Midcontinent Independent System Operator. *See* https://www.ferc.gov/market-oversight/mkt-electric/midwest.asp (Electric Power Markets: Midcontinent (MISO)).

IV. THE COMMISSION PROCEEDINGS AND CHALLENGED ORDERS

In November 2012, Entergy made its filing of proposed successor arrangements following Entergy Arkansas' withdrawal. Hearing Order P 9, JA 423. The "main feature" of that filing was the plan to integrate into the Midcontinent Independent System Operator and proposed revisions to the Entergy System Agreement. *See* November 20, 2012 Filing at 3, JA 93.

In that filing Entergy also stated that: "Pursuant to the Commission's order in [the Withdrawal Notice Proceeding], the allocation of the Ouachita Plant transmission upgrade costs following [Entergy Arkansas'] withdrawal from the System Agreement in December 2013 is another component of these successor operating arrangements." *Id*. *See* Hearing Order P 59, JA 440 ("Entergy's original filing in this proceeding noted that the Ouachita network upgrade costs were a component of the Operating Companies' successor arrangements."). To address the "successor operating arrangements" concerning Ouachita, Entergy filed agreements in separate FERC dockets to reallocate the Ouachita network upgrade costs by providing for payments by Entergy Arkansas that otherwise would not have been recoverable after withdrawal. Hearing Order P 59, JA 440; Initial

Decision P 5, JA 1194. Entergy did not, however, address the Union Pacific settlement. Hearing Order P 60, JA 440.

Protests were filed because, *inter alia*, Entergy's filing failed to address the post-withdrawal treatment of the Union Pacific settlement benefits. *Id*. PP 43, 60-63, JA 435, 440-42. The Hearing Order concluded that the issue of allocating the post-withdrawal Union Pacific settlement benefits raised issues of material fact that could not be resolved on the record before the Commission, and set the issue for hearing. *Id*. PP 1, 120, JA 419, 461.

Following a hearing, the Administrative Law Judge determined that Entergy Arkansas realized substantial benefits from the Union Pacific settlement after its withdrawal and that it was reasonable for Entergy Arkansas to share the post-withdrawal settlement benefits with the other Operating Companies. Initial Decision PP 242, 247, 277, JA 1246, 1247, 1254. The Administrative Law Judge adopted a benefits-based allocation methodology to allocate the benefits of the settlement. *Id*. PP 245, 249-51, JA 1247, 1248.

In the orders on review, the Commission affirmed the Initial Decision. Order Affirming Initial Decision PP 1, 10, JA 46, 50. The Commission rejected arguments that it lacked authority to review Entergy's successor arrangements, including the allocation of the Union Pacific settlement benefits. Order Affirming Initial Decision PP 16-17, JA 52-54; Rehearing Order PP 6-7, JA 84-85. The

Commission further affirmed the Initial Decision finding that Entergy Arkansas realized substantial post-withdrawal benefits from the Union Pacific settlement and that those benefits should be shared with other Operating Companies. Order Affirming Initial Decision PP 1, 33, 48, JA 46, 60, 67. The Commission also affirmed the Administrative Law Judge's benefits-based methodology for allocating the settlement benefits. *Id*. P 71, JA 77. *See also* Rehearing Order P 14, JA 88 (affirming determinations in the Order Affirming Initial Decision).

SUMMARY OF ARGUMENT

In the challenged orders, the Commission reasonably determined that Entergy Arkansas should, after withdrawal from the Entergy system, continue to share with the other Entergy Operating Companies the benefits of a 2008 Union Pacific settlement that provided below-market rate coal transportation from June 2011 to June 2015 to resolve breach of contract claims. Petitioner Arkansas Public Service Commission (Arkansas) and intervenor Entergy Services do not dispute that the Union Pacific settlement was intended to benefit the other Entergy Operating Companies through lower-cost energy, and did benefit the other Entergy Operating Companies prior to Entergy Arkansas' withdrawal. Nevertheless, they argue that the Commission erred in finding that Entergy Arkansas should continue to share the settlement benefits following its December 2013 withdrawal until the expiration of settlement benefits in June 2015.

Arkansas and Entergy point to the Commission's findings in the Withdrawal Notice Proceeding, affirmed by this Court, that the Entergy System Agreement imposes no exit fee or other payment obligation upon withdrawing companies. However, the Withdrawal Notice Proceeding concerned only Entergy Arkansas' contractual withdrawal obligations under the Entergy System Agreement. In assessing the justness and reasonableness of withdrawals, the Commission considers not only the applicant's compliance with its contractual obligations (i.e. the Entergy System Agreement), but also the impact on the remaining parties to the agreement and the proposed successor arrangements. In the Withdrawal Notice Proceeding, the Commission expressly deferred consideration of the proper post-withdrawal treatment of the Union Pacific settlement to this proceeding, on review of Entergy's Federal Power Act section 205 filing to implement successor arrangements. Accordingly, the finding in the Withdrawal Notice Proceeding that Entergy Arkansas had met the contractual requirements for withdrawing from the Entergy System Agreement was only the first step in evaluating the reasonableness of Entergy Arkansas' withdrawal.

In this proceeding, following a hearing, the Commission determined that Entergy Arkansas' successor arrangements would be unreasonable unless Entergy Arkansas continued to share the benefits of the Union Pacific settlement with the other Operating Companies. This sharing obligation did not arise from the System

Agreement, but rather effectuated the Union Pacific settlement through a just and reasonable successor arrangement. While Arkansas contends that the Union Pacific settlement is beyond FERC's jurisdiction, this ignores that the Commission has jurisdiction over cost allocations among the Operating Companies that affect FERC-jurisdictional rates. Moreover, the Commission possesses broad authority to fashion a remedy upon finding that Entergy's successor arrangements unreasonably failed to reflect the Union Pacific settlement.

Arkansas and Entergy contend that the sharing obligation constitutes an "exit fee" under the System Agreement that was found prohibited in the Withdrawal Notice Proceeding, because the methodology used to allocate the settlement benefits was based upon Service Schedule MSS-3 of the System Agreement. Basing the benefits methodology on Service Schedule MSS-3 did not, however, improperly perpetuate the System Agreement post-withdrawal. Rather, it represented a just and reasonable methodology to approximate the benefits Operating Companies would have received had Entergy Arkansas remained in the System Agreement, thereby appropriately permitting the Operating Companies to continue to receive the benefit of the bargain of the Union Pacific settlement.

The Union Pacific settlement benefits were calculated by comparing the cost of the settlement contracts to the cost of the transportation service Entergy would otherwise have been able to obtain in the market in 2011. Because Entergy had

historically entered into long-term contracts with advance lead time, the Commission accepted a 2010 analysis prepared by Entergy witness Mr. Crowley, that estimated the terms of the long-term coal transportation contract Entergy could have obtained in the market in 2011. Mr. Crowley prepared a subsequent analysis in 2014, which assumed that Entergy presciently would have entered into a one-year transportation contract in 2011, and then a three-year contract in 2012, to take advantage of the price drop in coal transportation in 2012. The Administrative Law Judge, as affirmed by the Commission, reasonably rejected the 2014 analysis, finding it inconsistent with Entergy's practice of negotiating long-term contracts and speculative because the 2012 drop in prices was not anticipated in 2011. As the Commission and the Administrative Law Judge found, subsequent changes in coal transportation rates after 2011 are not determinative of what contract terms Entergy Arkansas would have negotiated in 2011.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See*, *e.g.*, *La. Pub. Serv. Comm'n*, 522 F.3d at 391. "The '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 a rule if the agency has "'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). "And nowhere is that more true than in a technical area like [] rate design: '[W]e afford great deference to the Commission in its rate decisions.'" *Id.* (quoting *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)).

The Court upholds FERC's factual findings if they are supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014). "Once assured the Commission has engaged in reasoned decisionmaking, it is not for [the Court] to reweigh the conflicting evidence or otherwise to substitute [its] judgment for that of the Commission." *Ind. Mun. Power Agency v. FERC,* 56 F.3d 247, 254 (D.C. Cir. 1995). This Court also "defer[s] to the Commission's interpretations of its own precedents." *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 743 (D.C. Cir. 2007); *accord Mo. Pub. Serv. Comm'n v. FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015).

The challenged orders affirmed the determinations, following a trial-type evidentiary hearing, of an Administrative Law Judge. Where the Commission adopts an Administrative Law Judge's conclusion, it need not repeat the Administrative Law Judge's findings and reasoning. *See, e.g., Boroughs of Ellwood City v. FERC*, 731 F.2d 959, 967-68 (D.C. Cir. 1984).

II. THE COMMISSION REASONABLY REQUIRED THAT ENTERGY ARKANSAS SHARE UNION PACIFIC SETTLEMENT BENEFITS POST-WITHDRAWAL.

The Commission reasonably affirmed the Administrative Law Judge's determination that Entergy Arkansas should share the benefits of the Union Pacific settlement with the other Operating Companies following withdrawal. Order Affirming Initial Decision PP 36, 48, JA 62, 67. Neither petitioner Arkansas nor intervenor Entergy Services disputes that the Union Pacific settlement was intended to and did benefit the other Operating Companies. *See* Arkansas Brief at 8-9; Entergy Brief at 11-12. As explained in the Statement of Facts, Section II *supra*, the Union Pacific contract breach increased the cost of Entergy Arkansas energy purchased by other Operating Companies through the Entergy System Agreement Service Schedule MSS-3 Energy Exchange. Order Affirming Initial Decision P 48, JA 67; Initial Decision PP 236-39, JA 1245-46. In the state court litigation, the other Operating Companies as well as Entergy Arkansas claimed

specific damages from Union Pacific's contract breach. Order Affirming Initial Decision P 48, JA 67.

In settlement of the state court litigation, Union Pacific agreed to coal transportation contracts with Entergy Arkansas locking in below-market rates for 2011-2015. Order Affirming Initial Decision P 34, JA 61; Initial Decision PP 215, 223, JA 1241, 1243. Prior to Entergy Arkansas' December 2013 withdrawal, the other Operating Companies benefitted from the settlement's below-market rates through their power purchases in the MSS-3 Energy Exchange. Order Affirming Initial Decision P 50, JA 68; Rehearing Order P 7, JA 85. Under these circumstances, the Commission reasonably found that sharing the settlement benefits after Entergy Arkansas' withdrawal until the settlement contracts expired in June of 2015 would equitably allocate the costs and benefits associated with that settlement and assure that the successor arrangements among the Operating Companies were just and reasonable. Order Affirming Initial Decision P 17, JA 53.

A. The Withdrawal Notice Proceeding Did Not Address Or Decide The Proper Post-Withdrawal Allocation Of Union Pacific Settlement Benefits.

Arkansas and Entergy argue that post-withdrawal sharing of the Union Pacific settlement benefits is precluded by and inconsistent with the Commission's determination in the Withdrawal Notice Proceeding that the Entergy System

Agreement does not impose on withdrawing companies any exit fee or post-withdrawal payment obligation. Arkansas Brief at 23-30; Entergy Brief at 16. The Withdrawal Notice Proceeding reached no determination on the proper allocation of post-withdrawal Union Pacific settlement benefits, however, but rather expressly deferred consideration of the settlement to this proceeding on Entergy's Federal Power Act section 205 filing of its proposed successor arrangements. Withdrawal Notice Rehearing Order P 37 & n.54. *See* Order Affirming Initial Decision P 16, JA 52; Hearing Order P 58, JA 439.

Certainly, as affirmed by this Court, the Commission in the Withdrawal Notice Proceeding accepted Entergy's notice of withdrawal from the System Agreement, and found that the System Agreement did not impose further conditions on a withdrawing entity to pay an exit fee or otherwise compensate the remaining Operating Companies. Order Affirming Initial Decision P 3, JA 47 (citing Withdrawal Notice Order P 59). However, the System Agreement has provided the contractual basis for planning and operating the Operating Companies' generation and bulk transmission facilities on a coordinated, single-system basis since 1951. *See id*. P 2, JA 47 (citing Hearing Order P 2, JA 420). Consequently, the Commission in the Withdrawal Notice Proceeding also recognized that Entergy Arkansas' withdrawal would be a significant change to the Entergy System Agreement such that the Commission would need to review

successor arrangements to ensure that they are just and reasonable. *Id*. PP 4, 16, JA 47, 52 (citing Withdrawal Notice Order P 63; Withdrawal Notice Rehearing Order P 27 n.27); Rehearing Order P 6, JA 84. *See also* Hearing Order P 4, JA 420 (quoting *La. Pub. Serv. Comm'n v. Entergy Corp.*, 119 FERC ¶ 61,224 P 47 (2007) ("[I]n light of the history and nature of the existing members' planning and operation of their facilities under the System Agreement, it is possible that it may ultimately be appropriate to require transition measures or other conditions to ensure just and reasonable wholesale rates and services for affected Operating Company members going forward from the effective date of Entergy Arkansas' withdrawal.")).

The Commission in the Withdrawal Notice Proceeding further specifically held that its acceptance of Entergy Arkansas' withdrawal notice did not resolve the issue of post-withdrawal allocation of the Union Pacific settlement benefits or the Ouachita Generating Plant network upgrade costs, which had to be resolved in a subsequent proceeding (this proceeding) on review of Entergy's successor arrangements. Withdrawal Notice Rehearing Order P 37 & n.54. *See* Order Affirming Initial Decision P 16, JA 52; Hearing Order P 58, JA 439. *See also, e.g., La. Pub. Serv. Comm'n v. Entergy Corp*., 138 FERC ¶ 61,029 PP 43, 53 (2012) (dismissing complaint filed by the Louisiana Public Service Commission regarding the allocation of post-withdrawal Union Pacific settlement benefits and Ouachita

upgrade costs, because those concerns should be raised in the future proceeding regarding the structure of the post-withdrawal Entergy system).

Thus, the Commission expressly undertook a two-part analysis to review the Entergy Arkansas withdrawal: an initial interpretation of the withdrawal obligations imposed under the terms of the Entergy System Agreement; and a later proceeding to review the justness and reasonableness of the post-withdrawal arrangements, specifically including the proper post-withdrawal allocation of Union Pacific settlement benefits. *Council of New Orleans*, 692 F.3d at 177; Withdrawal Notice Rehearing Order PP 27 & n.27, 37 & n.54. This Court affirmed the Commission's two-step process, including FERC's jurisdiction to review the justness and reasonableness of post-withdrawal arrangements in a subsequent proceeding. *Council of New Orleans*, 692 F.3d at 177 ("Our decision today reaches only the obligation of withdrawing companies under the Agreement. As FERC noted, it must still review the post-withdrawal arrangements to ensure that they are just, reasonable and not unduly discriminatory."). *See Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 286 (D.C. Cir. 2006) (quoting *ISO New England, Inc*., 109 FERC ¶ 61,147 P 41 (2004)) (affirming the Commission's authority under the Federal Power Act to review the circumstances of utility withdrawals from a Regional Transmission Organization because of the potential for a "'substantial [deleterious] impact on other market participants and the markets

themselves'"). *See also Duquesne Light Co*., 122 FERC ¶ 61,039 P 127 (2008); *Louisville Gas & Elec. Co*., 114 FERC ¶ 61,282 PP 27-28 (2006); and *Am. Transmission Sys., Inc*., 129 FERC ¶ 61,249 P 27 (2009) (all cited in Arkansas Brief at 32) (the determination of the reasonableness of a utility's proposal to withdraw from a Regional Transmission Organization can only be made after examination of both the applicant's compliance with its contractual withdrawal obligations as well as its proposed replacement arrangements).

B. The Commission's Determination Did Not "Override" The Filed Rate.

In this proceeding, the Commission reviewed Entergy's successor arrangements to effectuate the Entergy Arkansas withdrawal to determine whether they were just and reasonable. Order Affirming Initial Decision PP 16-17, JA 52-53. Entergy filed proposed amendments to the System Agreement, Hearing Order P 9, JA 423, and specifically recognized that "[p]ursuant to the Commission's order in [the Withdrawal Notice Proceeding], the allocation of the Ouachita Plant transmission upgrade costs following [Entergy Arkansas'] withdrawal from the System Agreement in December 2013 is another component of these successor operating arrangements." *See* November 20, 2012 Filing at 3, JA 93; Hearing Order P 59, JA 440 ("Entergy's original filing in this proceeding noted that the Ouachita network upgrade costs were a component of the Operating Companies' successor arrangements."). To address the "successor operating arrangements"

concerning Ouachita, Entergy filed agreements in separate FERC dockets to reallocate the Ouachita network upgrade costs after withdrawal. Hearing Order P 59, JA 440. Entergy did not, however, address the Union Pacific settlement in its proposed successor arrangements. *Id*. P 60, JA 440.

The Commission found that Entergy's proposed amendments to the System Agreement, as modified, were just and reasonable, *id*. P 103, JA 455, and that the successor arrangements as to the allocation of Ouachita upgrade costs were being addressed in other dockets. *Id*. P 119, JA 461. However, the Commission found that, with respect to the Union Pacific settlement, Entergy's proposed successor arrangements may be unjust, unreasonable or unduly discriminatory, and therefore the Commission set for hearing the issue of allocating the post-withdrawal benefits of the Union Pacific settlement. *Id*. PP 120-21, JA 461-62; Order Affirming Initial Decision P 8, JA 49. Following the hearing, the Commission ultimately determined that Entergy's proposed successor arrangements would not be just and reasonable absent the equitable allocation of the post-withdrawal Union Pacific settlement benefits. Order Affirming Initial Decision P 17, JA 53.

The Commission reasonably determined that it possessed jurisdiction to make this determination. As this Court affirmed in *Council of New Orleans*, 692 F.3d at 177, the Commission "must still review the post-withdrawal arrangements to ensure that they are just, reasonable and not unduly discriminatory." Order

Affirming Initial Decision PP 16-17, JA 52-53. Entergy itself recognized that reallocation of the Ouachita network upgrade costs post-withdrawal constituted a "successor operating arrangement," *see* November 20, 2012 Filing at 3, JA 93, and that the Commission possessed jurisdiction to determine whether Entergy's successor arrangements were just and reasonable with respect to the Union Pacific settlement. *See* Brief on Exceptions of Entergy Services, Inc. at 19, JA 1285.

Arkansas, however, argues that the Commission's determination "overrides" the filed rate, the Entergy System Agreement, which does not itself impose post-withdrawal sharing of settlement benefits. *See, e.g.*, Arkansas Brief at 29. Entergy Arkansas' obligation to share the benefits of the Union Pacific settlement arose not from an obligation under the System Agreement, but from "effectuating the Union Pacific Settlement through a just and reasonable successor arrangement." Order Affirming Initial Decision P 51, JA 69. *See also id*. P 50, JA 68 ("The Union Pacific Settlement was an arrangement reached for a situation that arose prior to the exit of Entergy Arkansas from the System Agreement, and the sharing of benefits here merely effectuates that arrangement."). The absence of an exit fee in the System Agreement does not authorize Entergy Arkansas to abandon other contractual arrangements with other Operating Companies. Order Affirming Initial Decision P 50, JA 68 (citing *La. Pub. Serv. Comm'n v. Entergy Servs., Inc*., 153 FERC ¶ 61,032 P 20 (2015) (the fact that no post-withdrawal exit fee was

required did not excuse Entergy Arkansas from obligations sustained during the time it was part of the System Agreement), *on reh'g*, 155 FERC ¶ 61,118 (2016), *appeal pending, Ark. Pub. Serv. Comm'n v. FERC*, D.C. Cir. No. 16-1193.

The Commission orders therefore do not impose a new obligation on Entergy Arkansas, but rather effectuate the existing Union Pacific settlement by requiring that Entergy Arkansas continue to share the benefits it negotiated when it was a member of the Entergy System Agreement. Rehearing Order P 7, JA 85; Order Affirming Initial Decision P 17, JA 53. *See also* Initial Decision P 53 n.4, JA 1206 (finding "no further on-going transaction under a 'new filed rate' is required"). *See, e.g., City of Osceola v. Entergy Ark., Inc*., 791 F.3d 904, 908 (8th Cir. 2015) (interpretation of an existing contract is not a decision setting a new filed rate).

Arkansas suggests that FERC cannot order benefit sharing based upon the Union Pacific settlement because the settlement is not a FERC-jurisdictional contract. Arkansas Brief at 20, 25. The Commission, however, possesses jurisdiction to determine cost allocations among the Operating Companies, including the benefits of the Union Pacific settlement. Rehearing Order P 7, JA 85 (finding it "within the Commission's purview to determine how Entergy Arkansas' post-withdrawal settlement benefits should be allocated among the Operating Companies"). This Court has recognized that the Commission possesses

jurisdiction over cost allocations among the Operating Companies, even where the allocated costs are non-jurisdictional, because those costs affect the Operating Companies' FERC-jurisdictional rates. *See La. Pub. Serv. Comm'n*, 522 F.3d at 389-90 (FERC has jurisdiction over allocation of non-jurisdictional production costs among Operating Companies because the costs affect wholesale rates); *Miss. Indus.*, 808 F.2d at 1540-41 (FERC has jurisdiction over allocation of non-jurisdictional nuclear capacity costs in a Power Sale Agreement because allocation affects Operating Companies' wholesale rates). *See also S.C. Pub. Serv. Auth.*, 762 F.3d at 84 (the Commission has "clear" authority to reallocate capacity and production costs as a practice affecting rates); *Elec. Power Supply Ass'n*, 136 S.Ct. at 773-74 (Commission possesses jurisdiction over contracts or practices directly affecting wholesale rates).

That the Union Pacific settlement was not originally filed with the Commission does not mean that it does not affect jurisdictional rates; as this Court has recognized, "it is the norm not to require § 205 filing of contracts that merely affect jurisdictional rates." *Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001). The Commission has authority to interpret unfiled contracts that affect jurisdictional rates. *See, e.g.*, *Town of Norwood v. FERC*, 217 F.3d 24, 30 (1st Cir. 2000) (Commission had authority to interpret unfiled contracts that are "relevant to FERC tariffs").

This is, moreover, within the Commission's broad authority to fashion a remedy upon finding Entergy's successor arrangements to be unjust, unreasonable and unduly discriminatory with regard to the Union Pacific settlement. Rehearing Order PP 6-7 & n.23, JA 84-85 (citing, *e.g.*, *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984) ("[T]he Commission had broad authority to fashion equitable remedies in a variety of settings.")); Order Affirming Initial Decision P 16, JA 52 ("In reviewing successor arrangements, the Commission also has authority to develop remedies as necessary to ensure that such arrangements are just and reasonable."). *See also, e.g., Entergy Servs., Inc. v. FERC*, 319 F.3d 536, 545 (D.C. Cir. 2003) (the Commission may take action under Federal Power Act section 206, 16 U.S.C. § 824e, to order tariff revisions in a proceeding that began under section 205).

For example, this Court has held that the Commission possessed authority to remedy unjust, unreasonable or unduly discriminatory rates by mandating beneficiary-based cost allocation between utilities without pre-existing contractual or commercial relationships under its Federal Power Act jurisdiction over practices affecting rates. *S.C. Pub. Serv. Auth.*, 762 F.3d at 84-85. *See also*, *e.g.*, *Penn. Water & Power Co. v. FPC*, 343 U.S. 414, 422-23 (1952) (Commission has authority to remedy unjust and unreasonable rates by ordering continued integrated operation of two utilities at rates determined by the Commission because

integration of utilities is a "practice" within FERC's jurisdiction under the Federal Power Act); *Cent. Iowa Power Coop. v. FERC*, 606 F.2d 1156, 1170-72 (D.C. Cir. 1979) (Commission could compel members of voluntary power pooling agreement to expand membership to include small generating systems to remedy undue discrimination).

C. The Sharing Obligation Is Not An Exit Fee Under The Entergy System Agreement.

Arkansas and Entergy argue that the required sharing of Union Pacific settlement benefits constitutes an "exit fee" under the Entergy System Agreement. Arkansas Brief at 31-36; Entergy Brief at 9-21. This argument rests on the fact that the Commission adopted a methodology (proposed by Mississippi Public Service Commission witness Collin Cane) that calculated settlement benefits by approximating the amount of energy that the other Operating Companies would have purchased from Entergy Arkansas through the Service Schedule MSS-3 Energy Exchange, had Entergy Arkansas remained in the System. *See* Entergy Brief at 15-16. The argument is that this methodology "effectively perpetuate[s]" the System Agreement and therefore constitutes an exit fee under the Agreement. Entergy Brief at 15, 19. *See also* Arkansas Brief at 35.

The Commission reasonably rejected these arguments, finding that the benefit sharing remedy did not impose on Entergy Arkansas any continuing obligation under the Entergy System Agreement. Order Affirming Initial Decision

PP 17, 49-51, JA 53, 68-69. When Entergy Arkansas participated in the System Agreement, settlement benefits were shared through the System Agreement; Entergy Arkansas' departure from the System Agreement required a new methodology for sharing benefits. *Id*. P 50, JA 68. Mr. Cain used the Service Schedule MSS-3 Energy Exchange as the model for the post-withdrawal allocation methodology because it was the mechanism used to flow settlement benefits to the other Operating Companies, and it had been found just and reasonable. *See* Initial Decision PP 207-208, JA 1240 (describing Mr. Cain's testimony that his payment calculations did not rest on Entergy Arkansas remaining in the System Agreement, but rather "they were premised on the idea that the mechanism by which the settlement benefits propagated to the respective Entergy Operating Companies was the Entergy System Agreement, which he then used as the model for allocation.").

Using a benefits methodology that approximated the benefits the Operating Companies would have received had Entergy Arkansas remained in the System Agreement appropriately permitted all of the Operating Companies to receive the benefit of the bargain of the Union Pacific settlement. Order Affirming Initial Decision PP 71-72, JA 77-78; Rehearing Order P 7 n.23, JA 85. This methodology distributes benefits in the manner that was intended by the parties to the Union Pacific settlement and therefore mirrors the intent of the parties to distribute the settlement benefits as though Entergy Arkansas remained a part of the System

Agreement. Order Affirming Initial Decision P 53, JA 70; Initial Decision P 295, JA 1259. Thus, the benefit allocation methodology is a just and reasonable implementation of the Union Pacific settlement, and is not an improper exit fee or attempt to obtain lost benefits of the Entergy System Agreement. Rehearing Order P 7 n.23, JA 85 (citing Initial Decision PP 274, 277, 279-83, JA 1253, 1254, 1255-56); Order Affirming Initial Decision PP 49-51, JA 68-69.

Arkansas and Entergy dispute that the benefits methodology reflects the intent of the parties to the Union Pacific settlement. Arkansas Brief at 36-40; Entergy Brief at 20-21. In their view, because the parties were aware at the time of the 2008 settlement that Entergy Arkansas intended to withdraw from the System Agreement (Entergy Arkansas notified the other Operating Companies in 2005 of its intent to withdraw), the only reasonable conclusion was that the parties expected benefit sharing to end upon withdrawal. Arkansas Brief at 38; Entergy Brief at 20.

However, as the Commission found, the Union Pacific settlement did not address Entergy Arkansas' withdrawal from the Entergy System Agreement. Order Affirming Initial Decision P 51, JA 69; Rehearing Order P 11, JA 87. Despite being aware that Entergy Arkansas would withdraw in 2013, the parties provided for settlement benefits that would extend to 2015 without limiting the rights of the other Operating Companies to continue to receive benefits. Order

Affirming Initial Decision P 51, JA 69; Rehearing Order P 6, JA 84; Initial Decision P 279, JA 1255. At the time of the 2008 settlement, the Commission had made no determination regarding Entergy Arkansas' obligations under the System Agreement upon withdrawal. The Commission did not rule upon Entergy Arkansas' obligations upon withdrawal under the System Agreement until November of 2009 in the Withdrawal Notice Proceeding, and even then the Commission made clear that it retained jurisdiction to determine whether post-withdrawal arrangements, expressly including the treatment of the Union Pacific settlement, were reasonable. *See* Rehearing Order P 6, JA 84.

Thus, nothing compels the conclusion that the settling parties intended and agreed that the other Operating Companies' share of the settlement benefits would terminate upon Entergy Arkansas' withdrawal, instead of at the end of the settlement period. *See* Arkansas Brief at 38; Entergy Brief at 20. Rather, since the contracting parties provided for a settlement period until 2015, with no limitation on the other Operating Companies' entitlement to share in benefits, the Commission reasonably affirmed the Administrative Law Judge's conclusion that the parties to the Union Pacific settlement intended the other Operating Companies to continue to share the settlement benefits as originally envisioned until the end of the settlement period. Order Affirming Initial Decision P 51, JA 69; Initial Decision P 280, JA 1255.

D. The Commission Reasonably Calculated Post-Withdrawal Settlement Benefits.

The Commission affirmed the Administrative Law Judge's finding that calculating the benefits of the Union Pacific settlement required comparing the payments Entergy Arkansas made for coal transportation under the Union Pacific settlement with the payments Entergy Arkansas would have made absent the settlement. Order Affirming Initial Decision P 19, JA 55; Initial Decision P 252, JA 1248. *See* Answering Testimony of Thomas D. Crowley on Behalf of Entergy Services, Inc., Exhibit No. ESI-15 at 10-11, JA 1696-97.

Arkansas recognizes that this is the proper standard for calculating the settlement benefits. *See* Arkansas Brief at 43 (quantifying settlement benefits requires "estimating the transportation rates Entergy Arkansas would have had to pay and how much coal it would have transported post-withdrawal absent the Union Pacific Settlement"); Request for Rehearing of the Arkansas Public Service Commission at 21, 25, JA 1388, 1392 (same). Arkansas, however, challenges the Commission's determination, in estimating the contract rate Entergy would have paid absent the 2008 settlement, to use Entergy Services witness Thomas Crowley's 2010 analysis of market conditions rather than Mr. Crowley's subsequent 2014 analysis. Arkansas Brief at 40-44.

The original Union Pacific transportation contract would have expired in June of 2011. *See* Arkansas Brief at 7. The Union Pacific settlement provided an

additional four years of transportation service, from June of 2011 to June of 2015, at below-market rates. Order Affirming Initial Decision P 34, JA 61. Absent the settlement, Entergy Arkansas would have been required to go into the market to obtain replacement transportation commencing in 2011. *Id.*; Initial Decision PP 255, 272, JA 1249, 1252. *See* Answering Testimony of Thomas D. Crowley, Exhibit No. ESI-15 at 10-11, JA 1696-97. Thus, calculating the settlement benefits requires determining what contract terms Entergy Arkansas would have obtained had it entered the market in 2011. *See* Initial Decision P 255, JA 1249.

In his 2010 study, Mr. Crowley assumed that Entergy Arkansas would have obtained a replacement transportation contract for the 2011-2015 period at the rate set forth in a November 2009 proposal to Entergy Arkansas from another railroad, which Mr. Crowley used as a representative proxy for the contract rate Entergy Arkansas would have been able to obtain in 2011 in the absence of the settlement. *See* Order Affirming Initial Decision P 20, JA 55; Initial Decision PP 258-263, JA 1250. In his 2014 study, Mr. Crowley instead assumed that Entergy Arkansas presciently would have anticipated that coal transportation prices would moderate in 2012, and so would have negotiated a one-year contract in 2011, followed by a three-year contract that would have been negotiated after prices fell in 2012. Order Affirming Initial Decision P 21, JA 55 (later study "suffers from hindsight bias"); Initial Decision PP 264-272, JA 1250-52.

The Commission reasonably determined that the 2010 study fairly represented the benefits received by Entergy Arkansas under the Union Pacific settlement. Order Affirming Initial Decision PP 34-35, JA 61. The 2010 study appropriately used Entergy Arkansas' actual contracting practices and the market conditions existing at the time Entergy Arkansas would have been seeking a new contract to project the contract terms Entergy Arkansas would have received absent the settlement. Order Affirming Initial Decision P 33, JA 60. The 2010 study fit Entergy Arkansas' contracting practices, because Entergy had a history of seeking multi-year contracts for coal transportation negotiated in advance. Order Affirming Initial Decision PP 22, 34, JA 56, 61; Initial Decision PP 266-272, JA 1251-52. Absent the settlement, Entergy Arkansas would have been in the market for a multi-year contract before rates fell in July 2012, and would have faced rates similar to those in the 2009 proposal used as a market proxy in the 2010 analysis. Order Affirming Initial Decision PP 20, 34, JA 55, 61; Initial Decision PP 260, 265, JA 1250, 1251. Mr. Crowley himself testified that "[t]he 2010 valuation relied upon the [2009] rate quotation as representative of the market rate levels that would be available to [Entergy Arkansas] in the absence of the [Union Pacific] Settlement." Initial Decision P 259, JA 1250 (quoting Exhibit ESI-15 at 21, JA 1707).

On the other hand, the Commission found that the assumptions underlying the 2014 study were speculative. Order Affirming Initial Decision P 21, JA 55; Initial Decision PP 264-272, JA 1250-52. No party presented evidence that Entergy Arkansas anticipated in 2011 that coal prices would fall in 2012. Order Affirming Initial Decision PP 21, 35, JA 55, 61; Initial Decision P 268, JA 1251. Accordingly, the assumption in the 2014 study that Entergy Arkansas would have negotiated a "stop-gap" one year contract in 2011, in anticipation of moderating transportation rates is 2012, is based only on hindsight knowledge of what actually happened in the market, which is irrelevant to what Entergy Arkansas would have expected when contracting in 2011. Order Affirming Initial Decision PP 21, 35, JA 55, 61; Initial Decision PP 264-272, 287-292, JA 1250-52, 1257-58. *See also, e.g.*, Initial Decision P 285, JA 1256 (relying upon criticism of the 2014 valuation analysis by Louisiana Public Service Commission witnesses Kollen and Hayet); *id*. PP 200-201, JA 1238-39 (describing testimony of witness Lane Kollen); *id* PP 202-204, JA 1239 (describing testimony of witness Philip Hayet); *id*. PP 223-225, JA 1243 (describing testimony of Commission Staff witness John Sammon).

Arkansas contends that the hindsight objection is relevant only in a prudence analysis, and that "forward-looking rates" should be based on the latest data. Arkansas Brief at 42. However, this is not a circumstance where the Commission is approving forward-looking rates, as in *W. Resources, Inc.*, 66 FERC ¶ 61,157 at

61,306 (1994) (cited Arkansas Brief at 42) (determining appropriate test year data to use in setting forward-looking tariff rates for newly-merged companies) or *Astoria Generating Co., L.P. v. N.Y. Indep. Sys. Operator, Inc.*, 151 FERC ¶ 61,044 P 58, *reh'g denied*, 153 FERC ¶ 61,274 (2015) (cited Arkansas Brief at 42) (up-to-date information must be used in determining whether projects are exempt on a going-forward basis from buyer-side market power mitigation). Rather, here, in calculating the Union Pacific settlement benefits, as Mr. Crowley testified, *see* Exhibit No. ESI-15 at 10-11, JA 1696-97, the settlement terms must be compared to the terms of the contract Entergy would have negotiated in 2011 in the absence of the Union Pacific settlement. As the Commission and the Administrative Law Judge found, subsequent changes in coal transportation rates after 2011 are not determinative of what contract terms Entergy Arkansas would have negotiated in 2011. Order Affirming Initial Decision PP 21, 35, JA 55, 61; Initial Decision PP 264-268, JA 1250-51.

The Commission therefore reasonably rejected the 2014 study because it relied on contracting practices that differed from Entergy Arkansas' usual practice and it placed undue reliance on market data not known to Entergy Arkansas in 2011. Order Affirming Initial Decision P 35, JA 61. This Court defers to the Commission's expertise in its reasoned choice of methodology and "will only disturb FERC's selection of one methodology over another if its choice is not the

product of reasoned decisionmaking." *La. Pub. Serv. Comm'n*, 522 F.3d at 392. The Court's "important but limited role is to ensure that the Commission engaged in reasoned decisionmaking – that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice." *Elec. Power Supply Ass'n*, 136 S.Ct. at 784. The Commission satisfied that standard here.

CONCLUSION

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

Respectfully submitted,

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June 12, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8032 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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

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ADDENDUM

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

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and de-

livering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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(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).

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

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

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

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

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

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

Notwithstanding subsection (b), 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.

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(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; 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; 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

Arkansas Public Service Commission v. FERC **Docket No. ER13-432**
D.C. Cir. No. 16-1305

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 12th day of June 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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