ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

NO. 16-1382

LOUISIANA 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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FINAL BRIEF: JULY 17, 2017

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court and before the agency below are identified in the brief of Petitioner Louisiana Public Service Commission.

B. Rulings Under Review

1. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 155 FERC ¶ 61,120 (Apr. 29, 2016), R. 749, JA 636; and

2. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 156 FERC ¶ 61,221 (Sept. 26, 2016), R. 753, JA 720.

C. Related Cases

As more fully described in this brief (at pp. 6-11), this is the fourth appeal arising from a 1995 complaint filed by Petitioner Louisiana Public Service Commission ("Louisiana Commission") before the Federal Energy Regulatory Commission ("Commission"). In 1999, this Court remanded the matter for the Commission to further consider the complaint on its merits. *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999). Following the Commission's decision on remand, this Court again remanded the case for further consideration, after finding that the Commission has statutory authority to order refunds in this case. *La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007). Entergy Services, Inc., along with the Arkansas Public Service Commission, appealed those orders to this Court (Case Nos. 08-1330, 08-1363), but the Commission sought, and this Court granted, a voluntary remand to further address the issues. On

voluntary remand, the Commission ultimately denied refunds. Petitioner Louisiana Commission appealed that decision, and the Court remanded to the Commission to further consider the equities involved in the refund decision in light of the Court's opinion. *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014). On remand, the Commission further explained its decision to exercise its equitable discretion to deny refunds, and the Louisiana Commission again appeals.

/s/ Holly E. Cafer
Holly E. Cafer

July 17, 2017

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2010 Order	*La. Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,133 (2010), R. 689, JA 443
2011 Order	*La. Pub. Serv. Comm'n v. Entergy Corp.*, 135 FERC ¶ 61,218 (2011), R. 719, JA 485
2013 Order	*La. Pub. Serv. Comm'n v. Entergy Corp.*, 142 FERC ¶ 61,211 (2013), R. 741, JA 553
Br.	Petitioner Louisiana Commission's opening brief
Commission or FERC	Federal Energy Regulatory Commission
Entergy	Entergy Corporation (corporate parent of the Operating Companies) or Entergy Services, Inc. (acting on behalf of Operating Companies)
Entergy System or System	Generation and transmission facilities owned and operated by Entergy Operating Companies in Arkansas, Louisiana, Mississippi, and Texas
FPA	Federal Power Act
JA	Joint Appendix
Louisiana Commission or Louisiana	Petitioner Louisiana Public Service Commission
Louisiana I	*La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999)
Louisiana II	*La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007)
Louisiana III	*La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014)
Louisiana 1999	*La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999)

Operating Company/ies	Individually or collectively, Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Gulf States Louisiana, LLC and Entergy Texas, Inc. (which, prior to 2008, operated as a single entity, Entergy Gulf States, Inc.)
P	Denotes a paragraph number in a Commission order
R.	Indicates an item in the certified index to the record
Rehearing Order	*La. Pub. Serv. Comm'n v. Entergy Corp.*, 156 FERC ¶ 61,221 (Sept. 26, 2016), R. 753, JA 720
Remand Order	*La. Pub. Serv. Comm'n v. Entergy Corp.*, 155 FERC ¶ 61,120 (Apr. 29, 2016), R. 749, JA 636
System Agreement	A FERC-jurisdictional tariff that acts as an interconnection and pooling agreement for the Entergy System and provides for the joint planning, construction, and operation of new generating capacity

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BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

This appeal involves the request of the Louisiana Public Service Commission ("Louisiana" or "Louisiana Commission") for refunds resulting from an unjust and unreasonable cost allocation among the Entergy Operating Companies. In *Louisiana Public Service Commission v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014) ("*Louisiana III*"), the Court remanded orders of the Federal Energy Regulatory Commission ("Commission" or "FERC") denying refunds, finding that the Commission inadequately considered the equitable factors

involved. In this appeal of the Commission's orders on remand, the questions presented for this Court's review are:

1. Whether the Commission reasonably exercised its discretion to deny refunds based on equitable factors supported in the record, in a manner consistent with Commission precedent; and
2. Whether the Commission reasonably exercised its discretion to reject the Louisiana Commission's claim for four additional years of refunds when the claim was raised at least 16 years late and Louisiana failed to demonstrate legal error of the type that might warrant relief.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY FRAMEWORK

Section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. Section 205(c) of the Act, 16 U.S.C. § 824d(c), requires public utilities to file tariff schedules with the Commission showing their rates and terms of service, along with related contracts, for service subject to FERC jurisdiction. When those tariff schedules are filed, sections 205(a)-(b) of the Act, 16 U.S.C. §§ 824d(a)-(b),

obligate the Commission to assure that the rates and services described in the tariff are "just and reasonable," and not "unduly discriminatory."

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

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

holding company (like Entergy) with "two or more electric utility companies," permits the Commission to authorize refunds only "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." 16 U.S.C. § 824e(c).

Finally, section 309 of the Federal Power Act, 16 U.S.C. § 825h, provides that "[t]he Commission shall have the power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter." 16 U.S.C. § 825h.

II. THE COMMISSION'S PROCEEDINGS AND ORDERS

A. The Entergy System And System Agreement

At all times relevant to this appeal—the refund period of May 1995 to August 1996—the Entergy System was comprised of five 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). The Operating

[1] Those Operating Companies were: Entergy Arkansas, Inc.; Entergy Mississippi, Inc.; Entergy Louisiana, LLC; Entergy New Orleans, Inc.; and Entergy Gulf States, Inc. In 2007, Entergy Gulf States, Inc. separated into Entergy Gulf States Louisiana and Entergy Texas. *See Entergy Gulf States, Inc.*, 120 FERC ¶ 61,079 (2007) (authorizing separation plan). Entergy Arkansas and Entergy Mississippi terminated their participation effective 2013 and 2015, respectively. *See Council of the City of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012).

Companies are owned by a multistate holding company, Entergy Corporation.[2] *Id.* (What is now the Entergy System originated under Middle South Utilities, Inc., which owned most of the Operating Companies' predecessors.)

The Entergy System was highly integrated, with the Operating Companies' transmission and generation facilities operated as a single electric system. *See id.* at 383. At all times relevant to this proceeding, transactions among the Entergy Operating Companies were governed by the System Agreement. *Id*. The System Agreement acts as an interconnection and pooling agreement for the energy generated in the system and provides for the joint planning, construction and operation of new generating capacity in the system. *Id*.

The System Agreement consists of several Service Schedules, which allocate costs among the Operating Companies. At issue in this case are the cost allocations for Service Schedule MSS-1 (Reserve Equalization) and MSS-5 (Distribution of Revenue from Sales Made for the Joint Account of all Companies). In general, these schedules allocated costs among the Operating Companies according to their responsibility ratio. *See La. Pub. Serv. Comm'n v. Entergy Corp*., 124 FERC ¶ 61,275, P 4 (2008), JA 262. The responsibility ratio is

[2] For purposes of this brief, "Entergy" refers either to Entergy Corporation, the corporate parent of the Entergy Operating Companies and their affiliates, or to Entergy Services, Inc., a service affiliate that has acted on behalf of the Operating Companies in various FERC proceedings.

an Operating Company's load placed on the system at the time of system peak, as a proportion of the total load responsibility for the combined Operating Companies. *Id.*

B. The Cost Allocation Dispute

1. Earlier Proceedings

In 1995, the Louisiana Commission and the Council of the City of New Orleans filed a complaint with FERC, under FPA section 206, 16 U.S.C. § 824e(a), asserting that the formula for determining load responsibility in the System Agreement was unjust and unreasonable because it included interruptible load, in addition to firm load, in the calculation of peak load responsibility. The Commission dismissed the complaint, but on review, this Court directed the Commission to reconsider that decision. *See La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 76 FERC ¶ 61,168, (1996), *reh'g denied*, 80 FERC ¶ 61,282 (1997), *remanded*, *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999) ("*Louisiana I*").

On remand, the Commission set the matter for hearing and ultimately granted Louisiana's complaint on the merits, holding that it was unjust and unreasonable for Entergy to include interruptible load in its calculation of peak load responsibility, and directing Entergy to phase the change in over a twelve-month period. *La. Pub. Serv. Comm'n v. Entergy Corp.*, Op. No. 468, 106 FERC

¶ 61,228 (2004), JA 192, *on reh'g*, Op. No. 468-A, 111 FERC ¶ 61,080 (2005), JA 239. The Commission also held that it lacked authority to order refunds in cases where the refund would be funded from a reallocation of costs among the Operating Companies. Op. No. 468-A, 111 FERC ¶ 61,080, P 21, JA 245. Louisiana again appealed.

In 2007, this Court remanded to the Commission, directing the Commission to eliminate the phase-in of the remedy. *La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 518 (D.C. Cir. 2007) ("*Louisiana II*"). The Court also held that the Commission failed to adequately explain its decision to deny refunds for the 1995-1996 refund period. *Id*. at 520.

On remand from *Louisiana II*, the Commission issued a series of five orders. In the first two orders, the Commission required Entergy to remove all interruptible load from the cost allocation at issue, effective April 1, 2004. *La. Pub. Serv. Comm'n v. Entergy Corp*., 120 FERC ¶ 61,241, P 7 (2007), JA 257. The Commission also directed Entergy to make refunds among its Operating Companies reflecting the immediate removal of interruptible load from the cost allocation calculation, for the 15-month refund period of May 1995 through August 1996. *Id*. PP 2, 8, JA 256, 258; *see also La. Pub. Serv. Comm'n v. Entergy Corp*., 132 FERC ¶ 61,133, P 23 n.46 (2010), R. 689, JA 452 ("2010 Order") (describing refund period).

The Arkansas Public Service Commission and Entergy petitioned (Case Nos. 08-1330, 08-1363) this Court for review of these two orders issued on remand from *Louisiana II*. Upon consideration of petitioners' opening briefs, the Commission sought, and the Court granted, a voluntary remand to allow the Commission to more fully consider the parties' arguments. On voluntary remand, the Commission directed further briefing on the issue of refunds.

In the third order, the Commission held that refunds would be appropriate. 2010 Order P 3, JA 444. Having found the prior rate unlawful, the Commission found that the parties failed to present any reason to prevent the Commission from "applying its general policy and ordering refunds in the face of rates found to be unjust and unreasonable." *Id*. P 31 n.63, JA 456 (citing cases).

The Arkansas Commission, Mississippi Public Service Commission, and Entergy once again sought rehearing on the issue of refunds, and the Commission granted rehearing. In the fourth order of the series, the Commission ultimately concluded that while it has "the authority to grant refunds in this case, the better course is to invoke our equitable discretion to deny them." *La. Pub. Serv. Comm'n v. Entergy Corp*., 135 FERC ¶ 61,218, P 2 (2011), R. 719, JA 486 ("2011 Order"). The Commission explained that "in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been

allocated differently, the Commission traditionally has declined to order refunds." *Id*. P 23, JA 493 (citing cases).

The Louisiana Commission sought rehearing, and the Commission once again solicited additional briefing on the issue of refunds. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 137 FERC ¶ 61,018 (2011), R.728, JA 553 (ordering a paper hearing). In the fifth and final order in the series, the Commission denied rehearing and continued to deny refunds. *La. Pub. Serv. Comm'n v. Entergy Corp.*, 142 FERC ¶ 61,211 (2013), R. 741, JA 553 ("2013 Order"). The Commission found "it appropriate under the circumstances presented in the instant proceeding to follow our general rule that new cost allocations or rate designs that do not reflect over-recoveries or other special circumstances will run prospectively . . . and that refunds will not lie." *Id*. P 51, JA 574. Looking at the equities, the Commission noted that while this case did not appear to involve a potential for under-recovery of costs, the fact that Entergy could not revise past decisions counseled against ordering refunds. *Id*. P 63, JA 580.

2. *Louisiana III*

The Louisiana Commission petitioned this Court for review of the series of five orders. In *Louisiana III*, 772 F.3d 1297, the Court first held that there is no entitlement to or presumption in favor of refunds under the Federal Power Act. "To hold that refunds are mandatory every time there is an unjust and unreasonable

rate would be contrary to Congress's use of the permissive 'may' in section 206(b)," as the Court has previously held. *Id*. at 1302 (citing *Towns of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992)).

Nevertheless, the Court found that the Commission failed to adequately explain why it denied refunds in this cost allocation case. *Id*. at 1303. While the Commission had denied refunds in certain previous cost allocation cases, the Court held that "the equitable factors relied on by the Commission in previous refund denials were largely absent here." *Id*. at 1304. In particular, "[d]ecisions denying refunds have generally involved the possibility of under-recovery," but the Court noted that the Commission did not find that factor present here. *Id*.

Rather, the Court found that the Commission relied solely on the fact that Entergy did not over-collect revenues and was unable to revisit past decisions. *Id*. The Court first rejected the Commission's reliance on Entergy's lack of overcollection, holding that the Commission "did not explain why" this factor "should automatically negate refunds." *Id*. Second, the Court found inadequate the Commission's explanation of Entergy's inability to revisit past decisions. *Id*. at 1305-06. The Commission did not identify any specific past decisions that could not be revisited, nor explain why this is more than "a generic possibility of reliance" present in all refund cases. *Id*. at 1306.

As a result, the Court remanded to the Commission "to consider the relevant factors and weigh them against one another, striking 'a reasonable accommodation among them.'" *Id*. at 1306 (quoting *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981)).

C. The Commission's Orders On Review

On remand from *Louisiana III*, the Commission took the opportunity to clarify and explain its traditional approach to refunds in different types of cases, and, as directed in the Court's mandate, further considered the equitable factors. Ultimately, the Commission determined that, on balance, the record supports its decision to deny refunds for the 15-month refund effective period here. *See La. Pub. Serv. Comm'n v. Entergy Corp*., 155 FERC ¶ 61,120, PP 29-37, R. 749, JA 649-54 ("Remand Order"), *reh'g denied*, 156 FERC ¶ 61,221, PP 56-67, R. 753, JA 744-49 (2016) ("Rehearing Order").

On the matter of policy, the Commission emphasized its agreement with the Court that "the Commission's approach to refunds has . . . been shaped by the way certain equitable considerations are typically associated with certain specific fact patterns." Remand Order P 20, JA 645; *see also id*. P 19, JA 644. While there are references to a "general policy" on refunds in this proceeding and in other Commission opinions, these references do not accurately reflect the scope of the policy. *Id*. P 18, JA 644. In particular, the Commission clarified that its prior

reference to a general policy of ordering refunds when consumers have paid unjust and unreasonable rates—a reference repeated by the Court in *Louisiana III*—was imprecise. *Id*.; *see also id*. P 17, JA 643 (describing the Court's statement as being based on the Commission's inaccurate statement); *see also Louisiana III*, 772 F.3d at 1303 (citing Commission's order as reflecting that "general policy").

Through a discussion of Commission and Court precedent, the Commission demonstrated that the references to a "general policy" to grant refunds have "been limited to cases involving utility over-collection." Remand Order PP 18, 20-24, JA 644, 645-47 (citing, *e.g.*, *Consolidated Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003) (stating that the Commission has a "'general policy of granting full refunds' for overcharges")); Rehearing Order PP 10-19, 20, 29-32, JA 723-27, 727, 731-32.

On the other hand, where the utility does not over-collect, but it is determined that the revenues should have been allocated differently, the Commission "takes a different approach" and "traditionally has declined to order refunds" when an examination of the equitable factors supports that approach. Remand Order P 25, JA 647. The Commission emphasized that the absence of overcollection itself does not justify denial of refunds. Rehearing Order P 33, JA 732. "Rather, the absence of overcollection leads to equitable considerations that do not arise where overcollection is present." *Id*. As the Court acknowledged

in *Louisiana III*, in this type of case, the Commission has considered a range of factors, including the risk that the utility will under-collect, and the interests of the utility or customers who may have acted in reliance on the prior rate. Remand Order P 28, JA 648.

Turning to the equities in this case, the Commission first determined that the issue of whether interruptible load should be included in the calculation of system peak is a "demand allocation dispute, rather than a case of over-recovery." Remand Order P 29, JA 649 (quoting 2013 Order P 61, JA 578). Thus, the Commission's "'general policy' of awarding refunds in over-collection cases does not apply here," and the Commission must examine whether the relevant equitable factors support following the Commission's established practice of not awarding refunds in cost allocation cases. *Id*. P 30, JA 650.

Upon reconsideration, the Commission found that the record supports a finding that the equities weigh in favor of denying refunds. *Id*. The Commission relied on the two "primary grounds the Commission has cited in denying refunds in cost allocation cases." *Id*. First, the Commission found that, if refunds are granted, Entergy faces a significant possibility of under-collecting its revenues. *Id*. PP 30-33, JA 650-51; Rehearing Order PP 64-67, JA 748-49. This potential undercollection provides an equitable reason for denying refunds, but also supports denying refunds under Federal Power Act section 206(c), 16 U.S.C. § 824e(c),

which prohibits refunds in circumstances, like this, where the Commission cannot verify that the registered holding company will not experience "any reduction" in revenues. Remand Order P 33, JA 651.

Second, the Commission found that refunds would impose potentially unrecoverable costs on Entergy Operating Companies that rationally responded to the incentive in the System Agreement to avoid interruptible sales, making decisions that cannot now be undone. Remand Order PP 34-35, JA 651-52; Rehearing Order PP 60-63, JA 746-48. The Commission further rejected the Louisiana Commission's argument that notice of the 1995 complaint eliminates these equitable concerns. *See* Rehearing Order PP 56-59, JA 743-46. Finally, the Commission explained that both groups of impacted customers face inequities from the Commission's refund decision. In balancing the equities to consumers, the Commission has traditionally denied refunds and made the corrected rate effective prospectively, as it has done here. *See* Remand Order P 36, JA 653.

On rehearing, in addition to challenging the Commission's decision to deny refunds based on equitable considerations, the Louisiana Commission also raised a brand new argument. Louisiana argued that the Commission should order four years of refunds on the grounds that the Commission erred in dismissing its complaint in 1996. The Commission rejected this belated claim on procedural grounds and, alternatively, on the merits. Rehearing Order PP 68-78, JA 749-55.

The Commission's dismissal of the 1995 complaint, which was remanded by the Court for inadequate explanation in 1999, does not involve the type of legal error for which refunds are warranted. *Id*. P 74, JA 752; *see also id*. PP 70-78, JA 751-55.

SUMMARY OF ARGUMENT

The Court's mandate in *Louisiana III*, 772 F.3d 1297, required the Commission to reexamine the equitable factors relevant to the refund determination in this cost allocation case. On remand, the Commission fully examined the equitable considerations in light of the Court's guidance, ultimately concluding that the equities weigh against exercising the Commission's discretion to order refunds.

The Commission primarily relies on two equitable considerations. First, the Commission found that, if refunds are granted, Entergy faces a significant possibility of under-collecting revenues. The Louisiana Commission argues that standard ratemaking practices permit full recovery of any refunds paid, through surcharges to retail ratepayers. The Commission found, however, a substantial likelihood that Entergy will be unable to collect surcharges from retail ratepayers due to the departure of wholesale load from Entergy Arkansas and certain litigation risks. This finding supports not only the Commission's equitable determination, but also requires that refunds be denied under section 206(c), 16 U.S.C. § 824e(c),

which protects registered holding companies from refunds that would result in "any" undercollection.

Second, the Commission found that refunds would impose potentially unrecoverable costs on Entergy Operating Companies that avoided interruptible sales, based on the incentives in the System Agreement imposing higher costs on such sales. Far from "fanciful," Br. 41, the Commission's factual findings are based primarily on the Louisiana Commission's complaint, which it does not disavow. Further, the Commission reasonably inferred that the Entergy Operating Companies would act in accordance with economic incentives.

These considerations are not novel. As the Court in *Louisiana III* recognized, both the Court and the Commission have previously considered these factors in other cases resulting in denials of refunds. While the Louisiana Commission argues that the notice provided by its complaint precludes consideration of the equities, the Commission reasonably rejected the argument that notice itself warrants providing refunds, notwithstanding the equitable considerations. Further, mindful of the Court's decision in *Louisiana III*, the Commission addressed the inequities facing both consumers who paid too much and consumers who paid too little, but would face surcharges. Weighing those equities against the unfairness of a potential undercollection and the inability of

operating companies and consumers to revisit past decisions, the Commission determined that, on balance, refunds were not warranted.

While the above determinations satisfied the Court's mandate directing the Commission to reconsider the equitable factors relevant to refunds, the Commission also took the opportunity to clarify its approach to refunds in cases involving cost allocation and rate design. Reviewing decades of court and Commission precedent, the Commission confirmed that the only "general policy" on refunds relates to cases involving overcollection. Most important, as this Court found, the Commission's refund determination—whether in a case involving an overcollection, cost allocation, legal error or some other circumstance—is always fact-specific and record-driven, as it is here. For this reason, the Court may affirm the Commission's refund determination based on the specific equitable factors present in this record, and does not need to address matters of policy or other legal questions that were not central to the Commission's holding.

Finally, the Commission appropriately rejected the Louisiana Commission's belated claim that it is entitled to refunds based on a theory that the Commission committed legal error in dismissing Louisiana's complaint 20 years ago. Louisiana failed to justify its delay, even assuming it was not aware of the availability of relief for legal error until 2004. In any event, the Commission reasonably

explained that the dismissal of Louisiana's complaint was not legal error and, even if it was, the equities on this record do not support retroactive relief.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews Commission orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g., Sithe/Indep. Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). As the Supreme Court has recently explained, "[t]he 'scope of review under the 'arbitrary and capricious' standard is narrow.'" *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id*. Rather, the court must uphold an agency's decision "if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id*. (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43); *see also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) ("*South Carolina*"). "And nowhere is that more true than in a technical area like electricity rate design: '[W]e afford great deference to the Commission in its rate decisions.'" *Elec. Power Supply*

Ass'n, 136 S. Ct. at 782 (quoting *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)).

The Court "will set aside FERC's remedial decision only if it constitutes an abuse of discretion." *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999) ("*Louisiana 1999*") (affirming Commission orders denying refunds despite violation of filed rate, based on equitable factors). "In general, [this Court] defer[s] to FERC's decisions in remedial matters, respecting that the difficult problem of balancing competing equities and interests has been given by Congress to the FERC with full knowledge that this judgment requires a great deal of discretion." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998) (internal quotation marks omitted); *see also, e.g.*, *Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044-45 (D.C. Cir. 2000) ("the Commission ordinarily has remedial discretion, even in the face of an undoubted statutory violation").

Thus, this Court has repeatedly recognized that "'the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions.'" *La. Pub. Serv. Comm'n*, 522 F.3d at 393 (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)); *see also Towns of Concord*, 955 F.2d at 75-76 (affirming FERC's exercise of discretion not to require refunds despite violation of the filed

rate; noting that "the general rule is that agencies should order restitution only when 'money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it'") (quoting *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301, 309 (1935)). Finally, where the Commission "evaluate[s] the relative importance of several parameters," the Court has acknowledged that "[s]uch a juggling act would not benefit from our rearranging." *New Eng. Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 293 (D.C. Cir. 2014).

The Commission's factual findings, if supported by substantial evidence, are conclusive. *See* 16 U.S.C. § 825*l*(b); *see also Louisiana 1999*, 174 F.3d at 225. Further, the Commission's ratemaking decisions are entitled to "great deference" as "the statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition." *Morgan Stanley*, 554 U.S. at 532. "Under [this Court's] precedent, therefore, it [is] perfectly legitimate for the Commission to base its findings . . . on basic economic theory." *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 531 (D.C. Cir. 2010).

The Court also gives substantial deference to FERC's interpretation of its own precedent. *See Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 703-04 (D.C. Cir. 2010); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007).

II. THE COMMISSION REASONABLY BALANCED THE RELEVANT EQUITABLE FACTORS IN DENYING REFUNDS

In the orders on review, the Commission considered the relevant equitable factors and determined that, on balance, refunds should be denied. "The facts presented here evidence the two primary grounds the Commission has cited in denying refunds in cost allocation cases, the potential for under-recovery and the unfairness that results from retroactive implementation of a new rate for both utilities and customers who cannot alter their past actions in light of that new rate." Remand Order P 30, JA 650.

The Louisiana Commission claims both that the Commission did not adequately support the existence of the equitable factors here, and that the equitable factors are irrelevant because the parties had notice of the complaint. *See* Br. 31-46. Much of the Louisiana Commission's argument, including its claim that the equities are irrelevant, seeks to revisit the Court's determination, in *Louisiana III*, 772 F.3d at 1302, that there is no presumption in favor of refunds. But, the Commission's findings are adequately supported in the record, and its consideration of the equities satisfies both the requirements of the Federal Power Act, and the Court's mandate in *Louisiana III*. *See Louisiana III*, 772 F.3d at 1306 ("It remains for the Commission on remand to consider the relevant factors and weigh them against one another, striking 'a reasonable accommodation among them.'") (quoting *Las Cruces TV Cable*, 645 F.2d at 1047).

A. Entergy Faces A Potential For Under-Recovery

As the Court recognized in *Louisiana III*, "[d]ecisions denying refunds have generally involved the possibility of under-recovery." 772 F.3d at 1304 (citing *Black Oak Energy, LLC*, 136 FERC ¶ 61,040, P 28 (2011); *Occidental Chem. Corp. v. PJM Interconnection, LLC*, 110 FERC ¶ 61,378, P 10 (2005)). Both the Commission and the Court have previously relied on the potential or possibility of under-recovery by the utility in support of denying refunds. Remand Order P 31, JA 650 (citing, *e.g.*, *Second Taxing Dist. of City of Norwalk v. FERC*, 683 F.2d 477, 490 (D.C. Cir. 1982)); *see also Black Oak*, 136 FERC ¶ 61,040, P 28 (2011). In *Louisiana III*, this Court remanded Commission orders denying refunds, because the Commission had found that "'the danger of under-recovery of costs in this case is not present.'" 772 F.3d at 1304 (citing 2013 Order P 63, JA 580). Thus, the Court remanded to the Commission "because the line of precedent on which the Commission relied involved rationales that it concluded were not present" in this case. *Id*. at 1306.

Upon reconsideration on remand in the challenged orders, the Commission ultimately determined that, if it grants refunds, there is a significant possibility that Entergy will under-recover, i.e., it will collect less than the effective rate for the 15-month refund period. Remand Order PP 31-33, JA 650-51; Rehearing Order PP 56-59, 64-67, JA 743-46, 748-49. This finding is based upon impediments to

Entergy's ability to assess surcharges to cover the costs of the refunds. Remand Order P 33, JA 651. In particular, the Commission relied on the departure from the Entergy system of wholesale customers that would be required to pay surcharges, litigation uncertainty concerning recovery of surcharges from retail customers, and the prohibition on retroactive rate increases under section 206(b) identified in *City of Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009). *See* Remand Order P 33, JA 651. The Louisiana Commission disputes the Commission's reliance on these findings. Br. 31-41. But, as demonstrated below, the Commission adequately supported its findings on the record presented.

1. The Commission's Finding Of Potential Under-Recovery Is Adequately Supported

The Commission reasonably concluded that—based on potential impediments to Entergy's ability to collect surcharges to cover the cost of refunds—there was a substantial risk that Entergy would experience a reduction in revenues if refunds were ordered. Remand Order P 33, JA 651; Rehearing Order P 64, JA 748. On review of the record, the Commission identified two factual circumstances supporting this finding, discussed immediately below. In addition, the Commission found that this Court's decision in *City of Anaheim*, 558 F.3d at 524, may preclude assessing retroactive surcharges to fund the award of refunds in this circumstance. Remand Order P 31, JA 650; Rehearing Order P 28, JA 730. Because the Court's and the Commission's precedent require the identification of a

"risk," *Norwalk*, 683 F.2d at 490, or "danger" of under-recovery, a finding that the Commission properly relied on one of these three bases would be determinative. *Louisiana III*, 772 F.3d at 1304 (quoting 2013 Order P 63, JA 580).

As one of the factual circumstances supporting the Commission's finding of a potential under-recovery, the Commission explained that there is a significant possibility that Entergy would not recover the portion of surcharges that would be attributable to wholesale customers. Remand Order P 31, JA 650. During the refund period, 15 percent of Entergy Arkansas' peak load was made up of wholesale customers. *Id.* Entergy Arkansas' load composition has since changed substantially. None of those wholesale customers are currently Entergy Arkansas customers. *Id*. Rather, as of 2010, Entergy Arkansas had one wholesale customer, comprising .002 percent of its load. *Id*. That customer was not a customer during the refund period. *Id*. (citing Entergy Brief on Refund Issues at 14-15 (filed Jan. 19, 2010), R. 680, JA 387-88).

On this record, the Commission thus determined that the "source of surcharges is unclear." Remand Order P 31, JA 650. The Commission found no basis to conclude that surcharges attributable to wholesale load for the refund period could be assessed to retail ratepayers. *Id*.

The Louisiana Commission claims that it is standard ratemaking practice for the Commission to apply refunds and surcharges to the current generation of

customers, without regard to changes in customer status. *See* Br. 40 (citing *Louisiana III*, 772 F.3d at 1306 (noting that refunds on the Entergy System have been "routine and not disruptive")); *see also* Br. 37-41. Generally, however, when the Commission is authorized to require surcharges, the utility recovers surcharges from the customers who paid too little, to fund refunds to customers who paid too much. Rehearing Order PP 66-67, JA 749.

In fact, the Commission has previously found that if "current load would have to pay for charges incurred by past customers," the equities would favor denying refunds. Rehearing Order P 67, JA 749 (citing *Am. Elec. Power Serv. Corp*., 46 FERC ¶ 61,382, 62,195 (1989) (declining to order refunds in a holding company cost allocation case because, *inter alia*, the surcharges would fall on a different generation of customers)). By contrast, the Commission pointed to *Public Service Commission of Wisconsin v. Midcontinent Independent System Operator, Inc.*, 156 FERC ¶ 61,205, P 47 (2016) ("*Wisconsin*"), in which surcharges were assessed against each load serving entity that underpaid, to fund refunds to the load serving entities that overpaid. *See* Rehearing Order P 47, JA 741; *see also Wisconsin*, 156 FERC ¶ 61,205, P 47 (noting that the utility had records adequate to "calculate the exact amount" of costs that should be assessed to each entity that underpaid). Thus, the Commission found, as an equitable factor in favor of refunds, that "there is no concern that refunds would be charged to persons

without any connection to these proceedings." *Wisconsin*, 156 FERC ¶ 61,205, P 51.[3]

Further, the Court in *Louisiana III* recognized the Commission's reliance on "inequities among different generations" in support of decisions to deny refunds in cost allocation cases. 772 F.3d at 1304 (citing 2013 Order P 55 n.127, JA 576). The Louisiana Commission acknowledges that the Commission has considered generational differences among customers as an equitable factor, Br. 41, and offers no reasoned basis for the Commission to ignore this inequity here. As the Court and the Commission have both emphasized, refund determinations are fact-specific determinations. *See* Remand Order PP 19-20, JA 644-45; *see also Louisiana III*, 772 F.3d at 1303.

Additionally, as a second factual basis supporting the Commission's finding of potential under-recovery, the Commission found that there is a potential for litigation concerning the recovery of surcharges from Arkansas retail ratepayers. Remand Order P 32, JA 650; Rehearing Order P 64, JA 748. At an earlier stage of this case, when the Commission directed refunds, the Arkansas Public Service Commission rejected Entergy's request to recover surcharges from Arkansas retail

[3] The Commission's decision to grant refunds in *Wisconsin* is pending on review before this Court. *Verso Corp., et al. v. FERC*, No. 15-1098, *et al.* (D.C. Cir. filed Mar. 17, 2015) (in briefing; oral argument has not been scheduled).

ratepayers. Remand Order P 32, JA 651 (citing Entergy Brief Opposing Refunds at 18-19, R. 731 (filed Nov. 7, 2011), JA 512-13); *see also Louisiana II*, 482 F.3d at 519 (discussing Arkansas law). Based on this information, the Commission determined that the "ultimate outcome" of the potential litigation "remains uncertain, but it represents a second potential risk of under-recovery." Remand Order P 32, JA 651.

In *Louisiana II*, the Court held that the Commission had not adequately explained "why, under the Supremacy Clause, a rate increase ordered by the Commission may be recovered through retail rates but a refund ordered by the Commission may not." 482 F.3d at 520. On remand, the Commission found that, in its view, the Supremacy Clause would prevent state commissions from trapping Commission-ordered wholesale costs at the retail level. 2010 Order P 24, JA 452. Here, the Commission explained that it "has not departed from that finding." Rehearing Order P 64, JA 748. However, it should be noted that one ground for the Arkansas Public Service Commission's rejection of surcharges was based on this Court's decision in *City of Anaheim*, 558 F.3d 521. *See* Initial Brief of Entergy on Remand, Attachment A, Order of the Arkansas Pub. Serv. Comm'n at 13 (June 2, 2011), JA 624.

Further, the Commission is not the final arbiter of a dispute over retail rate recovery. Rather, the Commission emphasized that its precedent requires a

showing of only a possibility that Entergy may under-recover. Rehearing Order P 65, JA 749 (citing cases); *see also, e.g*. *Norwalk*, 683 F.2d at 490 (affirming denial of refunds where Commission found that "the Company might be subject to undercollections"). Based on the record here, the Commission reasonably found that because litigation over recovery of surcharges from Arkansas retail ratepayers appears likely, and prior litigation resulted in the denial of recovery, there is a potential for undercollection.

Finally, the Commission explained that under-recovery is "unfair because it would result in a loss of revenue from the reallocation when the utility would not have the opportunity to file a new rate case." Remand Order P 28, JA 648 (quoting *Black Oak*, 136 FERC ¶ 61,040, P 26) (explaining that, in a cost allocation case, the rate design is found unlawful, but the revenue requirement is not; therefore, it is unfair to require refunds that may result in undercollection). Accordingly, the Commission reasonably found, on the facts of this case, that the potential for Entergy to under-recover is an equitable factor weighing against refunds.

2. The Possibility Of Under-Recovery Satisfies Section 206(c)

The possibility that Entergy may under-recover if refunds are ordered brings to bear section 206(c) of the Federal Power Act, which permits the Commission to order refunds from a utility company of a holding company only if the

Commission "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." 16 U.S.C. § 824e(c). *See* Rehearing Order P 33, JA 732. There is no dispute that Entergy was a registered holding company under the Public Utility Holding Company Act of 1935 during the refund period. Remand Order P 33, JA 651; *see* 2010 Order P 21 n.42, JA 450 (discussing the 2005 repeal of the Public Utility Holding Company Act and explaining that section 206(c) "will have an increasingly limited reach as the Commission works through pending cases that date back to when there were registered holding companies"). It is reasonable for the Commission, in this long-running proceeding, to apply the law in effect during the refund period.[4] *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 278 (1994) (confirming the "traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment"). And, section 206(c) requires only a possibility of under-recovery. As the Court has explained, "Congress barred refunds" under this section "unless it can be shown

[4] The Commission established the refund effective date (May 14, 1995) in its order setting the complaint for hearing, issued October 4, 2000, five years before the repeal of the Public Utility Holding Company Act. *See* 2010 Order P 5, JA 445 (citing *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 93 FERC ¶ 61,013, 61,027-28 (Oct. 4, 2000)).

that the utility will not suffer an under-recovery." *Louisiana III*, 772 F.3d at 1302. Here, the Commission was not able to show that Entergy would not suffer an under-recovery if refunds were awarded. Remand Order P 33, JA 651. Thus, the Commission's finding that there is a possibility of under-recovery "is sufficient for the Commission to deny refunds under section 206(c)." Rehearing Order P 57, JA 744.

The Louisiana Commission asserts, Br. 35, that the Commission's reliance on section 206(c) conflicts with *Louisiana II*, where the Court held that the Commission had not adequately demonstrated that Entergy would not be able to recover refunds paid out by passing charges through to retail customers, particularly where "all parties were on notice" that Entergy's rate might be unlawful. *Louisiana II*, 482 F.3d at 519-20. Section 206(c), however, bans "refunds which might otherwise be payable under subsection (b)," to the extent such refunds would cause a reduction in revenues. 16 U.S.C. § 824e(c). The Commission, therefore, must be able to assure that the registered holding company "will not experience any reduction in revenues" as the result of refunds—a determination the Commission was not able to make here. Rehearing Order P 57, JA 744; *see also Louisiana III*, 772 F.3d at 1302 (same). In this light, and because the Commission's finding that Entergy faces the possibility of undercollection was not before the Court in *Louisiana II*, the Commission reasonably relied on section

206(c) as a basis for denying refunds. Because notice is always issued for section 206 complaints, an inference that notice would permit refunds that otherwise violated section 206(c) would read section 206(c)'s holding company limitation out of the statute.

The Louisiana Commission also claims that the Commission's orders on review cannot be squared with its prior statements on section 206(c). *See* Br. 35-37. Louisiana points to the Commission's 2010 and 2011 Orders, but the Commission's discussion of section 206(c) in those orders is, if anything, dicta. The Commission explained in the 2011 Order that the issue was moot because it was denying refunds. 2011 Order P 3, JA 486 ("[T]he parties' argument concerning our authority pursuant to FPA section 206(c) is, as a practical matter, moot."). Further, while the 2011 Order found Entergy was "no longer" a "registered" holding company, the Commission did not definitively address whether it should apply the law in effect during the refund period, or at some point thereafter. *See* 2011 Order P 11, JA 489.

B. Entergy Is Unable To Revisit Past Decisions

In *Louisiana III*, the Court held that "'past decisions' in the abstract cannot be the only factor against refunds," and there must be more than "a generic possibility of reliance . . . to distinguish other decisions where the Commission awards refunds based on unjust and unreasonable rates." 772 F.3d at 1306. On

remand, the Commission specifically identified the past decisions giving rise to equitable concerns here, based on the Louisiana Commission's complaint and reasonable inferences of economic behavior. *See* Remand Order PP 34-35, JA 651-52; Rehearing Order PP 60-63, JA 746-48. The Commission found that Entergy's Operating Companies had incentives to avoid interruptible transactions because those transactions would raise their costs and, now, those decisions cannot be undone. *See* Rehearing Order P 60, JA 746; Remand Order P 35, JA 652. Far from "fanciful," Br. 41, the Commission's determination, based primarily on Louisiana's complaint, is adequately supported and consistent with the Court's mandate.

Briefly, the System Agreement in effect during the refund period created an incentive for Entergy Operating Companies to avoid interruptible sales, to minimize costs. Remand Order P 35, JA 652. As the Louisiana Commission explained in its complaint, the System Agreement permits interruptible sales, and those sales provide system benefits. *Id*. P 34, JA 651. But, the System Agreement assigns "generating and transmission costs to an individual company for its curtailable load," resulting in "additional costs" for those curtailable contracts, "which may render the sales uneconomic from an individual company perspective." *Id*. (quoting Third Amended Complaint at 6, R. 48, JA 133 (Oct. 27, 1999)). That additional cost allocation, the Louisiana Commission explained,

places "a penalty on a company that reacts to competitive forces by lowering rates to a customer through tariffs that permit curtailment." *Id*. (quoting Third Amended Complaint at 7, JA 134); *see also id*. (noting Louisiana's description of offering curtailable contracts as "competitive conduct") (quoting Third Amended Complaint at 6-7, JA 133-34).

The Commission agreed, further noting that one of the reasons that the Commission held Entergy's inclusion of curtailable load in the calculation of peak load responsibility was unjust and unreasonable was "precisely because the operating companies would act based on economic incentives and including curtailable load as part of the cost allocation sent improper incentives." Rehearing Order P 62, JA 747; *see Louisiana I*, 184 F.3d at 896 (discussing the role of cost allocation in setting incentives for system planning and explaining that "the cost causation principles that the Commission" held justify excluding interruptible load from that allocation are "essentially forward-looking"), *accord* Opinion No. 468, 106 FERC ¶ 61,228, P 70, JA 220. And, the Commission found that this circumstance created equities weighing against refunds. Refunds would "impose potentially unrecoverable costs on Operating Companies" that, based on incentives created by the System Agreement, avoided curtailable sales. Remand Order P 35, JA 652. And, those decisions "cannot now be undone." *Id*.

For further support, the Commission explained that it has previously held that reliance on curtailable load to allocate costs can create similar disincentives. *Id*. & n.77, JA 653 (citing *Occidental*, 110 FERC ¶ 61,378, P 3 n.3 (stating that "relying on curtailed loads to allocate [a utility's] access charge costs may create a disincentive for load serving entities to" undertake other activities to reduce peak load, since they "would be charged for system costs regardless of whether they curtail load during system peaks")). Moreover, in that same case the Commission, after requiring removal of interruptible load from the allocation of system costs, denied refunds based, in part, on the utilities' inability to alter their decisions made in reliance on the effective rate. *Id*. (citing *Occidental*, 110 FERC ¶ 61,378, P 12).

The Louisiana Commission claims that the Commission must point to specific evidence demonstrating that Entergy acted on these incentives. Br. 42-44. But the Commission reasonably inferred that the disincentive created by the filed rate resulted in decisions not to enter into curtailable transactions. Remand Order P 35, JA 652; Rehearing Order P 62, JA 747. Such an inference, that utilities "acted in accordance with economic incentives and avoided transactions that would raise their costs," Rehearing Order P 60, JA 746, is within the Commission's authority, and warrants deference. *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1008 (D.C. Cir. 1987) (where FERC reasonably relies on economic theory, "[c]ourts reviewing an agency's selection of means are not

entitled to insist on empirical data for every proposition on which the selection depends"); *see also, e.g.*, *Sacramento Mun. Util. Dist.*, 616 F.3d at 531 (FERC appropriately made findings based on "'generic factual predictions' derived from economic research and theory") (quotation omitted). Indeed, the Court has previously affirmed the Commission's use of similar inferences. Remand Order P 35, JA 653 (citing *Cities of Batavia v. FERC*, 672 F.2d 64, 83-84 (D.C. Cir. 1982) (accepting Commission inferences about the effect of demand ratchets on ratepayer conduct); *Norwalk*, 683 F.2d at 490 (finding generalizations regarding customer conduct sufficient to support a determination that a rate ratchet would encourage reductions in demand at the time of the system peak)).

The Louisiana Commission argues, without support, that the Commission cannot draw inferences from economic theory, if the actions would have occurred in the past. Br. 43. But the Court has deferred to the Commission's reliance on economic theory in "circumstances where it would be difficult or even impossible to marshal empirical evidence," and the same is appropriate here. *South Carolina*, 762 F.3d at 76; *see also Louisiana 1999*, 174 F.3d at 227 (affirming the Commission's backward-looking inference that a program obviated a need for rate increases and noting that "sound inferences from all the circumstances," "are the stuff of which substantial evidence is made"). Moreover, the fact that some

curtailable transactions took place, *see* Br. 42, simply does not demonstrate that there was no disincentive for such transactions.

The Louisiana Commission asserts that the Entergy Operating Companies would be "better off" substituting firm sales for interruptible sales. Br. 44. The Louisiana Commission itself explains, however, that discounted interruptible sales are made to attract additional load to the system that is not willing to pay the rates for firm service. *See* Br. 42. The point is that the Operating Companies had less incentive to offer such discounts when the costs associated with such transactions were higher. *See* Remand Order P 35, JA 652. In any event, the Louisiana Commission offers no evidence in support of its assertion. *See* Rehearing Order P 63, JA 747. The fact that this methodology may have imposed economic incentives that are "less than optimal does not imply that the action was done in bad faith." *Id*. Moreover, the Commission's finding—and the basis for Louisiana's complaint—is that interruptible sales would have been more economic if they were not subject to additional system costs. *See* Remand Order P 35, JA 652. Thus, it remains inequitable to penalize, through surcharges, companies that engaged in rational economic behavior during the refund period. *Id*.

Finally, the Louisiana Commission also faults the Commission for failing to identify this equitable factor in prior decisions. Br. 27-28, 51. But the

Commission's re-examination of the record[5] to more fully consider the equitable factors is not only unsurprising, it was required by the Court's mandate in *Louisiana III*. 772 F.3d at 1306 (holding that the "existence of the identified equitable factor is unclear" and that it "remains for the Commission on remand to consider the relevant factors").

C. Notice Was Not Adequate To Require Refunds

The Louisiana Commission argues that notice of the filing of the 1995 complaint eliminates the need to consider the equities arising from Entergy's potential undercollection or inability to revisit past decisions. Br. 32-35. The Commission, however, rejected the argument that notice provided by the complaint itself warrants providing refunds notwithstanding equitable considerations. *See* Rehearing Order P 57, JA 744. The Louisiana Commission's argument is an attempt to revisit its claim—rejected by this Court in *Louisiana III*—that there is a

[5] The Commission confirmed that the orders on review were based on the record up to the point of the Remand Order. Rehearing Order P 6, JA 722. The Louisiana Commission suggests that the Commission improperly precluded it from responding to Entergy's motion to establish a briefing schedule and initial brief on remand from *Louisiana III*. *See* Br. 21, 29. But Louisiana not only responded to the motion, it opposed it on the basis that Entergy's brief "primarily seeks to recycle arguments that the Commission previously rejected." Louisiana Commission Opposition at 3, R. 747, JA 633 (Mar. 26, 2015). The Louisiana Commission had the further opportunity to address the issues in its request for agency rehearing. Rehearing Order P 6, JA 722. The Commission therefore rejected the suggestion that the parties did not have a full opportunity to present their views. *Id*. P 5, JA 722.

presumption in favor of refunds. If notice eliminates the equitable considerations here, it would effectively eliminate the discretion Congress gave the Commission to consider refunds in any case arising from a duly-noticed section 206 complaint. *See Louisiana III*, 772 F.3d at 1302-1303.

Moreover, the Commission questioned whether Louisiana's complaint necessarily provided sufficient notice to retail ratepayers that they may be liable for future surcharges to fund refunds of over-payments made by both departed wholesale customers, and retail customers. The Commission's notice finding focuses on the retail ratepayers from whom Entergy would be required to seek surcharges. Rehearing Order P 58, JA 744 ("The Commission made clear in the [Remand Order] that reliance by these ratepayers was an important concern."). Notice of such a retroactive rate change must be both adequate and specific. *Id*. (citing *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 699 (D.C. Cir. 1995)) ("The rule against retroactive ratemaking, however, 'does not extend to cases in which [customers] are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.'") (quoting *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)). Here, the Commission found that it has an "inadequate basis on this record to conclude that the complaint in this case gave the retail customers who would be assessed surcharges adequate notice that the resolution of some specific issue may

cause" a retroactive change in their rates. Rehearing Order P 58, JA 744; *see also* Remand Order P 31, JA 650 (noting that wholesale customers now comprise only .002 percent of load in Entergy Arkansas).

The Louisiana Commission claims that the Commission's determination conflicts with the Court's statement that "all parties," including Entergy, were on notice of the filing of the complaint. Br. 33 (citing *Louisiana II*, 482 F.3d at 520; *Louisiana III*, 772 F.3d at 1305). But the Commission's determination focuses on notice to retail ratepayers—not the parties. *See* Rehearing Order P 58, JA 744.

Further, the Louisiana Commission cites cases providing that "prior notice eliminates concerns that refunds would violate the filed rate doctrine." Br. 34 (citing *Oxy USA*, 64 F.3d at 699; *NStar Elec. & Gas Corp.*, 481 F.3d at 801; *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001)). But, even assuming adequate notice, none of the cited cases establishes that notice automatically negates equitable considerations in cost allocation cases, like this one, where refunds under section 206(b) would require surcharges to retail customers. *See* Rehearing Order PP 56-59, JA 744-46.

Finally, the Louisiana Commission claims that "notice eliminated the need to even consider reliance-based arguments." Br. 34 (citing, e.g., *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009)). In *Westar*, the Commission allowed an increased rate to go into effect under Federal Power Act section 205, 16

U.S.C. § 824d, but subsequently rejected the increased rate and required refunds. Rehearing Order P 59, JA 745 (distinguishing *Westar*); *see also NorthWestern Corp*., 155 FERC ¶ 61,158, PP 55-57 (2016), *appeal docketed*, No. 16-1176 (D.C. Cir. June 8, 2016) (requiring refunds, under section 205, where the rate ultimately approved was lower than the rate made effective subject to refund). By contrast, this case involves neither an overcollection nor the standard suspension and refund requirements of section 205. *See Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 953 (D.C. Cir. 2016) (describing the Commission's practice for suspending rate filings under section 205); *see also City of Anaheim*, 558 F.3d at 525 (distinguishing procedures under section 205 and section 206).

Moreover, Entergy's notice of the complaint does not change the fact that to avoid a possible refund requirement in this situation, the Entergy Operating Companies would have had to enter into uneconomic transactions—curtailable sales that impose additional costs under the System Agreement. *See* Remand Order P 34 n.74, JA 652. In other words, during the pendency of the complaint, Entergy reasonably relied on the filed rate then in effect, and the incentives created by that rate. "The existence of notice does not override the equities involved in requiring refunds for transactions that were authorized under the System Agreement." *Id*. Further, while Entergy "had the power to amend its tariff pursuant to" Federal Power Action section 205, Br. 43, while the complaint was

pending, that "argument assumes what had yet to be proven, i.e., that the provision was not in the public interest." Rehearing Order P 63, JA 748. Indeed, at the time of the 1995 complaint, Entergy had included interruptible load in the calculation of peak load responsibility for 44 years—a practice that was not uncommon in the industry.

D. The Commission Considered The Impact On Consumers

In *Louisiana III*, the Court emphasized that the Commission must fully consider the equitable factors, including the fact that "consumers in Louisiana paid their utility companies too much while consumers in other states paid too little." 772 F.3d at 1305. Mindful of this direction, the Commission addressed the competing equities facing both sets of consumers. Remand Order P 36, JA 653. As the Commission explained, in "cost allocation cases where over-recovery has not occurred," refunds must be implemented through surcharges, and it is the consumers, not the operating companies, that are the source of those refunds. *Id*. Thus, as it has before, the Commission acknowledged that it may be inequitable that some customers paid too much under the filed rate in effect during the refund period. *Id*. But, the possibility of surcharges poses inequities to the consumers who paid too little under the filed rate. *Id*. Those customers were not responsible for the misallocation, and they are not able to revisit their past, long-complete,

transactions. *Id*. On balance, and taking into account the other equitable factors weighing against refunds, the Commission declined to require refunds here. *Id*.

The Louisiana Commission disputes the Commission's balancing of the equities facing the two sets of consumers, and essentially argues that the Commission is required to place more weight on the inequities facing the customers who paid too much under the filed rate, than on the inequities facing the customers who previously paid too little and now, for reasons beyond their control, face surcharges. Br. 44-46. Louisiana again presses for a presumption in favor of refunds, an argument the Court rejected in *Louisiana III*. 772 F.3d at 1302-03. The Federal Power Act requires that unjust and unreasonable rates be remedied prospectively, and the Commission has done just that. Further relief, in the form of refunds under section 206, is always discretionary, and the Act does not require the Commission to favor one set of consumers over another. *See Koch Gateway Pipeline*, 136 F.3d at 816 ("[T]he difficult problem of balancing competing equities and interest has been given by Congress to the FERC with full knowledge that this judgment requires a great deal of discretion.").

III. THE COMMISSION'S DECISION IS CONSISTENT WITH PRECEDENT AND POLICY

The Court's mandate in *Louisiana III* directed the Commission to further consider the equitable factors relevant to the issue of refunds. 772 F.3d at 1306. As discussed in part II, above, the Commission fully considered the equities and

ultimately determined that refunds should be denied. The Commission also found that it would be appropriate to clarify its approach to refunds in cases involving cost allocation and rate design. *See* Remand Order P 1, JA 636. Most important, the Commission concurred with the Court's assessment that, "in dealing with refunds 'the Commission's decisions have relied on specific factors rather than such a broad policy.'" Remand Order P 19, JA 644-45 (quoting *Louisiana III*, 772 F.3d at 1303). Thus, as set forth above, the Court may affirm the Commission's reliance on the specific equitable factors present in this record, without further need to address matters of general policy or traditional approaches. Nonetheless, the Louisiana Commission challenges the Commission's clarification of its refund policies, Br. 46-51, and the Commission briefly addresses those contentions here.

As noted, the Commission agrees with the Court that its refund decisions in all cases—including those involving overcollection, violation of the filed rate doctrine, legal error, or cost allocation and rate design—are fact-specific, record-driven determinations. Remand Order P 19, JA 644. But the Court also referenced the Commission as having a "'general policy' of ordering refunds when consumers have paid unjust and unreasonable rates." *Louisiana III*, 772 F.3d at 1303 (quoting Louisiana Commission Br. at 48, D.C. Cir. No. 13-1155). As the Commission explained, the Court's statement appears to be based on the Commission's own imprecise use of the phrase "general policy" in two prior orders in this proceeding.

Remand Order P 18, JA 644 (citing 2010 Order P 31, JA 455, and 2013 Order P 34, JA 567-68). Upon examination, however, the Commission demonstrated that those orders, and other cases referring to a "general policy" to grant refunds have "been limited to cases involving utility over-collection." Remand Order PP 18, 20-24, JA 644, 645-47 (citing, *e.g.*, *Consolidated Edison Co. of N.Y.*, 347 F.3d at 972 (stating that the Commission has a "'general policy of granting full refunds' for overcharges")).

Further, in *Louisiana III*, the Court stated that the "Commission did not explain why a lack of over-recovery should automatically negate refunds." 772 F.3d at 1304. In the challenged orders, the Commission clarified that "the absence of over-recovery is not an independent reason for denying refunds." Remand Order P 29 n.65, JA 649. Rather, "the presence of an over-recovery eliminates the primary grounds for denying refunds in cost allocation and rate design cases"—the possibility of under-recovery and inequities resulting from the utility's and/or customers' inability to revisit past decisions. *Id*. ("If over-recovery has occurred, refunds of excess amounts will not cause under-recovery . . . .").

The Louisiana Commission continues to argue that the Commission has a general policy of always granting refunds whenever a rate is found unlawful. *See*, *e.g.*, Br. 46, 47. Much of the Louisiana Commission's argument was rejected in *Louisiana III*, where the Court held that there is no presumption in favor of

refunds, even where a rate is found unjust and unreasonable. 772 F.3d at 1302-03. Still other parts of its argument, Br. 50, were rejected in another case brought by the Louisiana Commission, where the Court affirmed the Commission's decision to exercise its discretion to deny refunds notwithstanding a violation of the filed rate. *Louisiana 1999*, 174 F.3d at 224-30.

Contrary to the Louisiana Commission's assertions, Br. 47, the Commission's approach to refund decisions in cost allocation and rate design cases, where there is not overcollection, is not new. The Commission cites cases dating back to 1979 reflecting the Commission's traditional approach of declining refunds, as appropriate based on the record, in such cases. Remand Order P 25 n.58, JA 647. The Court also recognized the Commission's approach to these cases in two 1982 decisions affirming Commission orders making rate design changes effective prospective only, and declining to order refunds. *See Norwalk*, 683 F.2d at 490 (affirming determination to make rate design changes prospective only); *Batavia*, 672 F.2d at 85 (same). In *Norwalk*, part of the proposed rate was found unjustified, and the Commission declined to order refunds for two reasons: "that the Company might be subject to undercollections from the refund because it could not collect retroactively from other customers, and that retroactive changes in rates cannot affect customer demand." 683 F.2d at 490. The Court noted that the Commission had offered the same reasons in *Batavia*, 672 F.2d at 85, and

affirmed, noting that the Commission was "properly concerned" that the utility did not under-collect, and had given "adequate attention" to competing interests. *Norwalk*, 683 F.2d at 490. To be sure, the Federal Power Act permits the Commission to order refunds that may result in undercollection, Rehearing Order P 28 n.47, JA 730, but *Norwalk* and *Batavia* affirmed the Commission's consideration of the "practical consequences" of ordering refunds in rate design and cost allocation cases. *Id*. P 26, JA 729 (quoting *Batavia*, 672 F.2d at 85); *see also* Rehearing Order PP 43-44, JA 739 (explaining that the Commission follows this approach to rate design and cost allocation cases that arise under both sections 205 and 206). The Commission's reliance on these factors here is thus consistent with Court precedent.

The Louisiana Commission continues to rely on cases involving violations of, or errors in the implementation of, the filed rate, including *Blue Ridge Power Agency v. Appalachian Power Co*., 58 FERC ¶ 61,193 (1992), and asserts that the Commission has not explained why violations of the filed rate doctrine warrant refunds. Br. 50. "The Commission's authority to order refunds of amounts improperly collected in violation of the filed rate derives from FPA § 309, 16 U.S.C. § 825h," and thus do not implicate the same limitations found in section 206. *Louisiana 1999*, 174 F.3d at 224 n.6 (citing *Towns of Concord*, 955 F.2d at 73); *see also Louisiana III*, 772 F.3d at 1304 (noting that *Blue Ridge* involved

refunds stemming from a violation of the filed rate doctrine). Thus, the Commission appropriately distinguished cases involving a utility's failure to adhere to the filed rate or other Commission directives. *See* Rehearing Order PP 34-36, 39-41, 48-49, JA 733-35, 736-37, 741. Likewise, the Commission distinguished other Entergy cases where refunds have been required, including the bandwidth cases, as involving deviations from the filed rate or settlements that do not represent Commission precedent. *See* Rehearing Order PP 36-38, JA 734-36.

As noted above, the Court's mandate here required the Commission to consider anew the equitable factors in light of the Court's guidance. While the Louisiana Commission urges the Court to explore the reaches of Commission refund policy discussed in the orders on review, equitable factors were central to the Commission's analysis and should set the scope of review before the Court.

IV. THE COMMISSION REASONABLY REJECTED THE LOUISIANA COMMISSION'S CLAIM FOR ADDITIONAL REFUNDS

On rehearing of the Remand Order, the Louisiana Commission raised a new argument dating back to the Commission's 1996 dismissal of Louisiana's original complaint. Nearly 18 years ago, in *Louisiana I*, the Court remanded the Commission's order dismissing Louisiana's 1995 complaint on the basis that the Commission failed to explain its departure from precedent. For the first time, after more than ten orders have issued since *Louisiana I*, the Louisiana Commission

declared that the Commission has an equitable obligation to correct its decision to dismiss the complaint. *See* Br. 51-56. Louisiana now requests refunds for the period from April 1, 2000 to March 31, 2004, the effective date of the Commission's March 8, 2004 order finding Entergy's rate unjust and unreasonable.[6] Rehearing Order P 68, JA 749. Far from offering "no rationale," Br. 52, the Commission rejected the Louisiana Commission's belated argument on both procedural grounds and, separately, on the merits. Rehearing Order PP 68-78, JA 749-55.

First, the Commission held that the Louisiana Commission had failed to preserve its claim that the Commission should require refunds to correct the error in dismissing the 1995 complaint, and it declined to exercise its discretion to reopen the record to consider the new claim. *Id*. P 69, JA 750. Commission regulations and precedent provide that it may "reject rehearing requests based on new issues that could properly have been raised at an earlier stage of the proceeding." *Id*. P 69 n.144, JA 750 (citing cases and 18 C.F.R. § 385.713(c)(3) (requiring a request for rehearing to include matters relied upon, "if rehearing is

[6] To the Commission's understanding, the Louisiana Commission alleges a four-year delay in the processing of the complaint, from the date of dismissal (August 5, 1996), to the date when, on remand from *Louisiana I*, the Commission set the matter for hearing (August 22, 2000). Louisiana applied that four-year period retroactive from March 31, 2004, because prospective relief became effective April 1, 2004. *See* Rehearing Order P 68 & n.143, JA 750.

sought based on matters not available for consideration by the Commission at the time of the final decision or final order")). Likewise, this Court has explained that the Commission "regularly rejects requests for rehearing that raise issues not previously presented where there is no showing that the issue is 'based on matters not available for consideration . . . at the time of the final decision.'" *Id*. P 69 n.144, JA 750 (quoting *NO Gas Pipeline v. FERC*, 756 F.3d 764, 770 (D.C. Cir. 2014)). The Commission's application of this approach here is in keeping with its precedent, and is further consistent with precedent affording agencies discretion in applying their own procedural rules. *See Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc*., 435 U.S. 519, 524 (1978) ("emphasiz[ing] that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments").

Before the Court, the Louisiana Commission claims that, "in 2004," it was "unaware of the authorities holding that FERC must correct its errors." Br. 52 (citing *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999) (holding that, in cases of legal error, "[t]here is also a strong legal presumption in favor of retroactivity that would make the parties whole"). This argument lacks credibility in light of the Louisiana Commission's pursuit of refunds in this case, among others, since 1995. *See Louisiana 1999*, 174 F.3d 218 (affirming FERC orders

denying refunds Federal Power Act section 309, 16 U.S.C. § 825h). In any event, the Louisiana Commission has not justified its failure to raise this argument between 2004 and 2016. *See also* Brief of Louisiana Commission at 28, 34, *La. Pub. Serv. Comm'n v. FERC*, No. 13-1155 (filed Dec. 19, 2013) (citing the 1999 decision in *Exxon* as a case on which petitioner chiefly relied). Since this Court's 1999 remand of the Commission's orders dismissing the Louisiana Commission's complaint, the Commission has issued multiple orders addressing only the 15-month refund period defined by section 206(b) of the Federal Power Act. Thus, the Commission reasonably determined that, under its precedent and regulation, the Louisiana Commission had failed to justify its delay in raising its request to consider a broader period of refunds.

Likewise, the Louisiana Commission's assertion, Br. 52, that the Commission must consider its belated argument because the Commission allegedly reconsidered other issues, is unavailing. In response to Entergy's motion for further briefing, the Louisiana Commission opposed any further briefing of the refund issues in this case. *See* Rehearing Order P 69, JA 751. And the Louisiana Commission makes no effort to explain why the Commission's reconsideration of Entergy's inability to revisit past decisions, in response to the Court's mandate, requires the Commission to consider its belated request for additional refunds.

Alternatively, the Commission denied on the merits the Louisiana Commission's request for four years of refunds. First, the Commission the explained that FPA section 206(b) expressly governs the duration of refunds available in response to Commission action on a complaint filed under that section. Rehearing Order P 71, JA 751. Specifically, "Congress found that any refund under section 206 be limited to 15 months," regardless of the length of the proceeding. *Id*. This is consistent with *Office of Consumers' Counsel v. FERC*, 826 F.3d 1136 (D.C. Cir. 1987), where the Court explained that a prospective remedy under section 5 of the Natural Gas Act, 15 U.S.C. § 717d—the parallel to section 206 of the Federal Power Act—is imposed as of the date of a Commission order finding the existing rate unlawful. Rehearing Order P 76, JA 754 (citing *Office of Consumers' Counsel*, 826 F.2d at 1139).

Both the Supreme Court and this Court have recognized that refunds under Federal Power Act section 206 are limited, and customers "have no protection from excessive charges collected during the pendency" of the adjudicatory proceeding. *Atlantic Refining Co. v. Pub. Serv. Comm'n of NY*, 360 U.S. 378, 389 (1959) (discussing parallel section 5 of the Natural Gas Act), *quoted in* Rehearing Order P 75 n.154, JA 753. As this Court recently explained, FPA section "309 cannot be used to supersede specific statutory strictures." *TNA Merchant Projects v. FERC*, 2017 WL 2192927, at *4, Nos. 13-1008, *et al*. (D.C. Cir. May 19, 2017).

In this case, that stricture limits refunds under FPA section 206 to the 15-month period specified by Congress.

The Louisiana Commission asserts that this case is analogous to *Tennessee Valley Municipal Gas Association v. FPC*, 470 F.2d 446 (D.C. Cir. 1972), but the Commission found the circumstances here distinguishable. In *Tennessee Valley*, FERC's predecessor, the Federal Power Commission, dismissed a complaint brought under section 5 of the Natural Gas Act, 15 U.S.C. § 717d, on the basis that the record was too stale, and that a new rate proceeding would not be in the public interest. Rehearing Order P 72, JA 752; *Tennessee Valley*, 470 F.2d at 451. 112 days later, the Commission reversed itself, vacated the dismissal, and established a hearing to update the record. Rehearing Order P 72, JA 752. On review, the Court found that the Commission had committed legal error, noting that the Commission had come "very close to an admission that it did err in refusing to order reopening and updating, of an admittedly stale record." 470 F.2d at 452. The Court then directed the Commission to put the petitioner in the same position it would have been in if the Commission had acted 112 days earlier. *Id*. at 453.

As the Commission explained, the dismissal of the Louisiana Commission's complaint did not involve the same type of legal error at issue *Tennessee Valley*. Rehearing Order P 74, JA 752. Here, neither the Court nor the Commission has determined that dismissal of the complaint was legal error. In *Louisiana I*, the

Court found that the Commission had failed to justify its order dismissing the complaint, and permitted the Commission to reach the same result with a reasoned explanation. *See* 184 F.3d at 897, 900; Rehearing Order P 74, JA 752. At the time of the complaint, Entergy "had included interruptible loads in the calculation of peak load responsibility for 44 years," "it was not uncommon in the electric power industry," and "was a matter on which reasonable persons could disagree." Rehearing Order P 63, JA 747. The Commission's subsequent decision to grant the complaint and initiate an investigation was appropriate, but does not signify the type of stark legal error at issue in *Tennessee Valley*. *Id*. P 74, JA 752.

Moreover, in *Louisiana III*, the Court rejected Louisiana's reliance on the "'strong equitable presumption' in support of" refunds as inapplicable here. 772 F.3d at 1303 (discussing *Exxon*, 182 F.3d 30, 49, and *Pub. Serv. Co. of Colorado v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996)). In the cited cases, the presumption applied because the Commission had committed legal error. 772 F.3d at 1303. The Court found, in contrast, that the Louisiana Commission "has not identified an analogous legal error; the Commission's initial dismissal of [Louisiana's] complaint is not what caused Entergy's rate to become unjust and unreasonable." *Id*. The Court explained that, in the absence of a "conflict with the explicit requirements or core purposes of a statute," *i.e.*, a legal error, the presumption in

favor of refunds does not apply. *Id*. (quoting *Towns of Concord*, 955 F.2d at 76). The Court found no such conflict here.

Further, in *Tennessee Valley*, the Court was able to assume that other aspects of the case remained constant. 470 F.2d at 453. The same assumption is not reasonable here in light of the longer time period, the Commission's reliance, in Opinion No. 468, on year 2000 data, and the fact that that Commission precedent on interruptible load changed during that four-year period. Rehearing Order P 74, JA 752-53. Further, the circumstances in *Tennessee Valley* allowed the Court to choose a precise effective date, while here, the Louisiana Commission relies on a "hypothetically created effective date." *Id*. P 76, JA 754.

Finally, even assuming this case involved legal error of the type that permits additional equitable relief, the Commission found that the equities here did not support such a remedy. Rehearing Order P 77, JA 754; *see also Exxon*, 182 F.3d at 49-50 (acknowledging that FERC retains discretion not to remedy legal error "if the other considerations properly within its ambit counsel otherwise," particularly "detrimental and reasonable reliance") (citing *Pub. Serv. Co. of Colorado*, 91 F.3d at 1490). The same considerations that weigh against ordering refunds for the 15-month period, weigh against ordering refunds for a four-year period. Rehearing Order P 77, JA 755. Further, notice is even more problematic, because the parties had no notice as to when during the period of appeal their transactions might be

subject to correction. *Id*. P 75, JA 753. While the Commission has the statutory authority to order surcharges to correct a legal error, Entergy still faces a potential under-collection, and the Operating Companies and customers are still unable to revisit their past decisions. *Id.* P 77, JA 755. Thus, the Commission reasonably declined to require refunds based on the Louisiana Commission's belated "legal error" theory.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,650 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

Statutes & Regulations

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

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any

order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

The term ''public utility'' when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),[1] 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

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

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

(g) Books and records

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

The Rural Electrification Act of 1936, referred to in subsec. (f), is act May 20, 1936, ch. 432, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (§901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Public Utility Holding Company Act of 2005, referred to in subsec. (g)(5), is subtitle F of title XII of Pub. L. 109–58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (§16451 et seq.) of subchapter XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

AMENDMENTS

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

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

2005—Subsec. (b)(2). Pub. L. 109–58, §1295(a)(1), substituted ''Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title'' for ''The provisions of sections 824i, 824j, and 824k of this title'' and ''Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''Compliance with any order of the Commission under the provisions of section 824i or 824j of this title''.

Subsec. (e). Pub. L. 109–58, §1295(a)(2), substituted ''section 824e(e), 824e(f), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''section 824i, 824j, or 824k of this title''.

Subsec. (f). Pub. L. 109–58, §1291(c), which directed amendment of subsec. (f) by substituting ''political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of

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

1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year,'' for ''political subdivision of a state,'', was executed by making the substitution for ''political subdivision of a State,'' to reflect the probable intent of Congress.

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

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

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

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

EFFECTIVE DATE OF 2005 AMENDMENT

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

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

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

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

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

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

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

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

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

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

(c) Temporary connection and exchange of facilities during emergency

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

(2) With respect to an order issued under this subsection that may result in a conflict with a

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a reg-

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

[1] See References in Text note below.

complaints may be withdrawn and refiled without prejudice.''

LIMITATION ON AUTHORITY PROVIDED

Pub. L. 100–473, § 3, Oct. 6, 1988, 102 Stat. 2300, provided that: ''Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)) shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act [16 U.S.C. 791a et seq.] to issue an order that (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; 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. For purposes of this section, the terms 'electric utility companies' and 'registered holding company' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].''

STUDY

Pub. L. 100–473, § 5, Oct. 6, 1988, 102 Stat. 2301, directed that, no earlier than three years and no later than four years after Oct. 6, 1988, Federal Energy Regulatory Commission perform a study of effect of amendments to this section, analyzing (1) impact, if any, of such amendments on cost of capital paid by public utilities, (2) any change in average time taken to resolve proceedings under this section, and (3) such other matters as Commission may deem appropriate in public interest, with study to be sent to Committee on Energy and Natural Resources of Senate and Committee on Energy and Commerce of House of Representatives.

§ 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

(June 10, 1920, ch. 285, pt. II, § 207, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

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

(b) Request for inventory and cost statements

Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 10, 1920, ch. 285, pt. II, § 208, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

§ 824h. References to State boards by Commission

(a) Composition of boards; force and effect of proceedings

The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Cooperation with State commissions

The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Availability of information and reports to State commissions; Commission experts

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may upon request from a State make available to such State as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement to the Commission by such State of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

mony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

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

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

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

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

COMMISSION REVIEW

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

§ 825i. Appointment of officers and employees; compensation

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

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

CODIFICATION

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

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

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

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

AMENDMENTS

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

REPEALS

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

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

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

ation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

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

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Public Printer 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 Printing 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.)

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.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United 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) of this section 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 amended (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 Procedure.

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 sen-tence 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 in-serted ''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) of this section, 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

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver*. If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver*. If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver*. Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule*. If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument*. When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review*. After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability*. (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file*. A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request*. Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled ''Statement of Issues,'' listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers*. (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay*. Unless otherwise ordered by the Commission, the filing of a request for rehearing does

not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification under this section does not suspend the proceeding.

§ 385.715 Interlocutory appeals to the Commission from rulings of presiding officers (Rule 715).

(a) *General rule.* A participant may not appeal to the Commission any ruling of a presiding officer during a proceeding, unless the presiding officer under paragraph (b) of this section, or the motions Commissioner, under paragraph (c) of this section, finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person.

(b) *Motion to the presiding officer to permit appeal.* (1) Any participant in a proceeding may, during the proceeding, move that the presiding officer permit appeal to the Commission from a ruling of the presiding officer. The motion must be made within 15 days of the ruling of the presiding officer and must state why prompt Commission review is necessary under the standards of paragraph (a) of this section

(2) Upon receipt of a motion to permit appeal under subparagraph (a)(1) of this section, the presiding officer will determine, according to the standards of paragraph (a) of this section, whether to permit appeal of the ruling to the Commission. The presiding officer need not consider any answer to this motion.

(3) Any motion to permit appeal to the Commission of an order issued under Rule 604, or appeal of a ruling under paragraph (a) or (b) of Rule 905, must be granted by the presiding officer.

(4) A presiding officer must issue an order, orally or in writing, containing the determination made under paragraph (b)(2) of this section, including the date of the action taken.

(5) If the presiding officer permits appeal, the presiding officer will transmit to the Commission:

(i) A memorandum which sets forth the relevant issues and an explanation of the rulings on the issues; and

(ii) the participant's motion under paragraph (b)(1) of this section and any answer permitted to the motion.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 17th day of July 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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