ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

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No. 16-1433

SAN DIEGO GAS & ELECTRIC COMPANY,
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: September 15, 2017

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

A. Parties:

To counsel's knowledge, all parties before this Court and the Federal Energy Regulatory Commission are listed in Petitioner's opening brief.

B. Rulings Under Review:

1. *San Diego Gas & Elec. Co.*, Docket No. EL15-103-000, Order On Petition For Declaratory Order, 154 FERC ¶ 61,158 (2016) (Declaratory Order), R. 14, JA 1; and

2. *San Diego Gas & Elec. Co.*, Docket No. EL15-103-001, Order Denying Rehearing, 157 FERC ¶ 61,056 (2016) (Rehearing Order), R. 19, JA 15.

C. Related Cases:

The issue under review in this proceeding has not previously been before this Court or any other court. Nor is this case related to any case pending before this Court or any other court.

/s/ *Ross R. Fulton*
Ross R. Fulton
Attorney

September 15, 2017

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GLOSSARY

California System Operator	The California Independent System Operator
Commission or FERC	Federal Energy Regulatory Commission
Declaratory Order	*San Diego Gas & Elec. Co.*, Docket No. EL15-103-000, Order On Petition For Declaratory Order, 154 FERC ¶ 61,158 (2016)
Incentives Rule	18 C.F.R. § 35.35 and *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 (2006), *on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *on reh'g*, Order No. 679-B, 119 FERC ¶ 61,062 (2007)
Int. Brief	Brief of Intervenors supporting Petitioner
JA	Joint Appendix
P	Paragraph in a Commission order
Pet. Br.	Petitioner's Opening Brief
R.	Record on appeal
Rehearing Order	*San Diego Gas & Elec. Co.*, Docket No. EL15-103-001, Order Denying Rehearing, 157 FERC ¶ 61,056 (2016)
San Diego Gas & Electric or San Diego	San Diego Gas & Electric Company
South Orange County Project or Project	South Orange County Reliability Enhancement Project

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STATEMENT OF THE ISSUE

This case concerns whether San Diego Gas & Electric Company (San Diego Gas & Electric or San Diego) is eligible to recover fully from ratepayers – under an incentive that is intended to induce future development – funds that it has already spent. At issue is an abandonment incentive that is available from the Federal Energy Regulatory Commission (Commission or FERC) applying its Order No. 679 rulemaking (Incentives Rule), which in turn implements a 2005 amendment to

the Federal Power Act. That incentive allows a utility to recover 100 percent of expenses for a transmission project if that project is abandoned for reasons outside the utility's control – so long as a nexus exists where the requested incentive materially encourages the transmission investment.

Here, San Diego Gas & Electric sought a declaratory order that it could receive the abandonment incentive for the $350-400 million South Orange County Reliability Enhancement Project (South Orange County Project or Project). San Diego sought this order after investing four years and $31 million on the Project.

The Commission determined that San Diego was entitled to the incentive for the Project from the date of the Commission's order. This allows the utility to recover over 90 percent of the Project's costs if the Project is abandoned.

But the Commission concluded that the incentive did not apply to the $31 million that San Diego had already spent. The Commission found that the incentive was not necessary to persuade the utility to spend that money on the Project – when San Diego had already spent those funds without an assurance of recovery. The Commission instead determined that the utility could recover half of the $31 million from ratepayers under a separate Commission order.

The issue presented for review is: Whether the Commission reasonably interpreted the Incentives Rule's case-specific nexus requirement to find that the abandonment incentive should not apply, because the incentive would not help

encourage San Diego Gas & Electric to spend the $31 million that it had already spent on the South Orange County Project.

COUNTER-STATEMENT OF JURISDICTION

To obtain judicial review of Commission orders, a petitioner must satisfy the requirements of both Article III of the United States Constitution and section 313 of the Federal Power Act, 16 U.S.C. § 825*l*(b). *See, e.g.*, *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009). As discussed *infra*, San Diego Gas & Electric fails to explain adequately how it meets the minimum standing requirements.

San Diego does not specify how the Commission's orders impair future financing on this Project. Nor could it – because the utility now has the assurance of full recovery for all future Project costs. If San Diego is concerned about financing for other, unnamed projects, it can promptly file a declaratory action. Any alleged harm with this Project results from the utility's delay in filing such a petition. *See, e.g.*, *Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 740 (D.C. Cir. 2008) (no standing where alleged injury not traceable to FERC's actions).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE FACTS

I. BACKGROUND

A. Statutory And Regulatory Background

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over the transmission and wholesale sale of electricity in interstate commerce. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). Under section 205 of the Federal Power Act, all rates for or in connection with jurisdictional sales and transmission service are subject to Commission review to assure that they are just and reasonable, and not unduly discriminatory or preferential. 16 U.S.C. §§ 824d(e), 824e(a); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773-74 (2016); *see also Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 254 (D.C. Cir. 2007) ("[Federal Power Act] section 205 allows utilities to file changes to their rates at any time and requires FERC to approve them as long as the new rates are 'just and reasonable.'").

In 2005, Congress passed the Energy Policy Act to, among other things, increase transmission efficiency and innovation. *See N.C. Util. Comm'n v. FERC*, 741 F.3d 439, 443 (4th Cir. 2014) (citing Pub. L. 109-58, 119 Stat. 594 (2005)). As part of that legislation, Congress added Section 219 to the Federal Power Act. *See* 16 U.S.C. § 824s.

Section 219(a) directs the Commission to establish, by rule, incentive-based rate treatments for transmission infrastructure, "for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion." 16 U.S.C. § 824s(a). Pursuant to Section 219(c), the Commission issued Order No. 679 and the accompanying rule, 18 C.F.R. § 35.35. *See* Promoting Transmission Investment through Pricing Reform, Order No. 679, 116 FERC ¶ 61,057 (2006), *on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *on reh'g*, Order No. 679-B, 119 FERC ¶ 61,062 (2007); *see also S. Cal Edison Co. v. FERC*, 717 F.3d 177, 179 (D.C. Cir. 2013) ("[p]ursuant to the Energy Policy Act of 2005, the Commission has also established incentive-based rate treatments to further encourage the construction of transmission" projects); *Conn. Dep't of Pub. Util. Control v. FERC*, 593 F.3d 30, 33 (D.C. Cir. 2010) (noting that the Commission issued the Incentives Rule to comply with newly added section 219 of the Federal Power Act).

Order No. 679 and the resulting rule did not automatically grant any incentive. *See* 18 C.F.R. § 35.35(d). A utility instead has to justify that it meets a three-part test entitling it to an incentive. *Id.*; *accord* Order No. 679 P 76.

First, the applicant must demonstrate that the project either ensures reliability or reduces transmission congestion. Order No. 679 P 76; *see* 18 C.F.R. § 35.35(d); Order No. 679-A P 41 (adopting a rebuttable presumption that

certain review processes satisfy this requirement, such as a regional planning process or state siting approvals).

Second, an applicant must show a nexus between the incentive being sought and the investment being made. Order No. 679 PP 6, 48, 76; *see* 18 C.F.R. § 35.35(d) (the incentives must be "tailored to address the demonstrable risks or challenges faced by the applicant in undertaking the project"); *see generally N.C. Util. Comm'n*, 741 F.3d at 443-445 (discussing nexus test). The purpose of requiring both case-by-case adjudication and a fact-specific nexus is to ensure that the Incentives Rule benefits consumers by providing real incentives to development – not simply increasing consumer rates without encouraging new investment. *See* Order No. 679 P 6; *id.* P 21 (finding that such an approach would adequately balance consumer and investor interests). Third, each applicant must prove that the resulting rates will be just and reasonable. *Id.* P 76.

Among the Incentives Rule's available inducements is the abandonment incentive. For most Order No. 679 incentives, a utility receives an increase in its return on equity. But with the abandonment incentive, a utility may recover 100 percent of the costs of an abandoned transmission project if the abandonment is outside the utility's control. *Id.* P 163; *see also id.* P 28 (stating that, although the abandonment initiative qualifies as an "incentive" under the Federal Power Act, "it

is perhaps more properly characterized as reducing a regulatory barrier – the potential lack of recovery of costs to infrastructure development").

A utility may apply for the abandonment incentive in one of two ways. *See id.* PP 76-79. It can make a standard rate filing with the Commission, seeking a rate adjustment. *Id.* PP 76, 79. Or it can first file a declaratory petition requesting that the Commission find the utility would be entitled to the incentive. The utility must then file to adjust its rates should the abandonment occur. *Id.* PP 76-77.

The Commission included the declaratory option because it is a "valuable tool" to assist with "facilitat[ing] financing and investment in new" infrastructure, "prior to commencing siting, permitting and construction activities." *Id.* P 77. The Commission pledged to act on such declaratory petitions within 60 days or as soon as possible. *Id.*

The Commission's Opinion No. 295 policy – pre-dating the 2005 amendment of the Federal Power Act and the 2006 Incentives Rule – offers a separate basis for a utility to recover for an abandoned facility. *See New Eng. Power Co.*, Opinion No. 295, 42 FERC ¶ 61,016, at 61,082 (1988), *reh'g denied in part, granted in part*, Opinion No. 295-A, 43 FERC ¶ 61,285 (1988). A utility can recover 50 percent of the costs of an abandoned project from ratepayers, with the utility responsible for the remaining 50 percent. *Id.* at 61,081; *see generally Town of Norwood, Mass. v. FERC*, 80 F.3d 526, 532 (D.C. Cir. 1996) (noting that

Opinion No. 295 limits the recovery for plants abandoned to 50 percent of the costs).

B. The South Orange County Project

San Diego Gas & Electric is a public utility in San Diego and Orange Counties, California. It is a participating transmission owner in the California Independent System Operator (California System Operator), which is responsible for managing electricity transmission within California. *See San Diego Gas & Elec. Co.*, 154 FERC ¶ 61,158 (2016) (Declaratory Order), R. 14, JA 1, *reh'g denied*, 157 FERC ¶ 61,056 (2016) (Rehearing Order), R. 19, JA 15.

To address reliability concerns in southern Orange County, San Diego Gas & Electric proposed constructing the South Orange County Project. *See* Declaratory Order P 3 (Project would provide a second power station and associated upgrades) (citing San Diego Decl. Pet. at 3-5 (Sept. 23, 2015), R. 1, JA 31-33), JA 2. The California System Operator selected the Project for inclusion in its 2010-2011 Transmission Plan. Declaratory Order P 16 (citing San Diego Decl. Pet., Exhibit No. SDG-2 at 8, JA 89), JA 8. The California System Operator determined that, when completed, the Project would be the most effective solution for addressing regional reliability concerns. Declaratory Order P 5, JA 3. San Diego Gas & Electric estimates that the Project will cost $350 to $400 million. *Id.* P 4 (citing San Diego Decl. Pet. at 5, JA 33), JA 2.

In 2012, San Diego Gas & Electric sought a necessary certificate of public convenience and necessity from the California Public Utilities Commission. *See* San Diego Decl. Pet. at 2, JA 30. According to San Diego, it received this certificate in December 2016. *See* Pet. Br., Addendum B, Geier Decl. P 6.

On September 23, 2015, San Diego Gas & Electric sought a declaratory order from the Commission that it was entitled to the abandonment incentive for the Project. *See* Declaratory Order PP 1, 20, JA 1, 10. According to San Diego, its petition resulted from its concern at that time with obtaining the needed state permitting. *Id.* P 6 (citing San Diego Decl. Pet. at 12, JA 40), JA 4. From the Project's inception to the utility's declaratory request four years later, San Diego spent about $31 million on the Project. *See* Declaratory Order P 20 (citing San Diego Decl. Pet. at 16, JA 44), JA 10.

The cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (Six Cities) – San Diego Gas & Electric's ratepayers – intervened to protest San Diego's declaratory request. *See* Declaratory Order P 8, JA 4. Although the Six Cities supported San Diego recovering 100 percent of its costs going forward, they asserted that the utility should only be able to recover half of the $31 million it had already spent, consistent with past Commission precedent. *See id.* P 9 (citing Six Cities Protest at 2-3, R. 11, JA 180-81), JA 5. The Six Cities asserted that San Diego Gas & Electric made a "voluntary business decision to

spend $31 million" on the Project "over the past approximately four years without any guarantee of abandoned plant recovery," and only brought its request when the utility became concerned that it would not receive state certification. Six Cities Protest at 3, JA 181.

C. The Commission's Orders On Review

The Commission largely granted San Diego Gas & Electric's declaratory request. It found the utility entitled to the abandonment incentive for the South Orange County Project – subject to a subsequent rate filing – for Project costs on or after the date of the Declaratory Order. *See* Declaratory Order P 18, JA 9. For those future costs, the Commission determined that the Project meets the Incentives Rule's prerequisites. *Id.* P 16, JA 8. The Project was included in the California System Operator's transmission planning process, satisfying the Rule's reliability requirement. *Id.* (noting that the California System Operator's planning process was previously found to satisfy this standard). And the Commission concluded that San Diego Gas & Electric faced risks developing the Project, and that those risks had a sufficient nexus to the requested incentive. *Id.* P 17, JA 8.

Yet the Commission determined that the utility was not entitled to the Incentives Rule's abandonment enticement for the $31 million that San Diego Gas & Electric had already spent – because those costs did not meet the Rule's nexus

test. *Id.*; *see id.* P 19 (quoting Order No. 679 P 48), JA 9; *see also* Rehearing Order P 17, JA 21.

The Commission noted that the "risks that may necessitate abandonment have been generally known to [San Diego Gas & Electric] since the project was included in the [California System Operator's] 2010-2011 Transmission Plan." Declaratory Order P 20, JA 10. Yet San Diego Gas & Electric went four years and spent over $31 million on the Project prior to its declaratory order request. *See id.*; Rehearing Order P 17, JA 21. San Diego conceded that it did so "without assurance of cost recovery for these development costs." Declaratory Order P 20 (quotation omitted), JA 1. The Commission thus concluded that the abandonment incentive was "not rationally related to those previously incurred costs; the incentive d[id] not serve as a means to that end." Rehearing Order P 17, JA 21.

The Commission nonetheless granted San Diego Gas & Electric the right to recover 50 percent of that $31 million from ratepayers under Opinion No. 295. Declaratory Order P 18, JA 9. It determined that its orders were consistent with Commission precedent and policy, requiring a fact-specific justification for full incentives recovery. *See* Rehearing Order P 12 (citing *PJM Interconnection, LLC*, 142 FERC ¶ 61,156, P 54 (2013) (*PJM Interconnection II*)), JA 19; *see also* Declaratory Order P 18 & nn.41-42 (collecting cases), JA 9.

SUMMARY OF ARGUMENT

This case involves nothing more than the Commission's case-specific application of its general rule. The Incentives Rule requires that the Commission make a fact-specific finding that a nexus exists between the incentive sought and the investment made: that the incentive will help encourage a utility's spending on a transmission project. Otherwise, consumers would be left with a higher bill without their added costs supporting new infrastructure.

Here, even if San Diego Gas & Electric has adequately demonstrated standing (and it has not, as it has not shown immediate or definite harm from the Commission's ruling), it largely ignores the Commission's application of the nexus test. The Commission reasonably concluded that – if San Diego spent $31 million over four years on the South Orange County Project as a business decision without any assurance of cost recovery – then the abandonment incentive was not needed to encourage that spending.

San Diego Gas & Electric instead contends that the Commission imposed an additional timing limitation on the Incentives Rule, preventing the recovery of prior costs. But the Commission did no such thing. Although the Commission acknowledged that a utility's recovery from customers of money spent before a FERC declaratory order granting the abandonment incentive may be uncommon, it

noted that such costs could be recovered if the applicant established the requisite nexus. It just found that San Diego Gas & Electric failed to do so here.

San Diego Gas & Electric alternatively objects to the Commission's case-specific determination. But the Incentives Rule does not automatically grant any incentive. It requires that the Commission undertake a case-by-case analysis to balance investor and consumer interests. The Commission reasonably relied upon the utility's readiness to spend money on the Project over four years without assurance of recovery as evidence that the abandonment incentive was not needed to encourage that spending.

Nor did the Commission's orders deviate from Commission precedent and policy. Where it has addressed the issue, the Commission has found the abandonment incentive not applicable to utility spending on a project prior to a Commission order approving the incentive. Even if the Commission's precedent is mixed, such an outcome is not inconsistent with the Incentives Rule's mandate to adjudicate individual incentive requests on the facts provided. It is particularly justified here where San Diego's request was contested by its ratepayers.

And the Commission did not mandate that a utility file for a declaratory order under the Incentives Rule. Instead, the Commission only reasonably found that if a utility chooses to file a declaratory petition, it should do so before the

utility spends significant sums – as the Incentives Rule's purpose of including the declaratory order option was to help facilitate financing.

The Commission granted San Diego Gas & Electric full recovery of over 90 percent ($350-$400 million) of the estimated cost of the Project. It permitted the utility to recover from ratepayers half of the $31 million that it had already spent. The Commission only found that San Diego Gas & Electric could not establish a nexus for the $31 million that it had willingly spent over the past four years – when the utility belatedly brought a declaratory petition only after it became concerned with state certification. The Commission had substantial evidence and ample justification for this determination.

ARGUMENT

I. SAN DIEGO GAS & ELECTRIC'S PETITION SHOULD BE DISMISSED FOR LACK OF STANDING

The Federal Power Act only permits "aggrieved" parties to seek judicial review of Commission orders. 16 U.S.C. § 825*l*(b). A party is aggrieved only if it can establish the constitutional and prudential requirements for standing. *Exxon Mobil Corp*, 571 F.3d at 1219; *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (petitioner bears burden to establish standing). This requires a showing of an actual or imminent injury-in-fact, fairly traceable to the challenged agency action, which will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

San Diego Gas & Electric has failed to establish standing. The Incentives Rule does not entitle a utility to an award. The Commission must grant such an enticement based on its case-specific review. 18 C.F.R. § 35.35(d); Order No. 679 P 1. The Commission found that San Diego Gas & Electric could fully recover its Project funding prospectively if the Project is abandoned – over 90 percent of the total cost. Declaratory Order P 17, JA 8. The Commission likewise permitted an incentive for the Project costs San Diego had already spent – it was simply less of an incentive (50 percent recovery) than the utility requested. *Id.* P 18, JA 9.

Contrary to its assertion, *see* Pet. Br. at 29-30, San Diego Gas & Electric has not demonstrated how the Commission orders it challenges impair the utility from securing Project financing or otherwise increase its cost of capital. *See PNGTS Shippers Grp. v. FERC*, 592 F.3d 132, 137 (D.C. Cir. 2010) ("The potential for future economic injury, even assuming it is readily quantifiable into a possible rate increase in the future, is not enough to show the requisite injury for Article III standing.") (quotations and citation omitted). As San Diego has the assurance of full recovery for any future Project costs, the Commission's orders should not affect the utility's future financing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) ("[W]e have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible*

future injury are not sufficient.") (citations and quotations omitted, emphasis in original).

Nor can San Diego Gas & Electric rely on the potential "increased costs of capital" for future, unknown projects. *Compare* Pet. Br. at 30 *with New Eng. Power Generators Ass'n v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013) ("[N]either a FERC decision's legal reasoning nor the precedential effect of such reasoning confers standing unless the substance of the decision itself gives rise to an injury in fact.") (citation omitted). Even if the utility could rest standing on such an abstract basis, it could not do so here because, under the Incentives Rule, the Commission must first decide whether any future project qualifies for the abandonment incentive. *See infra* at 29.

Any harm to San Diego Gas & Electric in receiving less of an incentive than desired is traceable to its own action – namely its four-year delay in seeking a declaratory order for the Project. *See Clapper*, 568 U.S. at 1149 (traceability lacking without concrete evidence that the defendants' actions caused the alleged harm); *cf. Orangeburg v. FERC*, 862 F.3d 1071, 1084 (D.C. Cir. 2017) (finding the agency's delay in acting on a declaratory petition relevant to whether the agency caused the harm). San Diego could have reduced its uncertainty by promptly bringing a declaratory petition to the Commission. If San Diego is concerned about securing financing for another project, *see* Pet. Br. at 29, it need only bring a

declaratory request for that project. *See* Rehearing Order P 22 ("it is reasonable to infer" that a utility should "request an Abandonment Incentive before significant expenditures are incurred"), JA 23.

II. STANDARD OF REVIEW

This Court reviews Commission actions under the Administrative Procedure Act's arbitrary and capricious standard. *See* 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow," and the Court "may not substitute [its] own judgment for that of the Commission." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (citation omitted). "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 relevant question is whether the Commission "'examine[d] the relevant data 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 v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Commission ratemaking decisions receive "great deference," because the Federal Power Act's "statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition." *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527, 532 (2008); *see also Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017)

("We defer to the Commission's weighing of the various considerations and ultimate 'policy judgment.'") (quoting *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1286 (D.C. Cir. 2011)). The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b). This "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

Here, the Commission applied its Incentives Rule. *See* 18 C.F.R. § 35.35. The Rule implements section 219 of the Federal Power Act, 16 U.S.C. § 824s, added by Congress in 2005. An agency's interpretation of an ambiguous statute it administers controls if that interpretation is reasonable. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) (citing *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). So too, under *Auer v. Robbins*, 519 U.S. 452, 463 (1997), an agency's interpretation of its own regulation is entitled to "'substantial deference'" and is given "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Shieldalloy Metallurgical Corp. v. NRC*, 768 F.3d 1205, 1208 (D.C. Cir. 2014) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); *see generally Airlines for Am. v. Transp. Sec. Admin.*, 780 F.3d 409, 413 (D.C. Cir. 2015) (an agency's

interpretation need not be the only possible interpretation, "nor even the interpretation deemed *most* reasonable by the courts") (quotation omitted, emphasis in original).

III. THE COMMISSION REASONABLY FOUND THAT SAN DIEGO GAS & ELECTRIC COULD NOT RECOVER ONE HUNDRED PERCENT OF THE MONEY IT HAD ALREADY SPENT ON THE PROJECT AS AN INCENTIVE

The Commission's Incentives Rule does not "grant outright any incentives to any public utility." Order No. 679 P 1. Instead, to receive the abandonment incentive that allows a utility to recovery fully the costs of an abandoned project from ratepayers, a utility must demonstrate that it meets three prerequisites:

- The project increases reliability or reduces congestion;
- The proposed incentive is "tailored" – that is, a nexus exists between the incentive sought and the investment at issue; and
- The resulting rate is just and reasonable.

18 C.F.R. § 35.35(d); *see* Order No. 679 P 76; *see also id.* P 82 ("The Commission will require applicants to justify each of the incentive-based rate treatments it proposes . . . .").

A. The Commission Reasonably Determined That San Diego Gas & Electric's Previous Costs Did Not Satisfy The Nexus Test

The Commission here assured San Diego Gas & Electric that it could recover most of the costs of the South Orange County Project ($350 to $400 million) from ratepayers under the abandonment incentive. *See* Declaratory Order

P 17, JA 8. Yet the Commission concluded that San Diego did not qualify for the abandonment incentive for the $31 million that it had already spent – because the utility could not satisfy the Incentives Rule's nexus requirement. *See* Rehearing Order P 19, JA 21.

To meet the nexus test, an applicant must show that "'the incentives [being requested] are rationally related with the investments being proposed.'" Declaratory Order P 19 (quoting Order No. 679 P 48), JA 9; *see generally Conn. Dep't of Pub. Util. Control*, 593 F.3d at 33 (affirming FERC's use of the same nexus test in a pre-Order No. 679 incentive proceeding). Although the nexus test is not a "but for" standard, the utility "'must demonstrate that the incentive will materially affect investment decisions . . . .'" *N.C. Util. Comm'n*, 741 F.3d at 443 (quoting Order No. 679 P 26). This ensures that "the incentive sought is designed to result in new facilities being constructed," Order No. 679-A P 21 (quotation omitted), thereby balancing "consumer and investor interests." Order No. 679 P 21; *see also id.* P 6 ("The purpose of our Rule is to benefit customers by providing real incentives to encourage new infrastructure, not simply increasing rates in a manner that has no correlation to encouraging new investment.").

The Commission here reasonably construed the nexus test as necessitating that an incentive be a "means to the end in question, i.e. to the investment." Rehearing Order P 17 & n.27 (citing *U.S. v. Comstock*, 560 U.S. 126, 134 (2010),

as defining a "rational relationship" in terms of means and ends), JA 21. As the Commission explained, "the function of an incentive is to encourage action that has not yet occurred." Rehearing Order P 15 (the purpose of an incentive is to "encourage," to "motivate effort" or to "tend to incite") (quotations omitted), JA 20; *see also* Declaratory Order P 19 (Order No. 679's incentives were designed to encourage transmission investment "that may otherwise not occur") (citing Order No. 679 PP 6, 77), JA 9.

But here, San Diego Gas & Electric concedes it spent about $31 million on the Project prior to bringing a declaratory action to the Commission, "'without assurance of cost recovery for these development costs.'" Rehearing Order P 17 (quoting San Diego Decl. Pet. at 16, JA 44), JA 21. The Commission noted that the risk cited by San Diego that could necessitate abandonment – the denial of state certification – was apparent since the Project was included in the California System Operator's 2010-2011 Transmission Plan. Declaratory Order P 20, JA 10. Yet – as San Diego's customers noted – the utility voluntarily "spent considerable sums without incentive rate treatment," over four years, and only sought the abandonment incentive "when California Public Utility Commission [] licensing for the Project ha[d] become" uncertain. Six Cities Protest at 2, JA 180.

So the Commission understandably determined that San Diego Gas & Electric did not satisfy the nexus test for its prior spending. *See* Rehearing Order P 17 (the incentive was not a "means to [an] end"), JA 21. Because it was "reasonable to conclude" that if San Diego "spent $31 million in development costs over an approximately four-year period, a significant amount of money over a significant time period," without any assurance of recovery, then "an Abandonment Incentive was not needed to encourage that investment." *Id.* P 19, JA 21; *cf. Conn. Dep't of Pub. Util. Control*, 593 F.3d at 34 (affirming the Commission's finding of a nexus where "FERC had a reasonable basis for concluding that the incentive might benefit consumers by *accelerating* completion of the [transmission] projects") (emphasis in original).

The Commission's reasonable interpretation of what the Incentives Rule's nexus test requires, and whether San Diego Gas & Electric satisfied that test under the Commission's "'case-by-case'" evaluation, is entitled to deference. *See N.C. Util. Comm'n*, 741 F.3d at 451 (holding that FERC's nexus findings were supported by substantial evidence) (quoting Order No. 679-B P 18); *see also MarkWest Mich. Pipeline Co. v. FERC*, 646 F.3d 30, 37 (D.C. Cir. 2011) (finding that FERC acted reasonably in interpreting its regulations because "applying an agency's regulation to complex or changing circumstances calls upon the agency's unique experience and policymaking prerogatives") (quotation omitted);

Marseilles Land & Water Co. v. FERC, 345 F.3d 916, 920-21 (D.C. Cir. 2003) (holding that "agencies are entitled to great deference in the interpretation of their own rules").

Yet although the Commission found the abandonment incentive inapplicable to the $31 million San Diego had already spent on the Project, the Commission did not prevent the utility from recovering any of those costs should the Project be abandoned. In addition to full recovery for all future spending, the Commission found that the utility was entitled to recover half of its $31 million investment from its ratepayers under the Commission's Opinion No. 295 policy. *See* Rehearing Order P 13 (citing Declaratory Order P 18, JA 9), JA 19; *see generally Advanced Energy Mgmt. All.*, 860 F.3d at 664-67 & n.8 (deferring to the Commission's "broad discretion to balance competing concerns" in affirming a penalty rate that the Commission approved to incentivize resources to meet capacity market commitments, finding that the penalty "does not have to be better than other estimates").

B. The Commission's Interpretation Is Consistent With Policy And Precedent

The Commission explained that its declaratory order granting full recovery for San Diego Gas & Electric's future costs and 50 percent recovery for its prior costs did not deviate from past precedent. In cases where the Commission has addressed the issue of whether an ongoing project would be eligible for the

abandonment incentive should the project be abandoned, the Commission has found the incentive not applicable to money spent by a utility on the project prior to a Commission order granting the incentive. The Commission has instead held that such retroactive costs are subject to its earlier Opinion No. 295 policy (issued prior to the 2005 addition of section 219 to the Federal Power Act) that provides for 50 percent recovery. *See* Rehearing Order P 10 n.14 (collecting cases) (citing Declaratory Order P 17, JA 8), JA 18.

In *PJM Interconnection, LLC*, 142 FERC ¶ 61,156 (2013) (*PJM Interconnection II*), two utilities submitted a filing to the Commission to implement transmission incentives – including the abandonment incentive – for a project that was currently being built. *Id.* P 3. The Commission issued an order on October 31, 2008 approving the abandonment incentive for the project. *Id.*

Project construction subsequently stopped. *Id.* P 1. On December 21, 2012, the utilities submitted a second filing to the Commission to recover the previously approved abandonment award. *Id.* P 52. The utilities sought to recover 100 percent of the project's costs – including costs the utilities incurred on the project before the Commission's October 31, 2008 order. *Id.* Although the Commission granted full recovery for costs incurred on or after November 1, 2008, it found that the abandonment incentive did not apply to funds spent before the Commission's October 31, 2008 order. *See id.* P 53. Instead, the Commission's Opinion No. 295

policy applied to those retroactive costs, limiting the utilities to recovering half of those expenses from ratepayers. *Id.* P 54.

As the Commission found here, "*PJM Interconnection II* treats the date of an order issued under Order No. 679 [the Incentives Rule] as the dividing line between an Abandonment Incentive under Order No. 679, which applies prospectively from the date of the order, and the Commission's cost-sharing policy under Opinion No. 295." Rehearing Order P 12, JA 19; *see also DCR Transmission LLC*, 153 FERC ¶ 61,295, P 42 (2015) (limiting 100 percent recovery to costs expended on or after issuance of the Commission order); *PJM Interconnection LLC*, 140 FERC ¶ 61,197, P 24 (2012) (*PJM Interconnection I*) (granting the abandonment incentive from the date of the Commission order approving the incentive, along with 50 percent recovery under Opinion No. 295 for the amount incurred prior to the date of the FERC order).

The Commission also found its decision consistent as a policy matter. *See* Rehearing Order P 14, JA 19. The Incentives Rule permits declaratory orders to "'facilitate financing and investment'" in a project prior to "'commencing siting, permitting and construction activities.'" *Id.* P 20 (quoting Order No. 679 P 77), JA 22; *accord* Rehearing Order P 6 (rule's purpose is to encourage new infrastructure and investment), JA 17. Granting San Diego Gas & Electric the full recovery of the $31 million it had already spent on the Project would "be contrary

to the general policy rationale that incentives are designed to encourage future transmission investments." Declaratory Order P 20, JA 10; *see also Conn. Dep't of Pub. Util. Control*, 593 F.3d at 34 (the purpose of an incentive is to induce utilities to respond to financial motivations).

IV. SAN DIEGO GAS & ELECTRIC MISCONSTRUES THE COMMISSION'S APPLICATION OF THE INCENTIVES RULE'S NEXUS TEST

Although San Diego Gas & Electric raises numerous challenges to the Commission's orders, its arguments suffer from a singular flaw. It fails to recognize that the Commission's decision was based upon the fact-specific finding that San Diego could not establish that an incentive was needed to encourage the utility to spend the $31 million that it had already spent on the Project.

A. The Commission Did Not Impose Additional Requirements Beyond Applying The Incentives Rule's Nexus Test

Even while acknowledging that a nexus must exist, San Diego Gas & Electric wrongly states that the Commission found such a link for the money the utility had already spent (as opposed to its prospective costs). *Compare* Pet. Br. at 22, 32 *with* Rehearing Order P 17, JA 21.[1] San Diego's claim that it is entitled to

[1] Contrary to Intervenors' suggestion, no party disputes "the presumption that projects meet the reliability requirement if they are selected through a fair and open regional planning process." Int. Br. at 5. But that has no bearing on whether San Diego Gas & Electric's retroactive costs have a nexus to the incentive sought. *See N.C. Util. Comm'n*, 741 F.3d at 443 (distinguishing between the reliability and nexus requirements and describing the nexus requirement as "more challenging").

the abandonment incentive for all of its $31 million in costs because the Commission found that the Incentives Rule's prerequisites were met is inaccurate.

San Diego Gas & Electric seemingly later admits that the Commission found no such nexus. It instead states that the Commission improperly applied the nexus test in a manner "similar" to a but-for test. *See* Pet. Br. at 48.

Yet in the Incentives Rule, the Commission emphasized the similarity between the but-for and nexus tests. The Commission rejected a but-for test primarily for evidentiary reasons, finding it difficult to disentangle "impediments to new transmission investment." Order No. 679-A P 26. But the Commission emphasized that "both the required nexus test and the 'but for' test share one thing in common: their common objective is to ensure that incentives are not provided in circumstances where they do not materially affect investment decisions." *Id.* P 25.

This Court has found a similar relationship between the Commission's but-for and nexus tests. In a pre-Incentives Rule proceeding where the Commission applied the nexus test to grant utilities an incentive to join a regional transmission organization, the Court in *Connecticut Department of Public Utility Control* likewise held that the Commission need not apply a but-for test. 593 F.3d at 35 (finding that identifying each "incented act and how the utility's behavior would

differ from what it would have been absent the incentive" would be a "task of positively heroic monitoring, indeed anticipatory monitoring").

But the Court also rejected that the Commission's nexus test could be used as a "fig leaf for accepting any link, however nominal or trivial." *Id.* at 33. Instead, the Court held that the Commission could only find a nexus when the Commission has "substantial evidence" that the "proposed incentive would affect the transmission owners' conduct or benefit consumers." *Id.* at 34 (holding that FERC did "insist on evidence establishing the requisite causal link").

Just as in *Connecticut Department of Public Utility Control*, so too here, the Commission concluded that, to satisfy the nexus test, the Commission must find that the incentive will "encourage transmission investment that may not otherwise occur." Declaratory Order P 19 (citing Order No. 679 PP 6, 48), JA 9. The Commission reasonably determined that the abandonment incentive was not needed to entice San Diego Gas & Electric to spend $31 million that it had already spent on the Project. *See* Rehearing Order P 21, JA 23.

B. The Commission Did Not Bar All Retroactive Recovery

Contrary to San Diego Gas & Electric's (and supporting Intervenors') contention, the Commission did not engraft a new "timing limitation" onto the Incentives Rule's abandonment incentive that prohibits the recovery of any costs incurred prior to a declaratory order. Pet. Br. at 23, 34; *see also* Int. Br. at 20. The

orders instead reflect a fact-specific finding that an incentive would not actually be encouraging San Diego's prior spending on the Project. *See* Rehearing Order P 17, JA 21.

The Commission must make such a case-specific determination whenever a utility requests an incentive. *See* Order No. 679-A P 24 (the decision of whether to grant an incentive is "appropriately the subject of an individual rate application (or declaratory order) where the Commission can evaluate whether the applicants have fully supported any incentive rate treatment sought"). Although the Commission added here that obtaining "full cost recovery" for the "period preceding the issuance of an order on cost recovery will be 'atypical;'" atypical is not an absolute bar. Rehearing Order P 19 (quoting *PJM Interconnection II*, P 54), JA 21; *cf.* Pet. Br. at 48 (acknowledging that the Commission's orders may have "left room for the Commission to grant 100 percent abandoned-plant recovery . . . even for costs incurred before issuance of a declaratory order . . . .").

As the Commission found in previously denying a different incentive for a completed project, the requisite nexus was lacking there when the incentive was not necessary "to encourage investment that has already been made . . . ." *Commonwealth Edison Co.*, 122 FERC ¶ 61,037, P 32 (2008). But the Commission added that a utility could receive incentives for a project that had already been planned or announced if those "'incentives may help in *securing*

financing for the project or *may bring the project to completion sooner* than originally anticipated.'" *Id.* P 33 (quoting Order No. 679 P 35) (emphasis in original).

So San Diego Gas & Electric's (and Intervenors') concern that the Commission will automatically deny abandonment incentive treatment for money a utility has already spent on a project is misplaced. Pet. Br. at 40; *see* Int. Br. at 14-16. The Commission's assessment could include such factors as whether the utility had to spend money for the project to be included in a regional transmission plan, or any delay in the Commission considering the declaratory petition. *See generally* Order No. 679-A P 21 (FERC will consider the "risks and challenges faced" by a project in determining whether a nexus exists).

But on the facts before the Commission, it reasonably could conclude that San Diego spent "$31 million in development costs over an approximately four-year period" between the Project's inclusion in the California System Operator's annual plan and San Diego's declaratory request. *Compare* San Diego Rehearing Request at 9 (contending San Diego spent $31 million on the Project without specifying whether the money was spent before the California System Operator selected the Project), R. 15, JA 223, *with* Six Cities Protest at 3 (stating that San Diego spent $31 million on the Project between the Project being included in the California System Operator's 2010-2011 Transmission Plan and San Diego's

declaratory request), JA 181. And that an incentive was not needed to encourage San Diego to spend those funds. *See* Rehearing Order P 19 (finding substantial evidence for this determination), JA 21.

San Diego Gas & Electric's (and supporting Intervenors') focus upon the Incentives Rule's effective date is likewise unhelpful. *See* Pet. Br. at 24, 35; Int. Br. at 4-5. As San Diego admits, the Rule applies to any investment made after August 8, 2005, "so long as the reliability and nexus tests are satisfied." Pet. Br. at 24. Any project undertaken after that date must still meet the nexus test. *See* Rehearing Order P 25 & n.41 (citing Order No. 679 P 34), JA 25.

C. The Incentives Rule Provides For Case-Specific Adjudication

San Diego Gas & Electric appears to object alternatively to the Commission's case-specific determination. It seemingly takes issue with the Commission's reliance upon the utility's willingness to spend $31 million over four years without the promise of cost recovery as evidence that the abandonment incentive was not necessary. Pet. Br. at 49; *see also* Int. Br at 8.

But, as noted, the Commission must find that the abandonment incentive is a means to encouraging the investment. Order No. 679 P 164; *accord Conn. Dep't of Public Util. Control*, 593 F.3d at 33 (finding that the Incentives Rule requires transmission owners to seek "incentives on a case-by-case basis"). The Commission declined to specify further in the Incentives Rule what evidence is

necessary to find such a nexus. *See* Order No. 679-A P 40 (rejecting a cost-benefit analysis for the nexus test); *see also id.* P 50 (rejecting applying a rebuttable presumption to the nexus requirement); *see generally Conn. Dep't of Pub. Util. Control*, 593 F.3d at 33 (rejecting petitioners' claim that the nexus test should require "more specific criteria for ascertaining the presence or absence of the required nexus"). Instead, the Commission established broad criteria to apply in "individual cases." Order No. 679-A P 24.

Here, the Commission reasonably relied upon the amount of time and money San Diego Gas & Electric spent without the incentive as evidence that the abandonment incentive was not needed to encourage the utility's investment. *See* Rehearing Order P 19, JA 21; *see also id.* P 18 ("What [San Diego Gas & Electric] refers to as [a case-specific needs test] is simply the rational relationship that must be shown to exist between the incentives requested and the investments being proposed."), JA 21.

In so doing, the Commission reasonably construed what the Incentives Rule's nexus test requires. *See Conn. Dep't of Util. Control*, 593 F.3d at 34 (deferring to the Commission's chosen criteria of whether the incentive would "affect" the utilities' behavior). The Commission then made a case-specific, factual determination as to whether that requisite link existed. *See N.C. Util. Comm'n*, 741 F.3d at 451 (holding that a challenge to the Commission's finding

that a project met the nexus test should be evaluated under the deferential substantial evidence standard).

Such a determination is both consistent with past precedent and the Incentives Rule itself. *See* Order No. 679-A P 24; *see also MarkWest*, 646 F.3d at 37 (affirming FERC by applying *Auer* deference to the Commission's interpretation of its regulation). San Diego has not provided any rationale as to how or why *Auer* deference should be ignored – particularly in this situation when the Incentives Rule explicitly declined to specify what nexus must exist or whether the Rule applies to prior spending. *See* Pet. Br. at 52.

Intervenors similarly object that it creates "uncertainty" for utilities when the Commission must make a project-specific determination. Int. Br. at 18; *see id.* at 13. That is an (improper) objection to the Incentives Rule itself. *See Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 825 (D.C. Cir. 2008) (challenge outside the 60-day review period of a FERC order is an impermissible collateral attack); Rehearing Order P 21 (the Incentives Rule "cannot be viewed as creating an entitlement to any incentive sought by an applicant at any time or as authorizing incentives for substantial financing and investment that has already occurred"), JA 23.

D. The Commission's Determination Is Consistent With The Federal Power Act And Commission Precedent

Nor is San Diego Gas & Electric correct that the Commission's orders are inconsistent with Section 219 of the Federal Power Act, 16 U.S.C. § 824s, or the Commission's past precedent. The Commission has found that the Incentives Rule complies with Section 219. *See Conn. Dep't of Pub. Util. Control*, 593 F.3d at 33 (citing FERC orders). The Commission here concluded that an Incentives Rule prerequisite was not satisfied. *See* Rehearing Order P 19, JA 21. Yet the Commission still permitted the utility to recover half of the $31 million it already spent under its preexisting Opinion No. 295 policy. *See id.* P 13, JA 19.

The Commission also found that its conclusion did not deviate from precedent. *See supra* at 23-26. The Commission reasonably determined that the cases cited by San Diego are not applicable because those orders did not address how or when the abandonment incentive applies to earlier costs. *See* Rehearing Order PP 23-24, JA 24.

For instance, in *Pacific Gas and Electric Co.*, 137 FERC ¶ 61,193 (2011), the Commission permitted the utility to recover its abandonment costs from the date of the utility's December 2007 declaratory petition (as opposed to the date of the Commission order approving the incentive). *Id.* P 19. The Commission did not address the issue of recovery prior to the Commission's order – or whether the utility could recover costs incurred before it filed its declaratory petition. Nor did a

party object to the utility's recovery for the period at issue. *Cf. Midland Power Coop. v. FERC*, 774 F.3d 1, 6 (D.C. Cir. 2014) (finding prior cases lacked precedential value where the opinion did not "even mention the issue").

Likewise, in *NextEra Energy Transmission West, LLC*, 154 FERC ¶ 61,009 (2016), the Commission did not address the recovery of retroactive costs – nor did any party challenge the recovery of such spending. *See id.* PP 25-27; *see also Allete, Inc.*, 153 FERC ¶ 61,296, P 28 (2015) (no apparent challenge to recovery of retroactive costs); *S. Cal Edison Co.*, 137 FERC ¶ 61,252, P 24 (2011) (same). Here, in contrast, San Diego Gas & Electric's ratepayers oppose the utility recovering money it spent years before seeking a declaratory order. *See* Six Cities Protest at 2-3, JA 180-81.

At worst, the Commission's precedent is imprecise. Such an outcome – where incentives are sometimes granted, sometimes denied – should be expected under the Incentives Rule's case-specific, fact-based adjudication. *See S. Cal Edison Co.*, 137 FERC ¶ 61,252, P 24 & n.39 (noting that FERC's determination there was "based on the specific facts and circumstances presented in this matter"). For instance, in *Pacific Gas & Electric*, the Commission granted abandonment recovery from the date of the utility's declaratory petition filing. But the utility filed its petition the same month it began spending money on the project – as opposed to (as here) four years later. *See* 137 FERC ¶ 61,193, P 5 (detailing the

dates of construction); *cf. Braintree Elec. Light Dept. v. FERC*, 550 F.3d 6, 11 (D.C. Cir. 2008) (agency does not violate past precedent when it does not diverge from any "clear prior pattern.").

E. The Commission Did Not Require A Declaratory Petition

San Diego Gas & Electric also wrongly contends that the Commission's orders now necessitate that a utility file a declaratory petition before it commences a project – rather than waiting to recover its costs after a project is abandoned. *See* Pet. Br. at 25, 38. The Commission denied any such requirement exists. *See* Rehearing Order P 20, JA 22. The Commission had no reason to address how the Commission would apply the nexus test where a utility only brought a post-abandonment (as opposed to declaratory) request for the incentive. *See e.g.*, *New York*, 535 U.S. at 8 (Commission can proceed step-by-step, on a case-by-case basis).

The only issue before the Commission was San Diego's declaratory petition – and the specific circumstances offered in support. The Commission reasonably could conclude that if a utility brings such a petition, it should be brought before "significant expenditures are incurred," Rehearing Order P 22, JA 23, consistent with the Incentives Rule's purpose of providing for declaratory orders to increase "investor confidence early in the process." *Id.* P 21, JA 23.

San Diego Gas & Electric responds that it is the Incentives Rule itself that "provide[s] the stimulus for infrastructure spending." Pet. Br. at 44. But the Rule alone cannot provide such assurance because each request requires individual consideration. Order No. 679 P 1. And the contention that the Incentives Rule provides such assurance without a fact-based Commission order is undercut by San Diego bringing a declaratory petition when it wanted (belated) assurance.

San Diego Gas & Electric could have brought its declaratory petition shortly after the California System Operator selected the Project for inclusion in its 2010-2011 Transmission Plan. If it had done so, it likely would have been able to recover all its costs – not just the 90-plus percent that the Commission approved. *See* Rehearing Order P 22, JA 23. What the Commission found San Diego Gas & Electric could not do is obtain full recovery from its consumers as an incentive to spend $31 million that the utility had already spent. *See id.* P 19, JA 21.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of standing. If the Court proceeds to the merits, the petition should be denied.

Respectfully submitted,

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Final Brief: September 15, 2017

San Diego Gas & Electric Co. v. FERC **Docket No. EL15-103**
No. 16-1433

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(5), Fed. R. App. P. 32(a)(6), and Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Final Brief of Respondent Federal Energy Regulatory Commission contains 8,476 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum, and has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point, Times New Roman font.

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September 15, 2017

ADDENDUM
STATUTES AND
REGULATIONS

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

Subsec. (f). Pub. L. 109–58, § 1291(c), which directed amendment of subsec. (f) by substituting ''political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year,'' for ''political subdivision of a state,'', was executed by making the substitution for ''political subdivision of a State,'' to reflect the probable intent of Congress.

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

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

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

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

EFFECTIVE DATE OF 2005 AMENDMENT

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

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

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

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

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

be considered to hold firm transmission rights for the transmission of the power provided.

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

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

(k) Effect of exercising rights

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

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

FERC Rulemaking on Long-Term Transmission Rights in Organized Markets

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

§ 824r. Protection of transmission contracts in the Pacific Northwest

(a) Definition of electric utility or person

In this section, the term ''electric utility or person'' means an electric utility or person that—

(1) as of August 8, 2005, holds firm transmission rights pursuant to contract or by reason of ownership of transmission facilities; and

(2) is located—

(A) in the Pacific Northwest, as that region is defined in section 839a of this title; or

(B) in that portion of a State included in the geographic area proposed for a regional transmission organization in Commission Docket Number RT01–35 on the date on which that docket was opened.

(b) Protection of transmission contracts

Nothing in this chapter confers on the Commission the authority to require an electric utility or person to convert to tradable or financial rights—

(1) firm transmission rights described in subsection (a) of this section; or

(2) firm transmission rights obtained by exercising contract or tariff rights associated with the firm transmission rights described in subsection (a) of this section.

(June 10, 1920, ch. 285, pt. II, § 218, as added Pub. L. 109–58, title XII, § 1235, Aug. 8, 2005, 119 Stat. 960.)

§ 824s. Transmission infrastructure investment

(a) Rulemaking requirement

Not later than 1 year after August 8, 2005, the Commission shall establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

(b) Contents

The rule shall—

(1) promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities;

(2) provide a return on equity that attracts new investment in transmission facilities (including related transmission technologies);

(3) encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of the facilities; and

(4) allow recovery of—

(A) all prudently incurred costs necessary to comply with mandatory reliability standards issued pursuant to section 824*o* of this title; and

(B) all prudently incurred costs related to transmission infrastructure development pursuant to section 824p of this title.

(c) Incentives

In the rule issued under this section, the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization. The Commission shall ensure that any costs recoverable pursuant to this subsection may be recovered by such utility through the transmission rates charged by such utility or through the transmission rates charged by the Transmission Organization that provides transmission service to such utility.

(d) Just and reasonable rates

All rates approved under the rules adopted pursuant to this section, including any revisions to the rules, are subject to the requirements of sections 824d and 824e of this title that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.

(June 10, 1920, ch. 285, pt. II, § 219, as added Pub. L. 109–58, title XII, § 1241, Aug. 8, 2005, 119 Stat. 961.)

§ 824t. Electricity market transparency rules

(a) In general

(1) The Commission is directed to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.

(2) The Commission may prescribe such rules as the Commission determines necessary and appropriate to carry out the purposes of this section. The rules shall provide for the dissemination, on a timely basis, of information about the availability and prices of wholesale electric energy and transmission service to the Commission, State commissions, buyers and sellers of

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 section 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 sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this

(i) Market monitoring must include monitoring the behavior of market participants in the region, including transmission owners other than the Regional Transmission Organization, if any, to determine if their actions hinder the Regional Transmission Organization in providing reliable, efficient and not unduly discriminatory transmission service.

(ii) With respect to markets the Regional Transmission Organization operates or administers, there must be a periodic assessment of how behavior in markets operated by others (*e.g.*, bilateral power sales markets and power markets operated by unaffiliated power exchanges) affects Regional Transmission Organization operations and how Regional Transmission Organization operations affect the efficiency of power markets operated by others.

(iii) Reports on opportunities for efficiency improvement, market power abuses and market design flaws must be filed with the Commission and affected regulatory authorities.

(7) *Planning and expansion.* The Regional Transmission Organization must be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service and coordinate such efforts with the appropriate state authorities. As part of its demonstration with respect to planning and expansion, the Regional Transmission Organization must satisfy the standards listed in paragraphs (k)(7)(i) and (ii) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) The Regional Transmission Organization planning and expansion process must encourage market-driven operating and investment actions for preventing and relieving congestion.

(ii) The Regional Transmission Organization's planning and expansion process must accommodate efforts by state regulatory commissions to create multi-state agreements to review and approve new transmission facilities. The Regional Transmission Organization's planning and expansion process must be coordinated with programs of existing Regional Transmission Groups (See § 2.21 of this chapter) where appropriate.

(iii) If the Regional Transmission Organization is unable to satisfy this requirement when it commences operation, it must file with the Commission a plan with specified milestones that will ensure that it meets this requirement no later than three years after initial operation.

(8) *Interregional coordination.* The Regional Transmission Organization must ensure the integration of reliability practices within an interconnection and market interface practices among regions.

(l) *Open architecture.* (1) Any proposal to participate in a Regional Transmission Organization must not contain any provision that would limit the capability of the Regional Transmission Organization to evolve in ways that would improve its efficiency, consistent with the requirements in paragraphs (j) and (k) of this section.

(2) Nothing in this regulation precludes an approved Regional Transmission Organization from seeking to evolve with respect to its organizational design, market design, geographic scope, ownership arrangements, or methods of operational control, or in other appropriate ways if the change is consistent with the requirements of this section. Any future filing seeking approval of such changes must demonstrate that the proposed changes will meet the requirements of paragraphs (j), (k) and (l) of this section.

[Order 2000–A, 65 FR 12110, Mar. 8, 2000, as amended by Order 679, 71 FR 43338, July 31, 2006]

Subpart G—Transmission Infrastructure Investment Provisions

§ 35.35 Transmission infrastructure investment.

(a) *Purpose.* This section establishes rules for incentive-based (including performance-based) rate treatments for transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

(b) *Definitions.* (1) *Transco* means a stand-alone transmission company that has been approved by the Commission and that sells transmission services at wholesale and/or on an unbundled retail basis, regardless of whether it is affiliated with another public utility.

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

(c) *General rule.* All rates approved under the rules of this section, including any revisions to the rules, are subject to the filing requirements of sections 205 and 206 of the Federal Power Act and to the substantive requirements of sections 205 and 206 of the Federal Power Act that all rates, charges, terms and conditions be just and reasonable and not unduly discriminatory or preferential.

(d) *Incentive-based rate treatments for transmission infrastructure investment.* The Commission will authorize any incentive-based rate treatment, as discussed in this paragraph (d), for transmission infrastructure investment, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. A public utility's request for one or more incentive-based rate treatments, to be made in a filing pursuant to section 205 of the Federal Power Act, or in a petition for a declaratory order that precedes a filing pursuant to section 205, must include a detailed explanation of how the proposed rate treatment complies with the requirements of section 219 of the Federal Power Act and a demonstration that the proposed rate treatment is just, reasonable, and not unduly discriminatory or preferential. The applicant must demonstrate that the facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion consistent with the requirements of section 219, that the *total* package of incentives is tailored to address the demonstrable risks or challenges faced by the applicant in undertaking the project, and that resulting rates are just and reasonable. For purposes of this paragraph (d), incentive-based rate treatment means any of the following:

(1) For purposes of this paragraph (d), incentive-based rate treatment means any of the following:

(i) A rate of return on equity sufficient to attract new investment in transmission facilities;

(ii) 100 percent of prudently incurred Construction Work in Progress (CWIP) in rate base;

(iii) Recovery of prudently incurred pre-commercial operations costs;

(iv) Hypothetical capital structure;

(v) Accelerated depreciation used for rate recovery;

(vi) Recovery of 100 percent of prudently incurred costs of transmission facilities that are cancelled or abandoned due to factors beyond the control of the public utility;

(vii) Deferred cost recovery; and

(viii) Any other incentives approved by the Commission, pursuant to the requirements of this paragraph, that are determined to be just and reasonable and not unduly discriminatory or preferential.

(2) In addition to the incentives in § 35.35(d)(1), the Commission will authorize the following incentive-based rate treatments for Transcos, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential:

(i) A return on equity that both encourages Transco formation and is sufficient to attract investment; and

(ii) An adjustment to the book value of transmission assets being sold to a Transco to remove the disincentive associated with the impact of accelerated depreciation on federal capital gains tax liabilities.

(e) *Incentives for joining a Transmission Organization.* The Commission will authorize an incentive-based rate treatment, as discussed in this paragraph (e), for public utilities that join a Transmission Organization, if the applicant demonstrates that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. Applicants for the incentive-based rate treatment

must make a filing with the Commission under section 205 of the Federal Power Act. For purposes of this paragraph (e), an incentive-based rate treatment means a return on equity that is higher than the return on equity the Commission might otherwise allow if the public utility did not join a Transmission Organization. The Commission will also permit transmitting utilities or electric utilities that join a Transmission Organization the ability to recover prudently incurred costs associated with joining the Transmission Organization, either through transmission rates charged by transmitting utilities or electric utilities or through transmission rates charged by the Transmission Organization that provides services to such utilities.

(f) *Approval of prudently-incurred costs.* The Commission will approve recovery of prudently-incurred costs necessary to comply with the mandatory reliability standards pursuant to section 215 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential.

(g) *Approval of prudently incurred costs related to transmission infrastructure development.* The Commission will approve recovery of prudently-incurred costs related to transmission infrastructure development pursuant to section 216 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential.

(h) *FERC–730, Report of transmission investment activity.* Public utilities that have been granted incentive rate treatment for specific transmission projects must file FERC–730 on an annual basis beginning with the calendar year incentive rate treatment is granted by the Commission. Such filings are due by April 18 of the following calendar year and are due April 18 each year thereafter. The following information must be filed:

(1) In dollar terms, actual transmission investment for the most recent calendar year, and projected, incremental investments for the next five calendar years;

(2) For all current and projected investments over the next five calendar years, a project by project listing that specifies for each project the most up-to-date, expected completion date, percentage completion as of the date of filing, and reasons for delays. Exclude from this listing projects with projected costs less than $20 million; and

(3) For good cause shown, the Commission may extend the time within which any FERC–730 filing is to be filed or waive the requirements applicable to any such filing.

(i) *Rebuttable presumption.* (1) The Commission will apply a rebuttable presumption that an applicant has demonstrated that its project is needed to ensure reliability or reduces the cost of delivered power by reducing congestion for:

(i) A transmission project that results from a fair and open regional planning process that considers and evaluates projects for reliability and/or congestion and is found to be acceptable to the Commission; or

(ii) A project that has received construction approval from an appropriate state commission or state siting authority.

(2) To the extent these approval processes do not require that a project ensures reliability or reduce the cost of delivered power by reducing congestion, the applicant bears the burden of demonstrating that its project satisfies these criteria.

(j) *Commission authorization to site electric transmission facilities in interstate commerce.* If the Commission pursuant to its authority under section 216 of the Federal Power Act and its regulations thereunder has issued one or more permits for the construction or modification of transmission facilities in a national interest electric transmission corridor designated by the Secretary, such facilities shall be deemed to either ensure reliability or reduce the cost of delivered power by reducing congestion for purposes of section 219(a).

[Order 679, 71 FR 43338, July 31, 2006, as amended by Order 679–A, 72 FR 1172, Jan. 10, 2007, Order 691, 72 FR 5174, Feb. 5, 2007]

San Diego Gas & Electric Company v. FERC **Docket No. EL15-103**
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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 15th day of September 2017, served the foregoing upon the counsel listed in the Service Preference Report via the Court's CM/ECF system or via U.S. Mail, as indicated below:

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