ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

NOS. 16-1068 and 16-1408 (Consolidated)

UTILITY WORKERS UNION OF AMERICA LOCAL 464 AND ROBERT CLARK,
Petitioners,

V.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: JUNE 26, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent submits:

A. Parties and Amici

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

B. Rulings Under Review

The rulings under review in Case No. 16-1068 are:

1. Order Accepting Forward Capacity Auction Results Filing, *ISO New England Inc.*, 151 FERC ¶ 61,226 (2015) ("Auction 9 Results Order"), R. 23, JA 189; and

2. Order Denying Rehearing, *ISO New England Inc.*, 153 FERC ¶ 61,378 (2015) ("Auction 9 Rehearing Order"), R. 26, JA 249.

The rulings under review in Case No. 16-1408 are:

1. Order Accepting Forward Capacity Auction Results Filing, *ISO New England Inc.*, 155 FERC ¶ 61,273 (2016) ("Auction 10 Results Order"), R. 66, JA 379; and

2. Order Denying Rehearing, *ISO New England Inc.*, 157 FERC ¶ 61,060 (2016) ("Auction 10 Rehearing Order"), R. 70, JA 401.

C. Related Cases

The orders under review in this proceeding have not previously been before this Court or any other court. However, the main issue raised in this proceeding—i.e., whether the retirement of the Brayton Point coal-fired power plant constituted

market manipulation—was presented to this Court in *Public Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016) (dismissed for lack of jurisdiction).

This Court also considered petitions for review of earlier Commission orders that established rules for competitive auctions in the New England regional electricity capacity market, in *Maine Public Utilities Commission v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), *rev'd in part sub nom. NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 558 U.S. 165 (2010), *on remand, New England Power Generators Association v. FERC*, 707 F.3d 364 (D.C. Cir. 2013), and that made changes to the capacity market rules, in *New England Power Generators Association v. FERC*, 757 F.3d 283 (D.C. Cir. 2014). Three other cases concerning those auction rules are currently pending before this Court in *New England Power Generators Association v. FERC*, Case Nos. 15-1071 and 16-1042 (consolidated) (briefing completed); *New England Power Generators Association v. FERC*, Case Nos. 16-1023 and 16-1024 (consolidated) (briefing completed); and *NextEra Energy Resources, LLC, et al. v. FERC*, Case Nos. 15-1070 and 17-1110 (consolidated).

/s/ Nicholas M. Gladd
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June 26, 2017

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Auction 9 Rehearing Order	*ISO New Eng. Inc.*, 153 FERC ¶ 61,378 (2015), R. 26, JA 249
Auction 10 Results Order	*ISO New Eng. Inc.*, 155 FERC ¶ 61,273 (2016), R. 66, JA 379
Auction 10 Rehearing Order	*ISO New Eng. Inc.*, 157 FERC ¶ 61,060 (2016), R. 70, JA 401
Br.	Opening brief of Petitioners Utility Workers Union of America Local 464 and Robert Clark
Commission or FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
JA	Joint Appendix
P	Denotes a paragraph in a Commission order
R.	Indicates an item in the certified index to the record
System Operator	ISO New England, Inc., operator of the regional transmission grid in the 6 New England states

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V.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

This case concerns the supply and pricing of electricity resources necessary to ensure the reliable provision of electric services. In New England, this is handled through annual wholesale auctions run by ISO New England, Inc., the regional independent system operator ("System Operator"), that rely on competitive forces to determine in advance how much supply is necessary to match future demand and what the price of that supply will be. If the market is deemed

non-competitive, then the System Operator applies special mitigation rules that lower the price below a monopolistic level, but still encourage the entry of new supply necessary to return the market to competitive levels.

The first seven years of the New England capacity auctions were uneventful, producing competitive results. The eighth annual auction ("Auction 8"), however, was controversial because the region's years-long capacity surplus had come to an end. As a result, that auction saw lower competition, higher prices, and allegations of market manipulation. Among the manipulation claims was the assertion that the owner of the Brayton Point coal-fired power plant ("Brayton Point") had chosen to retire that resource in order to impermissibly inflate prices in Auction 8. The Commission investigated those allegations and ultimately found the retirement decision to be justified. Nonetheless, the results of Auction 8 were appealed to this Court, which dismissed the petitions for lack of jurisdiction in *Public Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016).

Now before the Court are the results of the ninth and tenth annual auctions ("Auction 9" and "Auction 10", respectively). The issues presented are:

(1) [Case No. 16-1068] whether the Commission reasonably concluded, after exercising its enforcement discretion, that the retirement of the Brayton Point coal plant before Auction 8 did not manipulate Auction 9; and

(2) [Case No. 16-1408] whether the Commission reasonably concluded, after exercising its enforcement discretion, that the retirement of the Brayton Point coal plant before Auction 8 did not manipulate Auction 10.

COUNTER-STATEMENT OF JURISDICTION

The Union asserts that the Court has jurisdiction to review the orders at issue under section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). However, as discussed in greater detail *infra* in the Argument, section 10 of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), expressly prohibits judicial review of agency action that is "committed to agency discretion by law." This Court has held that the Commission's exercise of its enforcement authority is "entirely discretionary" and "nonreviewable." *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 460-61 (D.C. Cir. 2001) (applying *Heckler v. Chaney*, 470 U.S. 821 (1985), in interpreting the enforcement provisions of the Natural Gas Act, which are substantively the same as the enforcement provisions in the Federal Power Act); *see also Public Citizen*, 839 F.3d at 1173-74.

The Union's challenge rests entirely on the assertion that the owner of the Brayton Point coal plant chose to retire it for the sole purpose of manipulating the New England capacity market. The Commission investigated that claim and found the coal plant's retirement to be justified. *See id.* at 1168, n.2, 1174. The Court

lacks jurisdiction to review that enforcement determination. It therefore lacks jurisdiction to review these appeals, which necessarily turn on that determination.

The Union also has failed to demonstrate that it has standing, because it has not shown that it has suffered an injury-in-fact caused by the orders under review. The factual predicate of this case, i.e., the decision to retire the Brayton Point coal plant, occurred specifically in conjunction with Auction 8. But the Union here challenges the results of Auctions 9 and 10, not Auction 8. It argues, without support, that the prices produced by Auctions 9 and 10 would have been lower had Brayton Point participated in those auctions. That assertion is entirely speculative and does not constitute an injury-in-fact. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical").

Even assuming *arguendo* that the Union is correct that the prices produced by Auctions 9 and 10 would have been lower with Brayton Point's participation, the Union has not traced that outcome to the orders under review. Nor can it. The validity of the retirement decision at issue was settled well before Auctions 9 and 10. Any alleged impacts stemming from that retirement decision have no connection to the orders now under review.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. The Federal Power Act

Section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). It includes the power to set rates for electricity capacity, either directly or indirectly through a market mechanism, and to review capacity requirements that affect those rates. *See Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 482-84 (D.C. Cir. 2009).[1]

All rates for or in connection with jurisdictional sales and transmission

[1] "'Capacity' is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties—generally, generators—who can either produce more or consume less when required." *Id.* at 479*; see also NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 168 (2010) ("In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases an option to buy a quantity of energy, rather than purchasing the energy itself.").

services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA §§ 205(a), (b), (e), 16 U.S.C. §§ 824d(a), (b), (e). Section 205 "does not compel FERC to engage in nondiscretionary activity either by commanding FERC to set disputed rates for hearing or by mandating FERC disapprove any unjust or unreasonable rates." *Public Citizen*, 839 F.3d at 1173 (describing FPA § 205(a), 16 U.S.C. § 824d(a)).

Section 206 of the Federal Power Act, 16 U.S.C. § 824e, authorizes the Commission, on its own initiative or on a third-party complaint, to investigate whether existing rates are lawful. In a complaint proceeding, the complainant bears "the burden of proof to show that any rate . . . is unjust, unreasonable, unduly discriminatory, or preferential . . . ." FPA § 206(b), 16 U.S.C. § 824e(b). If the Commission finds that the burden has been met, it must determine and set the new just and reasonable rate. FPA § 206(a), 16 U.S.C. § 824e(a).

The Federal Power Act grants the Commission discretion concerning investigations and enforcement decisions. *See Public Citizen*, 839 F.3d at 1173-74 (discussing FPA § 205, 16 U.S.C. § 824d); *accord* 16 U.S.C. § 824v ("Prohibition of Energy Market Manipulation"); *id.* § 825f ("Investigations by Commission"); *id.* § 825m ("Enforcement of Act, Regulations and Orders"); *id.* § 825o-1 ("Enforcement of Certain Provisions").

B. Developing Supplier Competition And Regional Markets

Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition among power suppliers. The expansion of vast regional grids and the possibility of long-distance transmission has enabled electric utilities to make large transfers of electricity in response to market conditions, thereby creating opportunities for competition among suppliers. *See New York*, 535 U.S. at 7-8 (explaining evolution of competitive markets).

In the 1990s, the Commission furthered the development of such competition by ordering functional unbundling of wholesale generation and transmission services, requiring utilities to provide open, non-discriminatory access to their transmission facilities to competing suppliers. *See generally id.* at 11-13; *cf. Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536 (2008) ("[T]he Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity.").

The Commission's efforts to foster wholesale electricity competition over broader geographic areas in recent decades have led to the creation of independent system operators and regional transmission organizations. *See Morgan Stanley*, 554 U.S. at 536-37. These independent regional entities operate the transmission grid on behalf of transmission-owning member utilities and are required to

maintain system reliability. *See NRG*, 558 U.S. 165, 169 & n.1 (explaining responsibilities of regional system operators).

These regional entities also run auction markets for wholesale electricity sales. *See Morgan Stanley*, 554 U.S. at 537. Such organized regional markets are subject to FERC market rules that help mitigate the exercise of market power, to administratively-determined prices in some instances, and to oversight of market behavior and conditions by the Commission and by the regional entities' own market monitors. *See, e.g.*, *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity and Ancillary Servs. by Pub. Utils.*, Order No. 697, 72 Fed. Reg. 39,904, FERC Stats. & Regs. ¶ 31,252, 119 FERC ¶ 61,295 at P 955 (2007), *on reh'g and clarification*, Order No. 697-A, 73 Fed. Reg. 25,382, FERC Stats. & Regs. ¶ 31,268, 123 FERC ¶ 61,055 at P 395 (2008), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

The System Operator here, ISO New England Inc., is the regional entity that operates the regional transmission system and administers bid-based energy markets across six northeastern States (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont). *See generally NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 796 (D.C. Cir. 2007).

II. The New England Regional Capacity Market

A. New England's Evolving Resource Mix And Resource Adequacy Construct

Due to technological advances, resource economics, and state and federal policy decisions, the United States has experienced a significant increase in natural gas-fired generation, and a corresponding decrease in coal-fired generation, over the last two decades. *See, e.g.*, FERC, *Energy Primer: A Handbook of Energy Market Basics* (Nov. 2015) (providing overview of natural gas and coal as electricity fuels), *available at* https://www.ferc.gov/market-oversight/guide/energy-primer.pdf; Energy Information Admin., *U.S. electric generating capacity increase in 2016 was largest net change since 2011* (Feb. 27, 2017) (discussing increased reliance on natural gas, and decreased reliance on coal, for electricity generation), *available at* https://www.eia.gov/todayinenergy/detail.php?id=30112.

That shift has been particularly pronounced in New England. *See* ISO New England, Inc. Internal Market Monitor, *2014 Annual Markets Report*, ISO New England, Inc., section 1.1.1 (May 20, 2015), *available at* https://www.iso-ne.com/static-assets/documents/2015/05/2014-amr.pdf. In 1990, natural gas-fired plants produced only 5 percent of the electricity consumed in New England, and coal-fired plants produced 18 percent. *Id.* n.7. By 2012, gas-fired plants' share

had increased to 51 percent, and coal-fired plants' share had decreased to about 6 percent. *Id.*

In the middle of that transition, the regulatory paradigm fundamentally changed for wholesalers of electricity in New England. Prior to 2006, decisions about the adequacy of utilities' resource fleets were made by a voluntary association of the region's electric utilities. *See Connecticut*, 569 F.3d at 479 (D.C. Cir. 2009) (describing history of New England's resource adequacy construct). That approach, by design, procured more resources than the region needed to maintain reliability. *See New Eng. Power Generators Ass'n, Inc.*, 146 FERC ¶ 61,039 (2014) at P 50; *see also Devon Power LLC*, 115 FERC ¶ 61,340 at P 20 n.27 (2006) (noting that the construct that preceded the capacity market, by design, set a capacity target in excess of the region's capacity requirements), *on reh'g*, 117 FERC ¶ 61,133 at P 100 (noting the presence of a region-wide capacity surplus).

Recognizing the disadvantages of that model, the region's stakeholders, including the New England states, chose to abandon it in favor of competitive market forces. *Connecticut*, 569 F.3d at 479-80. As a result, the System Operator implemented a wholesale market for electricity capacity—the forward capacity market—that was specifically intended to maintain reliability by attracting

adequate resources at the least cost. *Id.* at 480.

B. The Forward Capacity Market

Having ruled on numerous appeals concerning new energy market rate designs over the last decade, this Court is well-acquainted with the problems of maintaining system reliability, especially in areas of high demand along the eastern seaboard, and with the various mechanisms that the Commission has approved in regional markets (including New England) for the purpose of promoting reliability. *See Connecticut*, 569 F.3d 477 (capacity market in New England); *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) (same) (reversed in one unrelated respect in *NRG*, 558 U.S. 165); *New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283 (D.C. Cir. 2014) (imposition of additional mitigation measures for New England capacity market); *New Eng. Power Generators Ass'n v. FERC*, 707 F.3d 364 (D.C. Cir. 2013) (standard for review of auction rates); *Blumenthal v. FERC*, 552 F.3d 875 (D.C. Cir. 2009) (transition to capacity market in New England); *see also, e.g.*, *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283 (D.C. Cir. 2011) (transitional capacity auctions in mid-Atlantic region); *Pub. Serv. Elec. & Gas Co. v. FERC*, 324 F. App'x 1 (D.C. Cir. 2009) (capacity market in mid-Atlantic); *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232 (D.C. Cir. 2005) (capacity market in New York).

Since 2006, the System Operator has administered the forward capacity market in New England pursuant to the rules set forth in its FERC-jurisdictional tariff ("Tariff"). Load-serving entities in New England (traditional local utilities) purchase from generators (and other suppliers) options to buy quantities of energy (i.e., capacity) three years in advance. *See Blumenthal*, 552 F.3d at 879; *see generally NRG*, 558 U.S. at 168-72 (describing New England's capacity market). A forward capacity market encourages the entry of new suppliers into the market with auctions that set rates three years in advance of delivery. This lag time allows competition from new suppliers that lack the installed capacity to deliver electricity now but could develop that capacity within three years of winning a bid. *See Md. Pub. Serv. Comm'n*, 632 F.3d at 1285 (dismissing challenge to a pricing model designed to encourage increased investment in capacity); *see also Del. Dep't of Nat. Res. and Envtl. Control v. EPA*, 785 F.3d 1, 12 (D.C. Cir. 2015) (explaining that capacity payments provide revenues to maintain operations of existing generation resources and to encourage development of new resources).

Capacity prices are set through the annual forward capacity auction. The capacity auction is a descending price auction under which generators and other suppliers willing to provide capacity submit bids reflecting the price at which they are willing to supply capacity. Each bid reflects the lowest price the bidding

resource will accept before it leaves the capacity market (called a "de-list" bid). *See New Eng. Power Generators*, 757 F.3d at 298 (explaining bidding process); *ISO New Eng. Inc.*, 148 FERC ¶ 61,201 at P 2 (2014) (describing capacity auction process). Any bid that "clears" the auction receives the auction-clearing price. *See New Eng. Power Generators*, 757 F.3d at 298. New England's capacity market also includes a locational component, conducting auctions in different zones based on transmission constraints between subregions. *See Me. Pub. Utils. Comm'n*, 520 F.3d at 469.

In certain conditions primarily relating to the level of competition in the auction, the auction price for existing resources is administratively-determined pursuant to specific mitigation rules in the System Operator's Tariff. *Public Citizen*, 839 F.3d at 1168 (citing *ISO New Eng. Inc.*, 148 FERC ¶ 61,201 at P 2 n.4); *see also ISO New Eng. Inc.*, 146 FERC ¶ 61,038 at PP 3-4, 25-28 (2014). In those situations, the auction is conducted and produces a clearing price as usual, but existing resources receive the lower of the clearing price or the administrative safeguard price. *New Eng. Power Generators Ass'n*, 146 FERC ¶ 61,039 at P 48.

The System Operator conducts the annual capacity auction to procure capacity commitments for a 12-month period ("Capacity Year") from June 1 through May 31. *See Devon Power LLC*, 115 FERC ¶ 61,340 at P 16. The results

of the capacity auctions are as follows:

Capacity Auction	Auction Held	Capacity Year (June 1-May 31)	Clearing Price (per kW-month)
1	2007	2010-2011	$4.50
2	2008	2011-2012	$3.60
3	2009	2012-2013	$2.95
4	2010	2013-2014	$2.95
5	2011	2014-2015	$3.21
6	2012	2015-2016	$3.43
7	2013	2016-2017	$3.15, except for one zone which cleared at $6.66 for existing resources and $14.99 for new resources.*
8	2014	2017-2018	$7.025 for existing resources and $15.00 for new resources, except for one zone which cleared all resources at $15.00.*
9	2015	2018-2019	$9.55, except for one zone which cleared at $11.08 for existing resources and $17.73 for new resources.*
10	2016	2019-2020	$7.03
11	2017	2020-2021	$5.30

See ISO New England, Inc., *Key Grid and Market Stats: Markets*, ISO-NE.com, https://iso-ne.com/about/key-stats/markets (last visited June 26, 2017).

* Indicates downward mitigation of price.

C. Rules For Exiting The Capacity Market

Prior to each capacity auction, the System Operator is required to conduct a detailed review of all resources that seek to enter, remain in, or exit the capacity market. *See ISO New Eng. Inc.*, 146 FERC ¶ 61,014 at P 4 (2014) ("Auction 8 Qualification Order"). The Tariff provides only two ways for a resource to leave the capacity market: (1) submit an exit bid (which is a type of "de-list bid" under the Tariff)[2] stating the auction price below which the resource will exit the capacity market but continue to participate in the System Operator's other markets (e.g., the daily energy market); or (2) submit a retirement request (referred to in the Tariff and elsewhere in this proceeding as a "Non-Price Retirement Request"), *see id.* P 4, n.7, which is "a binding request to retire all or part of" a capacity resource prior to the Capacity Year associated with the relevant capacity auction. Tariff §§ III.13.1.2.3.1.5.1, III.13.1.2.3.1.5.2, JA 417.

Both of these departure options are governed by rules imposing strict procedural and substantive requirements on the resource owner, and those requirements are tied directly to the annual auction in which the departure is

[2] Under the Tariff, there are multiple types of exit bids. *See* Auction 8 Qualification Order P 4 n.7. For example, there are "static de-list bids" and "permanent de-list bids." Resources use the former when seeking to leave the capacity market for just one year, and they use the latter when seeking to leave the capacity market permanently. *See id.*

sought. *See ISO New Eng. Inc.*, 146 FERC ¶ 61,014 PP 2-4 (discussing Tariff §§ 13.1.2, 13.8, JA 407, 439).

The System Operator's market monitor ("Market Monitor") reviews every exit bid for consistency with the cost limits in the Tariff, and the System Operator reviews all retirement requests for reliability implications. The Tariff allows the System Operator to reject a retirement request and attempt to negotiate an out-of-market contract if the retirement raises reliability concerns. *Id.* But even if the System Operator rejects the retirement request, the Tariff ultimately allows the resource owner to retire the resource as long as it notifies the System Operator of that decision within six months of receiving notice that its retirement request was rejected. Tariff § III.13.2.5.2.5.3(a)(iii), JA 436-37.

After the System Operator and Market Monitor review all of the auction bids, the System Operator is required to submit a filing with the Commission under section 205 of the Federal Power Act, 16 U.S.C. § 824d, describing the results of the qualification process and establishing the parameters of the upcoming auction. *See* Auction 8 Qualification Order, 146 FERC ¶ 61,014 at P 2 (citing Tariff § 13.8.1(a), JA 439-40). The System Operator then runs the auction using those parameters and submits the auction results to the Commission in yet another filing under section 205 of the Federal Power Act. Tariff § 13.8.2, JA 441.

III. Auction 8 Proceedings

A. Brayton Point's Retirement Request

During the System Operator's qualification process for Auction 8, the region's resource owners submitted requests to retire 98 resources totaling 3,135 MW—nearly ten percent of the region's existing capacity—rather than offer them in the auction. *ISO New Eng. Inc.*, 148 FERC ¶ 61,201 at P 4. Those resources were diverse. *See id.* n.10 (noting that the retiring resources included a 604 MW nuclear plant, the 1,535 MW Brayton Point coal plant, and 554 MW of demand response resources) (citing testimony from the Auction 8 results proceeding).

Before submitting its retirement request, Brayton Point first submitted an exit bid. *See* ISO New England, Inc. Apr. 29, 2014 Answer, Docket No. ER14-1409-000, at 5 (designated as item R. 29 in the certified index to the record in *Public Citizen, Inc. v. FERC*, Nos. 14-1244 and 14-1246 (D.C. Cir. May 12, 2015)), JA 66. The Market Monitor rejected that exit bid. *Id.* at 6. Brayton Point then converted its exit bid into a retirement request. *Id.* After conducting the necessary reliability review, the System Operator rejected Brayton Point's retirement request because it raised reliability concerns. *Id.* Ultimately, Brayton Point's owner opted to retire the resource rather than attempt to negotiate a contract for its continued operation. *Id.* at 7-8. Throughout that process, Brayton

Point's owner complied with all of the Tariff rules governing exit bids and retirement requests. *Id.* at 5.

B. Proceedings Establishing The Parameters Of Auction 8

After reviewing all bids and retirement requests submitted during the Auction 8 qualification process, the System Operator explained the results of that process in the Tariff-required Federal Power Act filing. *See* Auction 8 Qualification Order, 146 FERC ¶ 61,014 at P 1. The Commission accepted that filing after considering public comments. *Id.* P 11.

In a typical auction, the qualification filing is the sole filing establishing the parameters of the upcoming auction. But that was not the case in Auction 8. The large number of retirement announcements implicated a parameter in the Tariff that was beyond the scope of the qualification filing: the administrative pricing safeguard that is triggered in situations of relatively low competition.[3] As a result, that parameter was the subject of two additional filings. *See ISO New Eng. Inc.*,

[3] The Tariff refers to this administrative pricing scenario as "Insufficient Competition." *See ISO New Eng. Inc.*, 146 FERC ¶ 61,038 P 3 n.9 (2014). Under the Tariff definition, Insufficient Competition exists in an auction if there are not enough existing resources to meet the region's needs and the amount of new capacity offered into the auction is less than twice the magnitude of that shortfall. *Id.* (also listing other triggering scenarios not relevant here). The administrative pricing safeguard also applies to a condition defined as "Inadequate Supply," *see id.* P 3, but that specific provision ultimately was not triggered in Auction 8.

146 FERC ¶ 61,038 ("Administrative Pricing Tariff Order"); *New Eng. Power Generators Ass'n, Inc.*, 146 FERC ¶ 61,039 (2014) ("Administrative Pricing Complaint Order"). One was a complaint filed under section 206 of the Federal Power Act, and the other was a Tariff change filed under section 205 of the Federal Power Act. *See* 16 U.S.C. §§ 824d, 824e.

The complaint was filed by an association of power plant owners who alleged that, under the existing Tariff rules, the recently announced retirements—including Brayton Point's—would produce unreasonably *low* prices in Auction 8. Administrative Pricing Complaint Order PP 9-11 (explaining that the existing formula would produce a lower mitigated price, $3.47/kW-month, that is based on the region's historical capacity surplus instead of the current supply/demand balance).

Before the Commission could act on the complaint, the System Operator submitted a Tariff-change filing. Administrative Pricing Tariff Order P 1. The System Operator concurred that the administrative pricing safeguard would likely be triggered in Auction 8, *id.* P 7, and that the existing formulas could produce a price low enough to "undermine investor confidence in the long-term stability" of the capacity market revenues, *id.* P 14. However, the System Operator opposed the power plant owners' replacement rate and instead proposed its own solution, which

would produce an administrative price of $7.025/kW-month. *Id.* P 13 (proposing solution based on the Tariff's pre-existing formula for the cost of a new entrant into the market).

Those two competing filings presented the Commission with three options for the administrative safeguard price that was likely to apply in Auction 8: (1) a low price based on the region's historical capacity surplus; (2) a middle price based on the estimated cost of new entry; or (3) a high price based on the estimated cost of a combustion turbine. The Commission chose the middle price. *Id.* P 26 ("[T]he Commission must strike a balance between, on the one hand, setting a price that will retain enough existing resources to maintain reliability and, on the other hand, protecting consumers from overpaying for that capacity and minimizing price volatility that could undermine both investor and consumer confidence in the market."); *id.* P 26 (should the administrative pricing safeguard be triggered, the middle price "of $7.025/kW-month is just and reasonable because it appropriately balances the principles noted above, helping to ensure reliability while protecting consumers and the market from sudden, significant price increases"); *see also* Administrative Pricing Complaint Order PP 49-50, 54 (rejecting the low option, which would send "illogical price signals" that could undermine reliability, and the high option, which would have increased rates by

"approximately $3 billion").

C. Auction 8 Results

In February 2014, the System Operator held Auction 8 pursuant to the Tariff, using the parameters established in the pre-auction proceedings, and filed the results with the Commission. *See* ISO New England, Inc. Feb. 28, 2014 Tariff Filing, Docket No. ER14-1409-000 (designated as item R. 1 in the certified index in Nos. 14-1244 and 14-1246), JA 18. As expected, due to the supply/demand balance in the auction, the administrative pricing safeguard was triggered and the auction price for existing resources was $7.025/kW-month, except in one pricing zone. *Id.* at 2; *see also Public Citizen*, 839 F.3d at 1168 (noting that the administrative pricing rules were triggered in Auction 8).

As with the proceedings establishing the auction's parameters, the Auction 8 results proceeding was actively litigated. The Union, among others, alleged that Brayton Point's owner was retiring that plant to manipulate Auction 8. *See, e.g.*, UWUA Local 464 and Robert Clark June 11, 2014 Answer, Docket No. ER14-1409-000, at 2 (designated as item R. 34 in the certified index in Nos. 14-1244 and 14-1246), JA 78. Those protesters requested that the Commission "affirmatively determine whether [Auction 8's] rates were just and reasonable and assess whether the market was unduly manipulated during the auction." *Public Citizen*, 839 F.3d

at 1168. The Commission also received a report that the bids associated with certain resources located outside of New England ("importing resources") may have been structured in a manipulative manner. *See ISO New Eng. Inc.*, 148 FERC ¶ 61,201 at P 11.

In response to both sets of market manipulation allegations, the Commission issued a letter to the System Operator seeking additional information regarding the auction. *See* Office of Energy Market Regulation June 27, 2014 Letter, Docket No. ER14-1409-000 (designated as item R. 36 in the certified index in Nos. 14-1244 and 14-1246), JA 89. The System Operator's response to that letter opened a second comment window, during which parties submitted additional comments to the Commission. *See* Certified Index to the Record, Nos. 14-1244 and 14-1246 (D.C. Cir. May 12, 2015), at R. 39-54 (containing several comments on the System Operator's response to the Commission's letter).

Ultimately, due to a two-two deadlock between the four Commissioners sitting at that time, the Commission did not issue an order on the Auction 8 results filing. Accordingly, pursuant to section 205 of the Federal Power Act, 16 U.S.C. § 824d, those rates became effective on the date dictated by the statute. On the day after those rates became effective, the Secretary of the Commission ("Secretary") issued a notice announcing that they had become effective by operation of law.

Public Citizen, 839 F.3d at 1168. After certain parties requested rehearing of that notice, the Secretary issued another notice explaining that rehearing did not lie because the Commission did not issue an order in the proceeding. *Id.* at 1169. Two groups sought this Court's review of the Commission's notices regarding the Auction 8 results and "whether FERC's response to [Auction 8] ran afoul of its FPA obligations." *Public Citizen*, 839 F.3d at 1167.

D. *Public Citizen*

Petitioners in *Public Citizen* challenged the outcome of Auction 8 under two theories: (1) that the Secretary's notices constituted a Commission order for purposes of section 313(b) (the judicial review provision) of the Federal Power Act, 16 U.S.C. § 825*l*(b), *see* 839 F.3d at 1169; and (2) that section 205 of the Federal Power Act, 16 U.S.C. § 824d, compels the Commission to set the rates for hearing or otherwise "affirmatively prevent any unjust and unreasonable rates from going into effect," and that the Commission's failure to do so violated the Administrative Procedure Act, 5 U.S.C. §§ 551(13), 702, *see* 839 F.3d at 1172. The Court rejected both theories, finding the petitions non-justiciable. *See id.* at 1169-74.

As the Union does in the instant appeals, petitioners in *Public Citizen* explicitly argued that the retirement of the Brayton Point coal plant represented a

unilateral exercise of market power and that the Commission was obligated to hold a hearing or otherwise prevent Auction 8's rates from taking effect. *Id.* at 1172. The Court acknowledged that claim, but did not discuss it in detail. *Id.* at 1168, n.2 (noting that the Commission investigated Brayton Point's behavior in Auction 8, "ultimately concluding that the behavior was justified") (citing *ISO New Eng. Inc.*, 148 FERC ¶ 61,201 at P 11).

Nonetheless, the Court found the Commission's decision not to initiate a hearing to be within its unreviewable discretion under the Federal Power Act. *Id.* at 1173-74 (the Federal Power Act "contains no standards cabining FERC's discretion or enabling this Court to meaningfully review how the Commission exercises its discretion," and did not compel the Commission to take action with regard to the results of Auction 8) (citing *S. Railway Co. v. Allied Seaboard Milling Corp.*, 442 U.S. 444 (1979)). Accordingly, the Court dismissed the appeals for lack of jurisdiction. *Id.* at 1174 ("Since neither the FPA nor the APA grants us the power to hear these claims, we are compelled to 'dismiss the cause.'") (quoting *Ex Parte McCardle*, 74 U.S. 506, 514 (1868)) (brackets omitted).

IV. The Challenged Orders

A. Auction 9 Results

In February 2015, the System Operator conducted Auction 9 and filed the results with the Commission. *See* Auction 9 Results Order P 1, JA 189-90. The auction clearing price was $9.55/kW-month (except for importing resources, and resources in one pricing zone in which low supply triggered the administrative pricing safeguards). *Id.* P 20, JA 195-96.

The Union protested the results, alleging that the Brayton Point coal plant could still be run economically and, therefore, that the owner's decision to retire it before Auction 8 constituted market manipulation in Auction 9 (as well as Auction 8). *See id.* PP 14-15, JA 193-94; Auction 9 Rehearing Order PP 13-14, JA 252-53. As a result, the Union argued that the Commission should order a hearing on that issue before accepting the results of Auction 9. *See* Auction 9 Rehearing Order P 14, JA 253; Auction 9 Results Order P 15, JA 194.

The Commission disagreed, rejecting all of the Union's arguments concerning Brayton Point's retirement and explaining its rationale for doing so. Auction 9 Results Order P 22, JA 196-98; Auction 9 Rehearing Order PP 15-17, JA 253-54. The Commission ultimately accepted the Auction 9 results, concluding that the System Operator had met its burden to demonstrate that the results are just

and reasonable. *Id.* PP 20-21, JA 195-96; Auction 9 Rehearing Order P 16, 23, JA 254, 256.

The Union petitioned this Court to review the Auction 9 orders in Case No. 16-1068.

B. Auction 10 Results

In February 2016, the System Operator conducted Auction 10 and filed the results with the Commission. Auction 10 Results Order P 3, JA 380. The auction clearing price was $7.03/kW-month. *Id.* P 4, JA 380. The Union protested the results, once again alleging that Brayton Point could be run economically and, therefore, that the resource owner's retirement decision before Auction 8 constituted market manipulation in Auction 10 (as well as Auctions 8 and 9).

In contrast to its rehearing request in the Auction 9 proceeding, the Union's rehearing request in the Auction 10 proceeding was quite short. *Compare* Auction 9 Rehearing Request, R. 24, JA 199-228, *with* Auction 10 Rehearing Request, R. 68, JA 391-400. This is because it merely incorporated by reference "the full contents of" the Union's Auction 9 rehearing request, and then set forth one new argument that it did not make in the Auction 9 proceeding. Auction 10 Rehearing Request at 2, JA 392. The Union's new argument was based on a separate Tariff filing that the System Operator made after the Auction 10 qualification process,

proposing changes to the auction's retirement rules, to be effective starting with Auction 11. Specifically, the Union asserted that the results of Auctions 8, 9, and 10 must be "rejected and rerun" because those auctions were conducted without the revised retirement rules that the System Operator proposed for Auction 11. *Id.* at 3, JA 393.

The Commission once again disagreed with the Union's contentions "for the same reasons articulated in" the Auction 9 orders. Auction 10 Results Order P 26 (citing Auction 9 Results and Rehearing Orders), JA 388-89. As to the Union's new argument concerning the new retirement rules, the Commission emphasized that the System Operator proposed those reforms to "go into effect beginning with [Auction 11], three years after" Brayton Point's retirement request. *Id.* P 27, JA 389-90. The Commission explained that its acceptance of those subsequent Tariff changes as just and reasonable "does not render previous auctions, held without those reforms in place, to be unjust and unreasonable." *Id.*

The Commission ultimately accepted the Auction 10 results, concluding that the System Operator had met its burden to demonstrate that the results are just and reasonable. Auction 10 Results Order P 14, JA 383.

The Union petitioned this Court to review the Auction 10 orders in Case No. 16-1408.

SUMMARY OF ARGUMENT

These appeals hinge on the Union's assertion that the capacity prices in Auctions 9 and 10 were the product of the manipulative contrivance of a single resource owner's decision to retire the last coal plant in Massachusetts before Auction 8. That claim is contradicted by the Commission's enforcement determination, record evidence demonstrating that Auctions 9 and 10 were competitive, and the fact that the Tariff prohibited Brayton Point from participating in those later auctions. The Union's manipulation theory also ignores the changes in the region's resource mix and the reality that the market's price signals appropriately reflect those changes. The appeals therefore fail on their merits. But the Court need not reach the merits, because the appeals face two insurmountable jurisdictional hurdles.

First, all of the Union's arguments are premised on the assumption that the Commission's enforcement determination concerning Brayton Point is within the Court's jurisdiction to review. But that premise is flawed. This Court has explained that such determinations are outside the Court's jurisdiction because Congress gave the Commission plenary enforcement discretion. And because the Federal Power Act provides the Court no law to apply to the Commission's enforcement determination concerning Brayton Point, the Court necessarily lacks

jurisdiction over appeals that rest on that determination.

The second jurisdictional hurdle is the Union's failure to establish standing. The Union's alleged injury is that the Auction 9 and 10 rates were higher than they would have been if the Brayton Point coal plant had participated in those auctions. But the Union's terse standing statement makes no attempt to demonstrate that such an increase occurred. Further, even assuming *arguendo* that the Union's alleged harm exists, the Union cannot show that it was caused by the orders on review. All of the Commission's actions concerning Brayton Point's retirement decision took place before Auction 9, in orders that are not under review in these appeals.

Assuming jurisdiction, the Court should deny the petitions on their merits. In each of the orders on review, the Commission weighed the record evidence—including the Market Monitor's conclusions that the results of Auctions 9 and 10 were competitive—and found that the System Operator had shown the auction results to be reasonable. In so doing, the Commission appropriately rejected all of the Union's arguments and thoroughly explained its reasoning. And, in Auction 10, the Commission did so notwithstanding its finding that the Union's rehearing request did not comply with the Federal Power Act, the Commission's regulations, or Commission precedent. The Commission's well-reasoned determinations in

these proceedings warrant the Court's respect.

ARGUMENT

I. THE COMMISSION'S INVESTIGATION OF BRAYTON POINT'S RETIREMENT DECISION IS NOT SUBJECT TO JUDICIAL REVIEW

The Union's petitions rest on its allegation that the retirement of the Brayton Point coal plant constituted market manipulation. The Union has conceded as much. *See* Auction 9 Rehearing Request at 26 (referring to the alleged manipulation as the "fundamental and essential threshold issue"), JA 224; Br. 28 (describing the market manipulation allegation as "central to determining the legality" of the Auction 9 and 10 results). That concession should end these appeals.

A. The Commission's Enforcement Determinations Are Non-Reviewable

Section 10 of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), prohibits judicial review of agency action that is "committed to agency discretion by law." The Supreme Court has held that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *id.* at 837-38 ("In so holding, we essentially leave to Congress, and not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially

reviewable.").

And this Court has found, in the context of the Natural Gas Act, that the Commission's enforcement discretion is "nonreviewable" because it "falls squarely within the *Chaney* presumption." *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 457, 460 (D.C. Cir. 2001) (applying *Chaney*, 470 U.S. 821, to the Natural Gas Act). That holding is equally applicable to the Federal Power Act, which contains similar discretionary enforcement language. *Compare Baltimore Gas*, 252 F.3d at 461 (quoting Natural Gas Act enforcement provisions and Commission regulation in effect at that time) *with* 16 U.S.C. §§ 824v, 825f, 825m, 825o-1 (comparable provisions of Federal Power Act) *and* 18 C.F.R. § 1b.7 (same regulatory text at issue in *Baltimore Gas*); *cf. NSTAR*, 481 F.3d at 800 (judicial interpretations of Natural Gas Act provisions apply "interchangeably" to "substantially identical" counterparts in the Federal Power Act) (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981)).

In fact, the Court reaffirmed the non-reviewability of the Commission's enforcement discretion under the Federal Power Act, as applied to Brayton Point's retirement, in dismissing the petitions for review of Auction 8. *See Public Citizen*, 839 F.3d at 1173-74 ("[FPA section 205(e)] contains no standards cabining FERC's discretion [over investigation decisions] or enabling this Court to

meaningfully review how the Commission exercises its discretion.") (citing *S. Railway Co. v. Allied Seaboard Milling Corp.*, 442 U.S. 444); *see also Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1583 (D.C. Cir. 1992) (the Commission "need not launch a full investigation just because a party cries 'anticompetitive behavior.' Whether allegations of anticompetitive impact are sufficiently concrete and sufficiently relevant to the proceeding at hand to warrant hearing is a determination left to the discretion of the Commission.").

B. The Commission's Enforcement Determination Concerning Brayton Point Is Within Its Non-Reviewable Discretion, And The Union's Attempts To Undermine That Determination Have No Merit

The Union's market manipulation theory was first presented to the Commission in response to the results of Auction 8. *See Public Citizen*, 839 F.3d at 1168. The Commission took the allegation seriously, investigated it, found that the resource owner had justified its retirement decision, and concluded that no further action was necessary. *See id.* n.2 ("[FERC] also investigated a specific utility's bidding behavior, ultimately concluding the behavior was justified.") (citing *ISO New Eng. Inc.*, 148 FERC ¶ 61,201 at P 11). That is a standard-issue enforcement determination for which Congress gave the Court no "law to apply." *Chaney*, 470 U.S. at 834-35. It is, therefore, within the Commission's unreviewable statutory discretion. The Union's assumptions to the contrary are

unsupported.

The Union's opening brief does not argue (although it appears to assume) that the Commission's enforcement determinations are reviewable. Nor does it even mention precedent relevant to that issue. The closest authorities the Union cites, Br. 28-29, are *Cajun Electric Power Cooperative v. FERC*, 28 F.3d 173 (D.C. Cir. 1994), and *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973). But those cases entirely miss the mark. *Cajun Electric* involved the Commission's review of a merger and acquisition filing under section 203 of the Federal Power Act. That case merely stands for the proposition that, if the Commission imposes conditions to mitigate the market power impacts of a proposed merger or acquisition, the Commission must explain why it believes those measures will address the market power concerns that it identified. Similarly, *Gulf States*, which involved a securities issuance under section 204 of the Federal Power Act, required only that the Commission consider the anti-competitive effects of that issuance before approving it.

Neither case has any bearing on the Commission's discretion to determine whether certain behavior in a capacity auction constitutes market manipulation, or whether the Commission is required to hold an evidentiary hearing in such situations. *See, e.g.*, *Gulf States*, 411 U.S. at 762 (explaining that the Commission

need not hold a hearing on, or fully investigate, every allegation of anti-competitiveness); *cf. Dominion Energy Brayton Point, LLC,* 144 FERC ¶ 61,139 at PP 36, 37, 39 (2013) (conducting FPA section 203 analysis of Energy Capital Partners' purchase of Brayton Point prior to Auction 8, and concluding that the transaction would not raise market power concerns); *Dynegy Inc.*, 150 FERC ¶ 61,231 at PP 67-73 (2015) (conducting same analysis and reaching same conclusion, over the Union's protests, when Energy Capital Partners sold Brayton Point to Dynegy Inc. after Auction 9).

Rather than grapple with the Federal Power Act and relevant precedent on administrative enforcement discretion, the Union attempts to undermine the Commission's discretion by casting doubt on recent market outcomes. The Union would have the Court believe that the capacity market's price signals in Auctions 8, 9, and 10 were not the product of a sound market, operated with the constant oversight of both the System Operator's Market Monitor and the Commission. Instead, the theory goes, the capacity prices in those three auctions were the result of one resource owner's manipulative scheme to retire the last remaining coal plant in Massachusetts—specifically, the plant that employs the Union's members. *See* Br. 22.

The Union's theory is not supported by the record on review. *See infra* § III.

It also ignores the recent changes in the region's resource mix, *see supra* pp. 9-10, and the fact that the capacity market has produced price signals that reflect the supply/demand balance during that transition. As previously noted, when the capacity market was implemented, the region had a surplus of capacity resources. *See* Administrative Pricing Complaint Order P 50; *see also supra* p. 10. That capacity surplus did not evaporate overnight. Instead, the capacity market produced prices that reflected that surplus for its first seven years. *See ISO New Eng. Inc.*, 148 FERC ¶ 61,201 at P 4.

With the significant number of retirement requests before Auction 8, the region's capacity supply was, for the first time, poised to potentially drop below the level needed to satisfy demand. *See ISO New Eng. Inc.*, 148 FERC ¶ 61,201 at P 4. As a result, the price was expected to increase in Auction 8 in order to attract new supply resources. *See* Administrative Pricing Complaint Order P 50. And, indeed, the clearing price in Auction 8 did increase. *See Public Citizen*, 839 F.3d at 1168. After Auction 8, capacity prices increased again in Auction 9 (except in the Northeast Massachusetts/Boston pricing zone, where prices decreased). *Compare* Auction 9 Results Order P 4, JA 190 *with* ISO New England, Inc. Feb. 28, 2014 Tariff Filing, Docket No. ER14-1409-000 (Auction 8 results filing) (designated as item R. 1 in the certified index in Nos. 14-1244 and 14-1246),

JA 18. Resource owners responded to the price signals in both auctions by offering new supply into the capacity market and, accordingly, the supply/demand balance equilibrated and prices fell in Auctions 10 and 11. *See* Auction 10 Results Order P 4, JA 380; R. 2 at Att. A (listing new and existing resources that cleared in Auction 9); R. 27 at Att. A (listing new and existing resources that cleared in Auction 10); Office of Energy Market Regulation Apr. 28, 2017 Letter, Docket No. ER17-1073-000 (accepting Auction 11 results); ISO New England, Inc. Feb. 28, 2017 Tariff Filing, Docket No. ER17-1073-000 (showing Auction 11 clearing price of $5.30/kW-month); *id.* at Att. A (listing new and existing resources that cleared in Auction 11).

In other words, the market has sent price signals accurately reflecting the region's supply/demand balance, thereby promoting the appropriate retirement of aging resources and attracting the new entry needed to maintain resource adequacy. *See supra* p. 14 (table showing low prices during capacity surplus, price increases in response to resource retirements, and price decreases reflecting new supply). This is how a capacity market is supposed to work. *See Hughes v. Talen Energy Mktg. LLC*, 136 S. Ct. 1288, 1293 ("The capacity auction serves to identify need for new generation: A high clearing price in the capacity auction encourages new generators to enter the market, increasing supply and thereby lowering the

clearing price in the [energy markets] three years' hence; a low clearing price discourages new entry and encourages retirement of existing high-cost generators."); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 744-45 (2016) ("As in other areas of life, greater pay leads to greater participation."). And, as a result, the capacity market has helped keep the lights on in New England during a challenging transition in the region's resource mix.

The Union's manipulation theory entirely disregards those market results and the Commission's oversight. Tellingly, the Union has failed to mention the fact that the Commission's investigation of behavior during Auction 8 was not limited to Brayton Point's retirement. The Commission also investigated claims that the owners of certain importing resources submitted manipulative bids in the auction. *ISO New Eng. Inc.*, 148 FERC ¶ 61,201 at PP 10-11. In contrast to the allegations concerning Brayton Point, the Commission found that the claims concerning importing resources warranted a deeper investigation. *Id.* P 11 (explaining that, unlike with Brayton Point, the Commission was continuing to investigate the behavior of importing resources). The Commission ultimately concluded that a prospective change to the Tariff rules governing importing resources was necessary to prevent similar concerns from arising in the future. *See ISO New Eng. Inc.*, 149 FERC ¶ 61,227 at P 24 (2014) (finding Tariff changes to

be "a significant step toward decreasing the opportunity for importers to exercise market power").

Taken together, these tandem investigations of market participant behavior in Auction 8—and the related Tariff reforms concerning the administrative pricing safeguard, *supra* pp. 18-21, the rules governing importing resources, *supra* this section, and the retirement rules, *infra* § III.B.2—demonstrate a chief virtue of the Commission's statutory enforcement discretion: the Commission must make its own judgments as to its enforcement priorities based on "a complicated balancing of a number of factors which are peculiarly within its expertise." *Chaney*, 470 U.S. at 831; *see also Vt. Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 543 (1978) (administrative agencies entitled "to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties").

II. THE UNION HAS NOT DEMONSTRATED THAT IT HAS STANDING

Petitioners bear the burden of establishing the elements of standing in their opening brief. *Spokeo*, 136 S. Ct. at 1547; *Texas v. EPA*, 726 F.3d 180, 198 (D.C. Cir. 2013). The "irreducible constitutional minimum" for standing requires a petitioner to show that it has suffered (1) an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or

imminent, not conjectural or hypothetical;" (2) that has a "causal connection" with the challenged agency action; and (3) that likely "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted); *Spokeo*, 136 S. Ct. at 1547. The Union has not carried that burden.

The Union's interest in these proceedings, as stated in its opening brief, is solely as ratepayers subject to increased charges associated with the Auction 9 and 10 results. *See* Br. 22-23. The Union's alleged harm is not that prices increased from one auction to the next. The alleged harm is instead that the prices in Auctions 9 and 10 were higher than they would have been absent Brayton Point's retirement before Auction 8. *See* Br. 22-23. (noting that Brayton Point's "attempted shut-down" was "inflating market prices . . . and the costs for electricity consumers"). That conclusory allegation, without more, does not demonstrate an injury sufficient to support a claim of standing.

Although a rate increase can be sufficient injury to support a claim of standing, a petitioner must demonstrate that such a rate increase actually occurred. *See Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1026 (D.C. Cir. 2012) ("A 'conjectural or hypothetical' injury will not do.") (citing *Lujan*, 504 U.S. at 506). The Union has attempted no such demonstration here. The Union's opening brief

simply assumes that capacity prices in Auctions 9 and 10 were higher than they would have been had Brayton Point participated in those auctions. *See* Br. 22-23.

This is not enough. The outcome of a capacity auction depends on the bids submitted in that particular auction. Those bids reflect the individual resource owners' assessments of numerous variables—including their assessment of future costs, and the level of risk associated with the capacity obligation. *See, e.g., ISO New Eng. Inc.*, 147 FERC ¶ 61,172 at PP 90, 96-98 (2014). Those variables are subject to change between auction cycles. And, in this case, at least some of those variables did, in fact, significantly change after Auction 8. *See, e.g., id.* P 36 (reforming the capacity market to increase financial consequences of poor resource performance; changes effective starting with Auction 9); Auction 9 Results Order P 20 (noting the adoption of a system-wide sloped demand curve; change effective starting with Auction 9), JA 195-96. Additionally, whether Brayton Point's participation in Auctions 9 and 10 would have produced lower prices depends in part on what types of resources entered the market in response to Brayton Point's retirement announcement.

The Union's one-page standing statement ignores all such market dynamics. Given the many variables that contribute to price formation in a capacity auction, the Union's conclusory allegation that Brayton Point's retirement before Auction 8

increased prices in Auctions 9 and 10 "stacks speculation upon hypothetical upon speculation, which does not establish an 'actual or imminent' injury." *N.Y. Reg'l Interconnect*, 634 F.3d at 587 (citing *Lujan*, 504 U.S. at 560).

The Union has also failed to demonstrate that its alleged harm has a causal connection to the orders on review. Indeed, it cannot make such a showing. As the Commission found, Auctions 9 and 10 were (unlike Auction 8) competitive. Auction 9 Rehearing Order P 16 (citing Auction 9 Results Order PP 20-21, JA 195-96), JA 254; Auction 10 Rehearing Order P 7 (citing Auction 10 Results Order PP 14, 27, JA 383, 389-90), JA 405. And Brayton Point did not—indeed, it could not—participate in Auctions 9 or 10. Making the decision to retire before Auction 8 ensured that. Auction 9 Results Order P 22, JA 196-98; Auction 9 Rehearing Order PP 22-23, JA 256; Auction 10 Results Order P 26, JA 388-89; Auction 10 Rehearing Order P 4, JA 402-03.

To the extent Brayton Point's retirement decision is traceable to any Commission order, none of the candidate orders is now before the Court. As previously noted, under the Tariff, retirement requests are connected to, and analyzed in conjunction with, a specific auction cycle. *See supra* pp. 15-16 (discussing Tariff's retirement rules). For Brayton Point, that cycle was Auction 8. The Commission approved modifications to the administrative pricing safeguards

partly in response to that retirement decision when setting the parameters of Auction 8. The Auction 8 results then reflected that retirement decision. After Auction 8, the Commission rejected requests that it take further action on the retirement. *See id.* The Commission did not revisit these decisions in the Auction 9 and 10 proceedings now on review.

III. ASSUMING JURISDICTION, THE UNION'S APPEALS SHOULD BE DENIED ON THEIR MERITS

A. Standard Of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The "scope of review under [that] standard is narrow." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (citation omitted). The relevant inquiry is whether the agency has "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (finding reasoned decisionmaking where Commission "weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that

choice").

The Commission's decisions regarding rate issues are entitled to respect, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Md. Pub. Serv. Comm'n*, 632 F.3d at 1286 ("[B]ecause issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is highly deferential.") (internal quotation marks and citation omitted). *See also Morgan Stanley*, 554 U.S. at 532 ("The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions.").

The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (citation and internal quotation marks omitted); *accord S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014). If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S.

607, 620 (1966); *accord Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("[W]e do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision.").

B. The Commission Reasonably Accepted The Results Of Auctions 9 And 10 As Reasonable

As explained above, all of the Union's arguments on appeal are predicated on the erroneous assumption that the Commission's enforcement decision concerning the Brayton Point coal plant is susceptible of judicial review. *See supra* pp. 30-38. And there is no standard of review for the Court to apply to that decision. *See id.* But rather than rely solely on that unreviewable discretion, the Commission addressed all of the Union's arguments in the Auction 9 and 10 orders and thoroughly explained its reasons for rejecting them. Assuming jurisdiction, the Court should therefore deny the petitions on their merits.

1. Auction 9

The Commission examined the System Operator's Auction 9 results filing and all of the comments and evidence provided in response thereto. *See* Auction 9 Results Order PP 20-22, JA 195-98; Auction 9 Rehearing Order PP 12, 15-17, 19, 22-23, JA 252, 253-54, 255, 256. The Commission emphasized that Auction 9 was different from all of the previous capacity auctions, because it used a new design

element intended to maximize the social value of any surplus capacity procured in the auction. Auction 9 Results Order P 20 (explaining the benefits of the sloped demand curve that was first adopted for Auction 9), JA 195-96.

The Commission ultimately concluded that the System Operator had demonstrated the Auction 9 results to be just and reasonable. *Id.* And the Commission thoroughly explained its rationale for that conclusion, including its rejection of the Union's arguments concerning Brayton Point. *See id.* P 21 (emphasizing the Market Monitor's certification that the auction was competitive, "based on rigorous qualification requirements, the competitive bidding of new resources, and the absence of any anti-competitive behavior affecting the auction outcome"), JA 196; Auction 9 Rehearing Order P 16, JA 405. That well-supported finding warrants respect from the Court. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (deference appropriate where rate issue "involves both technical understanding and policy judgment").

On appeal, the Union argues that the Commission failed to require the System Operator to meet its statutory burden to show that the auction results are just and reasonable. Br. 24-26. This assertion is directly contradicted by the Commission's order. *See* Auction 9 Results Order P 20 ("Based on the evidence presented, we find that [the System Operator] has demonstrated that the results of

[Auction 9] are just and reasonable."), JA 195-96. As to the standard for satisfying the burden of proof in this instance, the Union argues that the System Operator was required to prove that the Brayton Point coal plant "would not have been profitable to run in the 2017-18 commitment period and beyond, and therefore that the 'retirement' was not manipulative." Br. 26. The Commission disagreed. *See* Auction 9 Rehearing Order P 19 ("The Tariff contains no provision requiring a resource to demonstrate that it is uneconomic before it is allowed to retire, and [the Union] does not point to any such provision."), JA 255; *see also id.* P 16 (noting limited relevance of alleged future profitability), JA 254.

The Union claims that the Commission failed to rebut certain "evidence and information" indicating that Brayton Point could be economically run. Br. 30. This assertion, too, ignores the Commission's order. The Commission considered the Union's evidence concerning the coal plant's possible "future" profitability and disagreed with the Union about its relevance to Auction 9. *See* Auction 9 Rehearing Order P 16 (explaining that, even if it were true that Brayton Point could be run profitably in the future, that "is not dispositive of whether market manipulation occurred or whether that issue should be set for hearing"), JA 254.

The Union also contends that the Commission erred in concluding that Brayton Point was not able to participate in Auction 9. Br. 33. As with the

Union's other claims, the Commission directly addressed and rejected this position. *See* Auction 9 Results Order P 22, JA 196-98; Auction 9 Rehearing Order PP 22-23, JA 256. The Commission noted that this argument is premised on the assumption that Brayton Point's retirement before Auction 8 constituted market manipulation. Auction 9 Rehearing Order P 22, JA 256. The Commission reiterated, yet again, that it had already rejected that argument. *Id.*; Auction 9 Results Order P 22 n.35, JA 196. Nonetheless, the Commission went on to provide multiple reasons for why the Union is mistaken. *See* Auction 9 Results Order P 22 (explaining that, under the Tariff, the submission of a retirement request for a resource precludes that resource's participation in subsequent capacity auctions), JA 196-98; *id.* (the "binding" nature of a retirement request is "critical" in preventing resources from toggling between cost-based and market-based compensation); Auction 9 Rehearing Order P 23 (the Tariff does not require the System Operator or the Commission to examine the economics underlying a retirement request and provides no mechanism to force continued participation in the capacity market), JA 256.

2. Auction 10

The Commission conducted the same thorough review of the Auction 10 results as it did for the Auction 9 results, and again found that the System Operator

had demonstrated them to be just and reasonable. *See* Auction 10 Results Order P 14, JA 383. That conclusion was based, in part, on evidence provided by the Market Monitor and auctioneer showing that the auction was competitive. *See* Auction 10 Rehearing Order P 7 (citing record evidence), JA 405. That includes evidence that there were insufficient existing resources to meet the region's needs, but that the market attracted a sufficient volume of new resources to meet those needs—and did so "at prices materially below the auction starting price." System Operator Auction 10 Results Filing at Att. D, 3-4, R. 27, JA 342-43.

On rehearing before the Commission, the Union attempted to incorporate by reference all of the arguments that it raised on rehearing in the Auction 9 proceeding. *See* Auction 10 Rehearing Request at 1-2, JA 391-92. The Commission explained that such incorporations by reference are inconsistent with the Federal Power Act, the Commission's regulations, and Commission precedent. Auction 10 Rehearing Order P 4 (citing authorities), JA 402-03. Yet the Commission went on to explain that it had already rejected the referenced arguments in the Auction 9 proceeding. *Id.*; Auction 10 Results Order P 26, JA 388-89. The Commission then addressed the one new issue that the Union raised, concerning the changes to the retirement rules that the System Operator proposed to implement starting in Auction 11. *See* Auction 10 Rehearing Order

PP 5-7, JA 403-05. The Commission rejected each of the Union's arguments on that issue and provided explanations for doing so. *See id.*

On appeal, the Union once again attempts to extend all of the arguments it raised in the Auction 9 proceeding to its Auction 10 appeal. *See* Br. 17-40. But the Union waived those arguments in the Auction 10 proceeding by not properly raising them to the Commission. *See Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 739 (D.C. Cir. 2012) (holding judicial review is limited to grounds "'set forth specifically'" in rehearing request) (quoting 16 U.S.C. § 825*l*(a)); *see also* 18 C.F.R. § 385.713(c)(2) (rehearing request must conform to specific requirements, including those of 18 C.F.R. § 385.203(a), and any issue not properly set forth "will be deemed waived"); 18 C.F.R. § 385.203(a)(7) (pleadings must articulate the position taken by the filing party, and the factual and legal basis for that position); *W. Area Power Admin.*, 153 FERC ¶ 61,213 at P 20 (2015) ("[I]n the context of rehearing requests, the Commission has rejected attempts to incorporate by reference arguments from a prior pleading in another proceeding.") (citations omitted).

The only issue properly before the Court in the Union's Auction 10 appeal is whether the System Operator's subsequent change to the retirement rules, which took effect after Auction 10, somehow renders the Auction 10 results unjust and

unreasonable. Br. 40-48. That issue is easily dismissed. As the Commission explained, those subsequent Tariff changes simply have no bearing on the rates that preceded them. Auction 10 Results Order P 27, JA 389-90; Auction 10 Rehearing Order PP 6-7, JA 404-05; *see also MacLeod v. ICC*, 54 F.3d 888, 892 (D.C. Cir. 1995) ("[S]ubsequent decisions are irrelevant in any event. We will not reach out to examine a decision made after the one actually under review."); *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005) (same, citing *MacLeod*); *ISO New Eng. Inc.*, 132 FERC ¶ 61,122 at P 58 (2010) ("[T]he filing of tariff changes pursuant to section 205 of the FPA does not establish that the previous tariff provisions are unjust and unreasonable.").

In any event, the Union's attempt to turn those market improvement efforts against the results of Auctions 9 and 10 is misguided. The Auction 11 retirement reforms are relevant to the Auction 10 results, and these appeals more generally, only insofar as those Tariff changes demonstrate that the System Operator and the Commission continue to work to strengthen New England's capacity market. *See Elec. Consumers Res. Council*, 407 F.3d at 1239 (court's deference to the Commission on complex market rate design "is based on the understanding that the Commission will monitor its experiment and review it accordingly").

Notwithstanding the reality that there will always be room for improvement

in any regulated market, the facts underlying these appeals show that the New England capacity market is functioning as intended—with close oversight by the System Operator's Market Monitor and the Commission. And it has been doing so during a period of significant change in New England. The Union's repeated claims that a recent increase in capacity prices is the result of one resource owner's alleged scheme to manipulate the market have been discredited by the Commission's investigation into the matter. The Court should respect the Commission's expert judgment on that enforcement issue, dismiss or deny the petitions for review, and remove the attendant uncertainty from a market that has successfully and reliably served New England consumers under challenging conditions. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (explaining that it is "not our job" to "render . . . judgment" on an issue "on which reasonable minds can differ," as long as the Commission has "addressed that issue seriously and carefully").

CONCLUSION

For the reasons stated, the petitions for review should be dismissed for lack of jurisdiction or denied on the merits.

Respectfully submitted,

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June 26, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,064 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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June 26, 2017

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Pub. L. 96–481, title II, § 203(c), Oct. 21, 1980, 94 Stat. 2327, which provided that effective Oct. 1, 1984, this section is repealed, except that the provisions of this section shall continue to apply through final disposition of any adversary adjudication initiated before the date of repeal, was itself repealed by Pub. L. 99–80, § 6(b)(1), Aug. 5, 1985, 99 Stat. 186.

SHORT TITLE

Pub. L. 96–481, title II, § 201, Oct. 21, 1980, 94 Stat. 2325, provided that: ''This title [enacting this section, amending section 634 of Title 15, Commerce and Trade, section 2412 of Title 28, Judiciary and Judicial Procedure, Rule 37 of the Federal Rules of Civil Procedure, set out in Title 28 Appendix, and section 1988 of Title 42, The Public Health and Welfare, and enacting provi-sions set out as notes under this section and section 2412 of Title 28] may be cited as the 'Equal Access to Justice Act'.''

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (e) of this section relating to annual report to Congress on the amount of fees and other expenses, see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Fi-nance, and page 153 of House Document No. 103–7.

TERMINATION OF ADMINISTRATIVE CONFERENCE OF UNITED STATES

For termination of Administrative Conference of United States, see provision of title IV of Pub. L. 104–52, set out as a note preceding section 591 of this title.

PROHIBITION ON USE OF ENERGY AND WATER DEVELOPMENT APPROPRIATIONS TO PAY INTERVENING PARTIES IN REGULATORY OR ADJUDICATORY PROCEEDINGS

Pub. L. 102–377, title V, § 502, Oct. 2, 1992, 106 Stat. 1342, provided that: ''None of the funds in this Act or subsequent Energy and Water Development Appropriations Acts shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in such Acts.''

REVIVAL OF PREVIOUSLY REPEALED PROVISIONS

Pub. L. 99–80, § 6, Aug. 5, 1985, 99 Stat. 186, provided that:

''(a) REVIVAL OF CERTAIN EXPIRED PROVISIONS.—Section 504 of title 5, United States Code, and the item relating to that section in the table of sections of chapter 5 of title 5, United States Code, and subsection (d) of section 2412 of title 28, United States Code, shall be effective on or after the date of the enactment of this Act [Aug. 5, 1985] as if they had not been repealed by sections 203(c) and 204(c) of the Equal Access to Justice Act [Pub. L. 96–481].

''(b) REPEALS.—

''(1) Section 203(c) of the Equal Access to Justice Act [which repealed this section] is hereby repealed.

''(2) Section 204(c) of the Equal Access to Justice Act [which repealed section 2412(d) of title 28] is hereby repealed.''

CONGRESSIONAL FINDINGS AND PURPOSES

Pub. L. 96–481, title II, § 202, Oct. 21, 1980, 94 Stat. 2325, provided that:

''(a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

''(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situa-tions.

''(c) It is the purpose of this title [see Short Title note above]—

''(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

''(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the 'American rule' respecting the award of attorney fees.''

LIMITATION ON PAYMENTS

Pub. L. 96–481, title II, § 207, Oct. 21, 1980, 94 Stat. 2330, which provided that the payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act [probably should be ''this title'', see Short Title note above] would be effective only to the extent and in such amounts as are provided in advance in appropriation Acts, was repealed by Pub. L. 99–80, § 4, Aug. 5, 1985, 99 Stat. 186.

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

SHORT TITLE

The provisions of this subchapter and chapter 7 of this title were originally enacted by act June 11, 1946, ch. 324, 60 Stat. 237, popularly known as the ''Administrative Procedure Act''. That Act was repealed as part of the general revision of this title by Pub. L. 89–554 and its provisions incorporated into this subchapter and chapter 7 hereof.

§ 551. Definitions

For the purpose of this subchapter—

(1) ''agency'' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) ''person'' includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) ''party'' includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a per-

son or agency admitted by an agency as a party for limited purposes;

(4) ''rule'' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) ''rule making'' means agency process for formulating, amending, or repealing a rule;

(6) ''order'' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) ''adjudication'' means agency process for the formulation of an order;

(8) ''license'' includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) ''licensing'' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) ''sanction'' includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) ''relief'' includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) ''agency proceeding'' means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) ''agency action'' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) ''ex parte communication'' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 381; Pub. L. 94–409, § 4(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 103–272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub. L. 111–350, § 5(a)(2), Jan. 4, 2011, 124 Stat. 3841.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
(1)	5 U.S.C. 1001(a).	June 11, 1946, ch. 324, § 2(a), 60 Stat. 237. Aug. 8, 1946, ch. 870, § 302, 60 Stat. 918. Aug. 10, 1946, ch. 951, § 601, 60 Stat. 993. Mar. 31, 1947, ch. 30, § 6(a), 61 Stat. 37. June 30, 1947, ch. 163, § 210, 61 Stat. 201. Mar. 30, 1948, ch. 161, § 301, 62 Stat. 99.
(2)–(13)	5 U.S.C. 1001 (less (a)).	June 11, 1946, ch. 324, § 2 (less (a)), 60 Stat. 237.

In paragraph (1), the sentence ''Nothing in this Act shall be construed to repeal delegations of authority as provided by law,'' is omitted as surplusage since there is nothing in the Act which could reasonably be so construed.

In paragraph (1)(G), the words ''or naval'' are omitted as included in ''military''.

In paragraph (1)(H), the words ''functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947'' are omitted as executed. Reference to the ''Selective Training and Service Act of 1940'' is omitted as that Act expired Mar. 31, 1947. Reference to the ''Sugar Control Extension Act of 1947'' is omitted as that Act expired on Mar. 31, 1948. References to the ''Housing and Rent Act of 1947, as amended'' and the ''Veterans' Emergency Housing Act of 1946'' have been consolidated as they are related. The reference to former section 1641(b)(2) of title 50, appendix, is retained notwithstanding its repeal by § 111(a)(1) of the Act of Sept. 21, 1961, Pub. L. 87–256, 75 Stat. 538, since § 111(c) of the Act provides that a reference in other Acts to a provision of law repealed by § 111(a) shall be considered to be a reference to the appropriate provisions of Pub. L. 87–256.

In paragraph (2), the words ''of any character'' are omitted as surplusage.

In paragraph (3), the words ''and a person or agency admitted by an agency as a party for limited purposes'' are substituted for ''but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes''.

In paragraph (9), a comma is supplied between the words ''limitation'' and ''amendment'' to correct an editorial error of omission.

In paragraph (10)(C), the words ''of any form'' are omitted as surplusage.

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

CODIFICATION

Section 551 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2242 of Title 7, Agriculture.

AMENDMENTS

2011—Par. (1)(H). Pub. L. 111–350 struck out ''chapter 2 of title 41;'' after ''title 12;''.

1994—Par. (1)(H). Pub. L. 103–272 substituted ''subchapter II of chapter 471 of title 49; or sections'' for ''or sections 1622,''.

1976—Par. (14). Pub. L. 94–409 added par. (14).

take corrective action consistent with this chapter and chapter 7, including, but not limited to—

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.

(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.

(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

(Added Pub. L. 96–354, §3(a), Sept. 19, 1980, 94 Stat. 1169; amended Pub. L. 104–121, title II, §242, Mar. 29, 1996, 110 Stat. 865.)

AMENDMENTS

1996—Pub. L. 104–121 amended section generally. Prior to amendment, section read as follows:

''(a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provisions of this chapter to any action of the agency shall not be subject to judicial re-view.

''(b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of the whole record of agency action in connection with the review.

''(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.''

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–121 effective on expiration of 90 days after Mar. 29, 1996, but inapplicable to interpretative rules for which a notice of proposed rulemaking was published prior to Mar. 29, 1996, see section 245 of Pub. L. 104–121, set out as a note under section 601 of this title.

§ 612. Reports and intervention rights

(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.

(c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).

(Added Pub. L. 96–354, §3(a), Sept. 19, 1980, 94 Stat. 1170; amended Pub. L. 104–121, title II, §243(b), Mar. 29, 1996, 110 Stat. 866.)

AMENDMENTS

1996—Subsec. (a). Pub. L. 104–121, §243(b)(1), which directed substitution of ''the Committees on the Judiciary and Small Business of the Senate and House of Rep-resentatives'' for ''the committees on the Judiciary of the Senate and the House of Representatives, the Se-lect Committee on Small Business of the Senate, and the Committee on Small Business of the House of Rep-resentatives'', was executed by making the substi-tution for ''the Committees on the Judiciary of the Senate and House of Representatives, the Select Com-mittee on Small Business of the Senate, and the Com-mittee on Small Business of the House of Representa-tives'' to reflect the probable intent of Congress.

Subsec. (b). Pub. L. 104–121, §243(b)(2), substituted ''his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the'' for ''his views with respect to the''.

CHANGE OF NAME

Committee on Small Business of Senate changed to Committee on Small Business and Entrepreneurship of Senate. See Senate Resolution No. 123, One Hundred Seventh Congress, June 29, 2001.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–121 effective on expiration of 90 days after Mar. 29, 1996, but inapplicable to interpretative rules for which a notice of proposed rulemaking was published prior to Mar. 29, 1996, see section 245 of Pub. L. 104–121, set out as a note under section 601 of this title.

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of reporting provisions in subsec. (a) of this section, see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 191 of House Document No. 103–7.

CHAPTER 7—JUDICIAL REVIEW

Sec.
701. Application; definitions.
702. Right of review.
703. Form and venue of proceeding.
704. Actions reviewable.
705. Relief pending review.
706. Scope of review.

SHORT TITLE

The provisions of sections 551 to 559 of this title and this chapter were originally enacted by act June 11, 1946, ch. 423, 60 Stat. 237, popularly known as the ''Ad-ministrative Procedure Act''. That Act was repealed as part of the general revision of this title by Pub. L. 89–554 and its provisions incorporated into sections 551 to 559 of this title and this chapter.

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) ''agency'' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; and

(2) ''person'', ''rule'', ''order'', ''license'', ''sanction'', ''relief'', and ''agency action'' have the meanings given them by section 551 of this title.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 103–272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub. L. 111–350, § 5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
(a)	5 U.S.C. 1009 (intro-ductory clause).	June 11, 1946, ch. 324, § 10 (introductory clause), 60 Stat. 243.

In subsection (a), the words ''This chapter applies, according to the provisions thereof,'' are added to avoid the necessity of repeating the introductory clause of former section 1009 in sections 702–706.

Subsection (b) is added on authority of section 2 of the Act of June 11, 1946, ch. 324, 60 Stat. 237, as amended, which is carried into section 551 of this title.

In subsection (b)(1)(G), the words ''or naval'' are omitted as included in ''military''.

In subsection (b)(1)(H), the words ''functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947'' are omitted as executed. Reference to the ''Selective Training and Service Act of 1940'' is omitted as that Act expired on Mar. 31, 1947. Reference to the ''Sugar Control Extension Act of 1947'' is omitted as that Act expired on Mar. 31, 1948. References to the ''Housing and Rent Act of 1947, as amended'' and the ''Veterans' Emergency Housing Act of 1946'' have been consolidated as they are related. The reference to former section 1641(b)(2) of title 50, appendix, is retained notwithstanding its repeal by § 111(a)(1) of the Act of Sept. 21, 1961, Pub. L. 87–256, 75 Stat. 538, since § 111(c) of the Act provides that a reference in other Acts to a provision of law repealed by § 111(a) shall be considered to be a reference to the appropriate provi-sions of Pub. L. 87–256.

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

REFERENCES IN TEXT

Sections 1891–1902 of title 50, appendix, referred to in subsec. (b)(1)(H), were omitted from the Code as executed.

AMENDMENTS

2011—Subsec. (b)(1)(H). Pub. L. 111–350 struck out ''chapter 2 of title 41;'' after ''title 12;''.

1994—Subsec. (b)(1)(H). Pub. L. 103–272 substituted ''subchapter II of chapter 471 of title 49; or sections'' for ''or sections 1622,''.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(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(a).	June 11, 1946, ch. 324, § 10(a), 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 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. 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 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; amend-ed Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58, § 1295(b)(1), sub-stituted ''hearing held'' for ''hearing had'' in first sen-tence.

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

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

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

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

[1] See References in Text note below.

wholesale electric energy, users of transmission services, and the public.

(3) The Commission may—

(A) obtain the information described in paragraph (2) from any market participant; and

(B) rely on entities other than the Commission to receive and make public the information, subject to the disclosure rules in subsection (b) of this section.

(4) In carrying out this section, the Commission shall consider the degree of price transparency provided by existing price publishers and providers of trade processing services, and shall rely on such publishers and services to the maximum extent possible. The Commission may establish an electronic information system if it determines that existing price publications are not adequately providing price discovery or market transparency. Nothing in this section, however, shall affect any electronic information filing requirements in effect under this chapter as of August 8, 2005.

(b) Exemption of information from disclosure

(1) Rules described in subsection (a)(2) of this section, if adopted, shall exempt from disclosure information the Commission determines would, if disclosed, be detrimental to the operation of an effective market or jeopardize system security.

(2) In determining the information to be made available under this section and time to make the information available, the Commission shall seek to ensure that consumers and competitive markets are protected from the adverse effects of potential collusion or other anticompetitive behaviors that can be facilitated by untimely public disclosure of transaction-specific information.

(c) Information sharing

(1) Within 180 days of August 8, 2005, the Commission shall conclude a memorandum of understanding with the Commodity Futures Trading Commission relating to information sharing, which shall include, among other things, provisions ensuring that information requests to markets within the respective jurisdiction of each agency are properly coordinated to minimize duplicative information requests, and provisions regarding the treatment of proprietary trading information.

(2) Nothing in this section may be construed to limit or affect the exclusive jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.).

(d) Exemption from reporting requirements

The Commission shall not require entities who have a de minimis market presence to comply with the reporting requirements of this section.

(e) Penalties for violations occurring before notice

(1) Except as provided in paragraph (2), no person shall be subject to any civil penalty under this section with respect to any violation occurring more than 3 years before the date on which the person is provided notice of the proposed penalty under section 825*o*–1 of this title.

(2) Paragraph (1) shall not apply in any case in which the Commission finds that a seller that has entered into a contract for the sale of electric energy at wholesale or transmission service subject to the jurisdiction of the Commission has engaged in fraudulent market manipulation activities materially affecting the contract in violation of section 824v of this title.

(f) ERCOT utilities

This section shall not apply to a transaction for the purchase or sale of wholesale electric energy or transmission services within the area described in section 824k(k)(2)(A) of this title.

(June 10, 1920, ch. 285, pt. II, § 220, as added Pub. L. 109–58, title XII, § 1281, Aug. 8, 2005, 119 Stat. 978.)

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in subsec. (c)(2), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to chapter 1 (§ 1 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1 of Title 7 and Tables.

§ 824u. Prohibition on filing false information

No entity (including an entity described in section 824(f) of this title) shall willfully and knowingly report any information relating to the price of electricity sold at wholesale or the availability of transmission capacity, which information the person or any other entity knew to be false at the time of the reporting, to a Federal agency with intent to fraudulently affect the data being compiled by the Federal agency.

(June 10, 1920, ch. 285, pt. II, § 221, as added Pub. L. 109–58, title XII, § 1282, Aug. 8, 2005, 119 Stat. 979.)

§ 824v. Prohibition of energy market manipulation

(a) In general

It shall be unlawful for any entity (including an entity described in section 824(f) of this title), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of title 15), in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.

(b) No private right of action

Nothing in this section shall be construed to create a private right of action.

(June 10, 1920, ch. 285, pt. II, § 222, as added Pub. L. 109–58, title XII, § 1283, Aug. 8, 2005, 119 Stat. 979.)

§ 824w. Joint boards on economic dispatch

(a) In general

The Commission shall convene joint boards on a regional basis pursuant to section 824h of this title to study the issue of security constrained economic dispatch for the various market regions. The Commission shall designate the ap-

§ 825f. Investigations by Commission

(a) Scope

The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person, electric utility, transmitting utility, or other entity has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates, or in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce. The Commission may permit any person, electric utility, transmitting utility, or other entity to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

(b) Attendance of witnesses and production of documents

For the purpose of any investigation or any other proceeding under this chapter, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) Resort to courts of United States for failure to obey subpena; punishment

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Testimony by deposition

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(e) Deposition of witness in a foreign country

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(f) Deposition fees

Witnesses whose depositions are taken as authorized in this chapter, and the person or officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(June 10, 1920, ch. 285, pt. III, § 307, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 856; amended Pub. L. 91–452, title II, § 221, Oct. 15, 1970, 84 Stat. 929; Pub. L. 109–58, title XII, § 1284(b), Aug. 8, 2005, 119 Stat. 980.)

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ‘‘, electric utility, transmitting utility, or other entity’’ after ‘‘person’’ in two places and inserted ‘‘, or in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce’’ before period at end of first sentence.

1970—Subsec. (g). Pub. L. 91–452 struck out subsec. (g) which related to the immunity from prosecution of any

individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–452 effective on 60th day following Oct. 15, 1970, and not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before 60th day following Oct. 15, 1970, see section 260 of Pub. L. 91–452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

§ 825g. Hearings; rules of procedure

(a) Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

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

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

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

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

COMMISSION REVIEW

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

§ 825i. Appointment of officers and employees; compensation

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

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

CODIFICATION

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

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

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

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

AMENDMENTS

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

REPEALS

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

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

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 amend-ed (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Proce-dure.

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

(b) Writs of mandamus

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

(c) Employment of attorneys

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

(d) Prohibitions on violators

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or

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

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

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

(A) electric energy; or

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

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

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of Title 28 which states that ''the District of Columbia constitutes one judicial district''.

AMENDMENTS

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

§ 825n. Forfeiture for violations; recovery; applicability

(a) Forfeiture

Any licensee or public utility which willfully fails, within the time prescribed by the Commission, to comply with any order of the Commission, to file any report required under this chapter or any rule or regulation of the Commission thereunder, to submit any information or document required by the Commission in the course of an investigation conducted under this chapter, or to appear by an officer or agent at any hearing or investigation in response to a subpena issued under this chapter, shall forfeit to the United States an amount not exceeding $1,000 to be fixed by the Commission after notice and opportunity for hearing. The imposition or payment of any such forfeiture shall not bar or affect any penalty prescribed in this chapter but such forfeiture shall be in addition to any such penalty.

(b) Recovery

The forfeitures provided for in this chapter shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States, brought in the district where the person is an inhabitant or has his principal place of business, or if a licensee or public utility, in any district in which such licensee or public utility transacts business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this chapter. The costs and expenses of such prosecution shall be paid from the appropriations for the expenses of the courts of the United States.

(c) Applicability

This section shall not apply in the case of any provision of section 824j, 824k, 824*l*, or 824m of this title or any rule or order issued under any such provision.

(June 10, 1920, ch. 285, pt. III, § 315, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amended June 25, 1948, ch. 646, § 1, 62 Stat. 909; Pub. L. 102–486, title VII, § 725(a), Oct. 24, 1992, 106 Stat. 2920; Pub. L. 109–58, title XII, § 1295(d), Aug. 8, 2005, 119 Stat. 985.)

AMENDMENTS

2005—Subsec. (c). Pub. L. 109–58 substituted ''This section'' for ''This subsection''.

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

CHANGE OF NAME

ActJune 25, 1948, eff. Sept. 1, 1948, substituted ''United States attorney'' for ''district attorney''. See section 541 of Title 28, Judiciary and Judicial Procedure.

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.

§ 825*o*. Penalties for violations; applicability of section

(a) Statutory violations

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $1,000,000 or by imprisonment for not more than 5 years, or both.

(b) Rules violations

Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, or any rule or regulation imposed by the Secretary of the Army under authority of subchapter I of this chapter shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $25,000 for each and every day during which such offense occurs.

(June 10, 1920, ch. 285, pt. III, § 316, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 862; amended July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501; Pub. L. 102–486, title VII, § 725(a), Oct. 24,

1992, 106 Stat. 2920; Pub. L. 109–58, title XII, § 1284(d), Aug. 8, 2005, 119 Stat. 980.)

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58, § 1284(d)(1), substituted ''$1,000,000'' for ''$5,000'' and ''5 years'' for ''two years''.

Subsec. (b). Pub. L. 109–58, § 1284(d)(2), substituted ''$25,000'' for ''$500''.

Subsec. (c). Pub. L. 109–58, § 1284(d)(3), struck out subsec. (c) which read as follows: ''This subsection shall not apply in the case of any provision of section 824j, 824k, 824*l*, or 824m of this title or any rule or order is-sued under any such provision.''

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

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted ''Title 10, Armed Forces'' which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

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.

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

(a) Violations

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

(b) Civil penalties

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

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

AMENDMENTS

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

STATE AUTHORITIES; CONSTRUCTION

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

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

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

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

CODIFICATION

As originally enacted, this section contained reference to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of Title 28 which states that ''the District of Columbia constitutes one judicial district''.

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

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

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

EFFECTIVE DATE OF REPEAL

Repeal effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such

§ 1b.1 Definitions.

For purposes of this part—

(a) *Formal investigation* means an investigation instituted by a Commission Order of Investigation.

(b) *Preliminary Investigation* means an inquiry conducted by the Commission or its staff, other than a formal investigation.

(c) Investigating officer means the individual(s) designated by the Commission in an Order of Investigation as Officer(s) of the Commission.

(d) *Enforcement Hotline* is a forum in which to address quickly and informally any matter within the Commission's jurisdiction concerning natural gas pipelines, oil pipelines, electric utilities and hydroelectric projects.

[43 FR 27174, June 23, 1978, as amended by Order 602, 64 FR 17097, Apr. 8, 1999]

§ 1b.2 Scope.

This part applies to investigations conducted by the Commission but does not apply to adjudicative proceedings.

§ 1b.3 Scope of investigations.

The Commission may conduct investigations relating to any matter subject to its jurisdiction.

§ 1b.4 Types of investigations.

Investigations may be formal or preliminary, and public or private.

§ 1b.5 Formal investigations.

The Commission may, in its discretion, initiate a formal investigation by issuing an Order of Investigation. Orders of Investigation will outline the basis for the investigation, the matters to be investigated, the officer(s) designated to conduct the investigation and their authority. The director of the office responsible for the investigation may add or delete Investigating Officers in the Order of Investigation.

§ 1b.6 Preliminary investigations.

The Commission or its staff may, in its discretion, initiate a preliminary investigation. In such investigations, no process is issued or testimony compelled. Where it appears from the preliminary investigation that a formal investigation is appropriate, the staff will so recommend to the Commission.

§ 1b.7 Procedure after investigation.

Where it appears that there has been or may be a violation of any of the provisions of the acts administered by the Commission or the rules, opinions or orders thereunder, the Commission may institute administrative proceedings, initiate injunctive proceedings in the courts, refer matters, where appropriate, to the other governmental authorities, or take other appropriate action.

§ 1b.8 Requests for Commission investigations.

(a) Any individual, partnership, corporation, association, organization, or other Federal or State governmental entity, may request the Commission to institute an investigation.

(b) Requests for investigations should set forth the alleged violation of law with supporting documentation and information as completely as possible. No particular forms or formal procedures are requested.

(c) It is the Commission's policy not to disclose the name of the person or entity requesting an investigation except as required by law, or where such disclosure will aid the investigation.

§ 1b.9 Confidentiality of investigations.

All information and documents obtained during the course of an investigation, whether or not obtained pursuant to subpoena, and all investigative proceedings shall be treated as nonpublic by the Commission and its staff except to the extent that (a) the Commission directs or authorizes the public disclosure of the investigation; (b) the information or documents are made a matter of public record during the course of an adjudicatory proceeding; or (c) disclosure is required by the Freedom of Information Act, 5 U.S.C. 552. Procedures by which persons submitting information to the Commission during the course of an investigation may specifically seek confidential treatment of information for purposes of Freedom of Information Act disclosure are set forth in 18 CFR part 3b and § 1b.20. A request for confidential treatment of information for purposes of Freedom of Information Act disclosure shall not, however, prevent disclosure for law enforcement

§ 385.102 Definitions (Rule 102).

For purposes of this part—

(a) *Decisional authority* means the Commission or Commission employee that, at the time for decision on a question, has authority or responsibility under this chapter to decide that particular question.

(b) *Participant* means:

(1) Any party; or

(2) Any employee of the Commission assigned to present the position of the Commission staff in a proceeding before the Commission.

(c) *Party* means, with respect to a proceeding:

(1) A person filing any application, petition, tariff or rate filing, complaint, or any protest under section 19a(i) of the Interstate Commerce Act (49 U.S.C. 19a(i));

(2) Any respondent to a proceeding; or

(3) Any person whose intervention in a proceeding is effective under Rule 214.

(d) *Person* means an individual, partnership, corporation, association, joint stock company, public trust, an organized group of persons, whether incorporated or not, a receiver or trustee of the foregoing, a municipality, including a city, county, or any other political subdivision of a State, a State, the District of Columbia, any territory of the United States or any agency of any of the foregoing, any agency, authority, or instrumentality of the United States (other than the Commission), or any corporation which is owned directly or indirectly by the United States, or any officer, agent, or employee of any of the foregoing acting as such in the course of his or her official duty. The term also includes a foreign government or any agency, authority, or instrumentality thereof.

(e) *Presiding officer* means:

(1) With respect to any proceeding set for hearing under subpart E of this part, one or more Members of the Commission, or any administrative law judge, designated to preside at such hearing, or, if no Commissioner or administrative law judge is designated, the Chief Administrative Law Judge; or

(2) With respect to any proceeding not set for hearing under subpart E, any employee designated by rule or order to conduct the proceeding.

(f) *Respondent* means any person:

(1) To whom an order to show cause or notice of tariff or rate examination is issued by the Commission;

(2) Against whom a complaint is directed; or

(3) Designated as a respondent by the Commission or by the terms of this chapter.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 606, 64 FR 44405, Aug. 16, 1999]

§ 385.103 References to rules (Rule 103).

This part cross-references its sections according to rule number, as indicated by the section titles. Any filing with the Commission may refer to any section of this part by rule number; for example, ''Rule 103.''

§ 385.104 Rule of construction (Rule 104).

To the extent that the text of a rule is inconsistent with its caption, the text of the rule controls.

[Order 376, 49 FR 21705, May 23, 1984]

Subpart B—Pleadings, Tariff and Rate Filings, Notices of Tariff or Rate Examination, Orders To Show Cause, Intervention, and Summary Disposition

§ 385.201 Applicability (Rule 201).

This subpart applies to any pleading, tariff or rate filing, notice of tariff or rate examination, order to show cause, intervention, or summary disposition.

§ 385.202 Types of pleadings (Rule 202).

Pleadings include any application, complaint, petition, protest, notice of protest, answer, motion, and any amendment or withdrawal of a pleading. Pleadings do not include comments on rulemakings or comments on offers of settlement.

§ 385.203 Content of pleadings and tariff or rate filings (Rule 203).

(a) *Requirements for a pleading or a tariff or rate filing.* Each pleading and

each tariff or rate filing must include, as appropriate:

(1) If known, the reference numbers, docket numbers, or other identifying symbols of any relevant tariff, rate, schedule, contract, application, rule, or similar matter or material;

(2) The name of each participant for whom the filing is made or, if the filing is made for a group of participants, the name of the group, provided that the name of each member of the group is set forth in a previously filed document which is identified in the filing being made;

(3) The specific authorization or relief sought;

(4) The tariff or rate sheets or sections;

(5) The name and address of each person against whom the complaint is directed;

(6) The relevant facts, if not set forth in a previously filed document which is identified in the filing being made;

(7) The position taken by the participant filing any pleading, to the extent known when the pleading is filed, and the basis in fact and law for such position;

(8) Subscription or verification, if required;

(9) A certificate of service under Rule 2010(h), if service is required;

(10) The name, address, and telephone number of an individual who, with respect to any matter contained in the filing, represents the person for whom filing is made; and

(11) Any additional information required to be included by statute, rule, or order.

(b) *Requirement for any initial pleading or tariff or rate filing.* The initial pleading or tariff or rate filing submitted by a participant or a person seeking to become a party must conform to the requirements of paragraph (a) of this section and must include:

(1) The exact name of the person for whom the filing is made;

(2) The location of that person's principal place of business; and

(3) The name, address, and telephone number of at least one, but not more than two, persons upon whom service is to be made and to whom communications are to be addressed in the proceeding.

(c) *Combined filings.* If two or more pleadings, or one or more pleadings and a tariff or rate filing are included as items in a single filing each such item must be separately designated and must conform to the requirements which would be applicable to it if filed separately.

(d) *Form of notice.* If a pleading or tariff or rate filing must include a form of notice suitable for publication in the FEDERAL REGISTER, the company shall submit the draft notice in accordance with the form of notice specifications prescribed by the Secretary and posted under the Filing Procedures link at *http://www.ferc.gov* and available in the Commission's Public Reference Room.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 647, 69 FR 32439, June 10, 2004; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006; Order 714, 73 FR 57538, Oct. 3, 2008]

§ 385.204 Applications (Rule 204).

Any person seeking a license, permit, certification, or similar authorization or permission, must file an application to obtain that authorization or permission.

§ 385.205 Tariff or rate filings (Rule 205).

A person must make a tariff or rate filing in order to establish or change any specific rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation established by and for the applicant.

§ 385.206 Complaints (Rule 206).

(a) *General rule.* Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.

(b) *Contents.* A complaint must:

(1) Clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements;

(2) Explain how the action or inaction violates applicable statutory standards or regulatory requirements;

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

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

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

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

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

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

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

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

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

§ 385.713 Request for rehearing (Rule 713).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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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 26th day of June 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

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