In the United States Court of Appeals for the Ninth Circuit

No. 17-73244

ARIZONA PUBLIC SERVICE COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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2013 Order	*Ariz. Pub. Serv. Co.*, 144 FERC ¶ 61,200 (2013), *reh'g denied*, 147 FERC ¶ 61,017 (2014)
2016 Filing	Notice of Cancellation, Request for Approval of Accounting and Rate Treatment, and Request for Expedited Action and Shortened Comment Period, R. 1, ER 179
Arizona	Petitioner Arizona Public Service Company
Cancellation Order	*Ariz. Pub. Serv. Co.*, 156 FERC ¶ 61,006 (2016), ER 15
Commission or FERC	Respondent Federal Energy Regulatory Commission
Edison	Southern California Edison Company
Expiration Agreement	Agreement Concerning Expiration of the Edison-Arizona Transmission Agreement, ER 71
FPA	Federal Power Act
Rehearing Order	Order Denying Rehearing and Granting Clarification, *Ariz. Pub. Serv. Co.*, 161 FERC ¶ 61,022 (2017), ER 1
Transmission Agreement	Transmission Service Agreement between Arizona and Edison, ER 188

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STATEMENT OF THE ISSUES

This case centers on whether a rate to be negotiated later is a filed rate, and on whether the agreed-upon amount must be passed through to ratepayers. This proceeding arises from a filing by Petitioner Arizona Public Service Company ("Arizona"), which proposed: (1) to cancel its Transmission Service Agreement ("Transmission Agreement") with Southern California Edison Company ("Edison"); (2) to pay a negotiated reimbursement to Edison; and (3) to recover that payment through rates charged to Arizona's transmission service customers.

In the orders on review, the Commission accepted the notice of cancellation but rejected the payment and cost recovery. The Commission further determined that Arizona had failed to file a related agreement with Edison ("Expiration Agreement"), as required by the Federal Power Act.

The issues presented on review are:

(1) Whether the Commission reasonably determined that Arizona had failed to satisfy its burden under the Federal Power Act to show that the payment to Edison, and recovery from Arizona's ratepayers, would be "just and reasonable"; and

(2) Whether the Commission reasonably determined that the Expiration Agreement is subject to the filing requirements of the Federal Power Act because it modified the termination date of the Transmission Agreement.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the attached Addendum.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

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).

All rates for or in connection with jurisdictional sales and transmission 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).

Under section 205, the burden of proof is on the filing utility to show that its proposed rate change is just and reasonable. FPA § 205(e), 16 U.S.C. § 824d(e). To enable such FERC review, the FPA requires every public utility to file with the Commission "schedules showing all [jurisdictional] rates and charges . . . together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." FPA § 205(c), 16 U.S.C. § 824d(c); *see* 18 C.F.R. § 35.1 (2017) (filing obligations).

II. THE COMMISSION PROCEEDINGS AND ORDERS NOW ON REVIEW

A. Background: Agreements Between Arizona And Edison

1. The Transmission Agreement

In 1966, Arizona and Edison entered into an agreement under which Arizona would construct, own, operate, and maintain a 500-kilovolt transmission line from the Four Corners Power Plant, a generating facility in New Mexico where Arizona and Edison would co-own two new units, to the Arizona-Nevada border.[1] Edison

[1] For brevity, this Brief refers to the transmission line and associated facilities as "the Arizona line." Arizona's brief and the Transmission Agreement refer to this line as "the Arizona Transmission System." *See* Br. 16; Transmission Agreement, Sec. 5.3, ER 195-96. The challenged FERC Orders refer to the

would have exclusive use of the Arizona line to transmit its share of the plant's energy to California. In exchange, Edison would pay Arizona monthly transmission charges, calculated using a formula rate that included a fixed 3.25 percent depreciation rate that was designed to recover Arizona's original investment in the Arizona line, based on straight-line depreciation, over the term of the Agreement. *See* Transmission Agreement, Sec. 9.1, ER 208-26.[2]

The Agreement further provided for various payments between the parties in the event of termination or expiration. *See* Secs. 25.2 to 25.5, ER 259-61. As relevant here, Section 25.4 governed payment upon expiration:

> Upon the expiration of the term of this agreement, if the Arizona Transmission System has been fully depreciated and/or amortized, the parties agree to negotiate equitable terms under which either Arizona or Edison shall be reimbursed, taking into account removal costs, salvage values, and the value of any remaining beneficial use to Arizona of the Arizona Transmission System, consideration being given to its then condition and probable remaining useable life at the time. If the investment in the Arizona Transmission System has not been fully amortized and/or depreciated, the parties agree to negotiate equitable terms under which Arizona or Edison shall be reimbursed, by the other, consideration being given to the Net Investment,[3]

Arizona line as "the Four Corners-Eldorado Line." *See Ariz. Pub. Serv. Co.*, 156 FERC ¶ 61,006 at P 3 (2016) ("Cancellation Order"), ER 16.

[2] "P" refers to the internal paragraph number within a FERC order. "R." refers to a record item. "Br." refers to a page in Petitioner's Opening Brief. "ER" refers to a page in the Excerpts of Record filed by Arizona.

[3] "Net Investment" is defined in Section 9.1.1.1 of the Transmission Agreement. Arizona's Net Investment, at any given time, is the total amount of

> removal costs and salvage value, and, under the circumstances then prevailing, the beneficial use to Arizona of the Arizona Transmission System.

ER 260-61.

The Transmission Agreement provided that it would "continue in force and effect during the term" of a lease from the Navajo Tribe of Indians for the land on which the Four Corners Power Plant was built, "and any and all renewals or extensions" of that lease. Sec. 26.1, ER 261; *see infra* p. 27.

2. The 2013-2014 Cancellation Proceeding

On May 2, 2013, Arizona filed a notice of cancellation of the Transmission Agreement, seeking to terminate the Agreement because Edison planned to sell its share of the Four Corners Power Plant to Arizona and would no longer need the transmission capacity on the Arizona line. *See Ariz. Pub. Serv. Co.*, 144 FERC ¶ 61,200 at P 3 (2013) ("2013 Order"), *reh'g denied*, 147 FERC ¶ 61,017 (2014). Arizona proposed to pay Edison $40 million for the termination, and to pass through that cost to Arizona's transmission customers. *See* 2013 Order P 3.

The Commission accepted the notice of cancellation but found that Arizona had not adequately supported the recovery of the payment through its rates. *Id.* at

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Arizona's investment minus the total straight line depreciation and amortization accumulated to that time. ER 211; *see also* ER 209 (identifying the accounting categories included in calculating total investment); Sec. 9.1.1.2, ER 216-17 (calculation of depreciation); Sec. 9.1.1.3, ER 218-19 (calculation of amortization).

P 14; *see also id.* at P 15 ("we find the negotiated sums . . . to be vague, imprecise, and without substantiation or evidence"). The Commission further explained that, to include such expenses in a cost-based rate, "there must be an evidence-based, quantifiable demonstration of the relevance of those expenses to the provision of a jurisdictional service to those customers from whom cost recovery is sought," and found that Arizona had failed to make such a showing. *Id.* at P 16; *see also id.* at P 17 ("we also find that [Arizona] has not supported its claims of benefits associated with inclusion of the $40 million payment in its rate base").

Subsequently, Arizona submitted a filing that revised the requested cancellation date "to the date on which the Edison-Arizona Transmission Agreement terminates pursuant to its own terms." Request to Change Effective Date of Cancellation, FERC Docket No. ER13-1402 (filed Dec. 18, 2013).[4] (Arizona did not specify when that date would occur.) In January 2014, the Commission accepted the revision (likewise referring to the Agreement's "own terms," but not specifying that date). Letter Order at 1-2, *Ariz. Pub. Serv. Co.*, FERC Docket No. ER13-1402 (Jan. 3, 2014).[5] The Commission noted, however,

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[4] Available at https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13421022.

[5] Available at https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13430492.

that when the Agreement terminated by its own terms, Arizona must file a notice of cancellation under Federal Power Act section 205. *Id.* at 2 n.3.

3. The Expiration Agreement

In December 2015, Arizona and Edison entered into an Agreement Concerning Expiration of the Edison-Arizona Transmission Agreement ("Expiration Agreement"), ER 71. In the "Background" section, the Expiration Agreement includes the following:

> C. Pursuant to Section 26.1 of the Transmission Agreement, the Transmission Agreement will expire according to its terms on July 6, 2016 (the "Expiration Date"); and the Arizona rate schedule containing the Transmission Agreement will be cancelled effective July 6, 2016 in accordance with the FERC order issued on January 3, 2014 in FERC Docket No. ER13-1402-003, subject to Arizona's filing a notice of cancellation with FERC under section 205 of the Federal Power Act; . . . .

ER 72. "Expiration Date" is subsequently defined to have "the meaning set forth in" that background paragraph. Section 1.1.15, ER 74. Article 2 of the Expiration Agreement concerns "Expiration of [the] Transmission Agreement," and states: "The Parties agree that pursuant to Section 26.1 of the Transmission Agreement, the Transmission Agreement will expire according to its terms on July 6, 2016," and goes on to provide for mutual releases of further obligations after that date. Sec. 2.1, ER 76.

The Expiration Agreement further provides that the parties "shall engage in informal communications with FERC Staff to seek guidance on whether" an

application would be required to recover the payment under section 25.4 of the Transmission Agreement from ratepayers and whether the Expiration Agreement itself "needs to be filed with FERC." Sec. 5.2(a), ER 79.

Neither party filed the Expiration Agreement with the Commission. The Commission became aware of that Agreement because Arizona submitted, as an exhibit to its 2016 Filing (defined *infra*), a separate document that referenced the Expiration Agreement (*see* ER 296-97); Arizona subsequently attached the Expiration Agreement itself to its request for rehearing (ER 71-85).

B. Arizona's Rate Application

Arizona initiated the proceeding now on review on April 1, 2016, by submitting a Notice of Cancellation, Request for Approval of Accounting and Rate Treatment, and Request for Expedited Action and Shortened Comment Period ("2016 Filing"). R. 1, ER 179. In that filing, Arizona asked the Commission to accept the notice of cancellation of the Transmission Agreement with an effective date of July 6, 2016. *Id.* at 2, ER 180. Arizona also proposed accounting and rate treatment of the reimbursement it had agreed to pay to Edison that would allow Arizona to recover the payment through its open access transmission service rates. *Id.* at 6-7, ER 184-85.

Arizona explained that the parties had agreed to a reimbursement payment of $12,688,457. For the factors specified in Section 25.4 of the Transmission

Agreement, the parties agreed to $0 for removal and salvage costs because Arizona would use the Arizona line going forward; Arizona would assume the future costs of removal and retain the salvage value when the Arizona line was removed from service. 2016 Filing at 5, ER 183. The parties calculated Arizona's Net Investment as $30,649,190, by subtracting the accumulated depreciation balance (based on Arizona's transmission service billing statements to Edison) from the total original cost of the facilities. *Id.*; *see also* ER 300 (letter agreement between parties showing calculations; reflecting gross plant of $88,390,640 minus accumulated depreciation of $57,741,450, equaling net book value of $30,649,190). The parties agreed to value the "remaining beneficial use" of the Arizona line at $43,337,647, an amount "determined by adjusting for the actual useful life of the facilities and recalculating the appropriate depreciation to have been charged to [Edison's] use using [Arizona's] FERC-approved transmission depreciation rates." 2016 Filing at 5, ER 183. The negotiated reimbursement payment was the difference between the "beneficial use" and the Net Investment:

$43,337,647 – $30,649,190 = $12,688,457

See id.

C. Cancellation Order

On July 1, 2016, the Commission issued an order accepting the notice of cancellation, effective July 6, 2016, but rejecting Arizona's proposal to pay Edison

the negotiated reimbursement. Order Accepting Notice of Cancellation of Rate Schedule and Rejecting Proposed Ratemaking and Accounting Treatment, *Ariz. Pub. Serv. Co.*, 156 FERC ¶ 61,006 at P 2 (2016) ("Cancellation Order"), ER 15, 16. As it had in the 2013 Order (*see supra* pp. 5-6), the Commission again found that Arizona failed to support its filing with relevant evidence showing that the rate would be just and reasonable. Cancellation Order PP 37-39, ER 29-30. To the extent that Arizona explained its calculation of the reimbursement amount, based on revising past depreciation charges using a different service life, the Commission further concluded that Arizona's proposal violated the filed rate doctrine and would amount to an impermissible retroactive adjustment. In addition, the Commission found that Arizona likewise failed to support its proposal to treat the $12,688,457 reimbursement as a regulatory asset for accounting purposes. *Id.* P 41, ER 31; *see also id.* P 43, ER 32 (Arizona "has offered no reason, no less demonstrated," why that amount satisfied the requirements for a regulatory asset).

Taking note of the existence of the Expiration Agreement (which was referenced in an attachment to Arizona's 2016 Filing), the Commission determined that the Expiration Agreement was subject to the Commission's jurisdiction, because it revised the Transmission Agreement by setting a new termination date. *Id.* P 32, ER 27. Accordingly, Arizona should have filed the Expiration Agreement under Federal Power Act section 205(c). The Commission referred the failure to

file to its Office of Enforcement "for further examination and inquiry as may be appropriate." Cancellation Order P 32, ER 27.

D. Rehearing Order

Arizona filed a timely request for agency rehearing ("Rehearing Request"). ER 34. (Edison filed a motion for clarification, on an issue not relevant here; in the alternative, it raised objections similar to Arizona's. R. 17.) On October 5, 2017, the Commission issued its Order Denying Rehearing and Granting Clarification, *Ariz. Pub. Serv. Co.*, 161 FERC ¶ 61,022 (2017) ("Rehearing Order"), ER 1. The Commission denied rehearing on all issues.

This appeal followed.

SUMMARY OF ARGUMENT

This case concerns the Commission's responsibility under the Federal Power Act to ensure "just and reasonable" rates for transmission service. In the orders challenged on appeal, the Commission relied on fundamental principles of cost-based ratemaking under the Federal Power Act. Arizona, however, largely ignores both its statutory burden and the Commission's reasoning and devotes the bulk of its argument to disputing an interpretation of "beneficial use" that the Commission never made.

Arizona proposed to pay Edison a negotiated amount that the parties derived from the agreed value of the Arizona line's remaining "beneficial use." But

Arizona bore the burden, under section 205 of the Federal Power Act, to show that the payment — and recovery of that amount from Arizona's transmission customers — met the statutory requirement of just and reasonable rates. 16 U.S.C. § 824d. The Commission properly concluded that Arizona failed to satisfy that burden.

First, the Commission correctly held Arizona to the standards of the Federal Power Act. The Commission had never determined whether a specific reimbursement payment negotiated under the Transmission Agreement would be just and reasonable; the Agreement provided that the parties would negotiate, but did not purport to preordain that the resulting rate was reasonable or to bind the Commission to accept their calculation.

In conducting that statutory review, the Commission reasonably determined that Arizona failed to meet its burden under Federal Power Act section 205 because it failed to provide any cost support for the reimbursement. Arizona contends that the payment to Edison reflects future benefits of using the Arizona line. But Arizona justified the value attributed to the Arizona line's remaining beneficial use based on an extension of its service life that Arizona did not even specify, let alone support with any evidence.

Moreover, the sole rationale that Arizona did offer — reimbursing Edison for past depreciation charges that would have been lower if they had been

calculated using a different service life — would amount to impermissible retroactive ratemaking and would violate the filed rate doctrine. Therefore, the Commission reasonably concluded that Arizona failed to demonstrate that the payment, and recovery from Arizona's ratepayers, was appropriate.

In addition, Arizona's filings in the FERC proceeding referenced the separate Expiration Agreement between Arizona and Edison, which provided, inter alia, that the Transmission Agreement would expire on July 6, 2016. The Commission reasonably found that, because the Transmission Agreement itself had been extended, by its own terms, when the Navajo Nation extended Arizona's lease, the Expiration Agreement modified the termination date of the Transmission Agreement. Accordingly, the Commission appropriately ruled that Arizona should have filed the Expiration Agreement pursuant to Federal Power Act section 205.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard; the "scope of review under [that] standard is narrow." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (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)); *accord Cal. Pub. Utils. Comm'n v. FERC*, 854 F.3d 1136, 1146 (9th Cir. 2017); *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 broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) (affording "great deference" to Commission's rate decisions). As to contracts and tariffs — contrary to Arizona's claims based on precedents from other circuits (*see, e.g.*, Br. 26, 30) — this Court reviews the Commission's interpretation "with a 'two-step, *Chevron*-like analysis.'" *MPS Merchant Servs. v. FERC*, 836 F.3d 1155, 1163 (9th Cir. 2016) (quoting *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011)); *see also Cal. Pub. Utils. Comm'n*, 854 F.3d at 1147 (upholding Commission's reasonable interpretation of ambiguous tariff provisions); *cf. Pac. Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1387 (9th Cir. 1984) (affording deference where FERC "employed its unique expertise in rate-setting contracts").

"The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b)); *see also Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pub. Utils. Comm'n of Cal.*, 462 F.3d at 1045 (internal quotation marks and citation omitted). "If the evidence is susceptible of more than one rational interpretation," the Court must uphold the Commission's findings. *Id*.

II. THE COMMISSION REASONABLY FOUND THAT ARIZONA HAD FAILED ITS STATUTORY BURDEN TO DEMONSTRATE THAT THE REIMBURSEMENT WAS JUST AND REASONABLE

Arizona reduces this case entirely to an issue of contract interpretation, arguing that the Commission wrongly interpreted "beneficial use." *See* Br. 29-45. But Arizona ignores both the "just and reasonable" standard of the Federal Power Act and the Commission's actual findings: that Arizona wholly failed to show cost support for its proposed valuation of "beneficial use" and offered only impermissible retroactive ratemaking as the basis for that valuation.

A. The Commission Properly Required Arizona To Demonstrate That Its Proposed Payment And Recovery Would Result In Just And Reasonable Rates

Arizona argues, in essence, that the Commission should have simply accepted the parties' negotiated payment. *See* Br. 29, 36-37, 42-43. The

Commission, however, has a statutory responsibility to consider the basis for jurisdictional rates: "section 25.4 does not permit the parties to decide such reimbursement without Commission review under the 'just and reasonable' requirement" of section 205 of the Federal Power Act. Rehearing Order P 7, ER 4. *See generally*, *e.g.*, *Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 914 (9th Cir. 2011) (the Act "requires, and charges FERC with ensuring," that rates are just and reasonable); *cf. Permian Basin*, 390 U.S. at 791 (the Commission is "obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection by Congress"). Therefore, the Commission correctly held Arizona to the section 205 standard, requiring it to show that its proposal to pay the reimbursement and recover that payment through its rates would be just and reasonable.

First, the Transmission Agreement did not set the amount or calculation of the termination payment. It only provided that the parties "agree[d] to negotiate equitable terms" for reimbursement, and identified the factors to be considered in that negotiation. Transmission Agreement, Sec. 25.4, ER 260. "To Be Negotiated" is not a rate — it is not even a formula for deriving a rate. Nor did the Agreement (even assuming it could) purport to "bind the Commission to accept whatever value the parties might negotiate in the future." Cancellation Order P 36, ER 28. "In accepting 50 years ago that the parties may agree in the future to

'equitable terms,' the Commission did not approve these yet-to-be-negotiated terms or determine that whatever terms ultimately resulted from such future discussions would necessarily be just and reasonable." Rehearing Order P 12, ER 6. Indeed, Arizona and Edison, in the Expiration Agreement, recognized that the Commission might not approve their negotiated payment. *See* Expiration Agreement, Sec. 5.2, ER 79 ("the outcome of an application for cost recovery shall not be a condition to, or otherwise affect," Arizona's obligation to make the payment to Edison), *discussed in* Rehearing Order P 10 & n.23, ER 5-6.

Because the Commission had not previously approved the negotiated reimbursement, that (newly-determined) payment altered the filed rate in the Transmission Agreement. *See* Rehearing Order P 8, ER 4. Specifically, the Commission determined that the final payment supplanted two components of the Transmission Agreement: the monthly transmission service charge to Edison under Section 9 and the negotiation process set forth in Section 25.4. Rehearing Order P 8, ER 4. Therefore, the Commission properly concluded that the reimbursement was a rate change that required "cost support and Commission review," under section 205 of the Federal Power Act and the Commission's regulations, to ensure that it resulted in just and reasonable rates. Cancellation Order P 36, ER 28. *See generally City of Winnfield v. FERC*, 744 F.2d 871, 877 (D.C. Cir. 1984) (utility bears burden of persuasion under section 205).

Arizona wrongly claims that the Commission modified section 25.4 in violation of section 206 of the Federal Power Act, 16 U.S.C. § 824e. Br. 43-45. The Commission, however, did not alter the rate on file; rather, "[f]or the first time, the Commission has before it, and has reviewed, that [Section 25.4] reimbursement under section 205 of the [Federal Power Act]." Rehearing Order P 13, ER 6. As discussed *infra* in Part C, Arizona failed to meet its own statutory burden; the Commission found "no cost support" for the proposal and determined that it "was not shown to be just and reasonable" under section 205. Rehearing Order P 13, ER 7.

B. The Commission Reasonably Construed "Beneficial Use" In The Context Of Cost-Based Rates

Of the four factors specified in Section 25.4 for consideration — Net Investment, salvage, removal, and beneficial use — the parties agreed that Arizona would bear the salvage and removal costs (as it planned to use the Arizona line going forward). The Commission accepted ("solely for purposes of the reimbursement calculation," without making a merits determination) Arizona's statement that its Net Investment was $30,649,190. Rehearing Order P 15 & n.28, ER 7; Cancellation Order P 34 & n.47, ER 28.

Therefore, the "beneficial use" component is the focus of this case. That term, unlike Net Investment, is not defined anywhere in the Transmission Agreement or included as an element of the cost-based formula rate for

transmission service. *See* Cancellation Order P 36, ER 28; Transmission Agreement, Sec. 9, ER 208-27. Indeed, "beneficial use" does not appear in any section of the Agreement other than the termination-related provisions in Paragraph 25, ER 259-61. Nor is it used in FERC ratemaking or accounting. *See* Rehearing Order P 15, ER 7. Accordingly, the Commission reasonably considered the context of the Transmission Agreement itself, including both Section 25.4 and the cost-based formula rate in Section 9.1.1 for monthly transmission service charges — the latter of which, Arizona claimed, had been designed to recover Arizona's original investment and all other costs of providing dedicated transmission service over a 50-year service life and the 50-year term of the Agreement.[6] *See* Cancellation Order P 35, ER 28.

Arizona argues at length that the Commission interpreted "beneficial use" as necessarily equal to Net Investment. *See* Br. 27, 29-38. But the Commission made no such finding, as a matter of contract interpretation; indeed, it did not confine the term to a specific meaning. Consistent with Arizona's claim that Section 25.4 was intended to reimburse either party for costs that the Section 9 rate had over- or

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[6] The Commission noted that "the Agreement itself does not contain a 50-year term," but recognized that the calculations attached to Arizona's filing did reflect that Arizona "has fully depreciated and covered in rates the initial cost of constructing the [Arizona] line over its service life . . . ." Cancellation Order P 39 n.54, ER 30; *see also* 2016 Filing, Ex. APS-2, ER 300-01 (calculations).

under-recovered, the Commission merely required "beneficial use" to be explained and supported as a cost-based rate component. *See* Rehearing Order P 15, ER 7-8; *id*. n.29, ER 8 ("the Commission simply took the parties at their word, and construed 'beneficial use' within the cost-based design and intent that they articulated as the Agreement's basis"). That interpretation is both consistent with the Transmission Agreement and rooted in the Commission's expertise in cost-of-service ratemaking. *See generally Cal. Pub. Utils. Comm'n*, 854 F.3d at 1147 (court will uphold the Commission's reasonable interpretation of ambiguous tariff provisions); *Pac. Gas & Elec. Co.*, 746 F.2d at 1387 (deferring to Commission where its interpretation was "so clearly based upon the agency's expertise in electricity transmission regulation").

C. Arizona Failed Its Burden To Provide Cost Support For Its Proposed Rate

Arizona's claim that the Commission equated "beneficial use" with "Net Investment" ignores the Commission's actual finding: that Arizona had failed to meet its burden, under Federal Power Act section 205, to substantiate *any* valuation of "beneficial use" in this case. *See* Cancellation Order P 36, ER 29 (Arizona had "provided no cost support" for the calculation of "beneficial use"); *id*. P 38, ER 29 (Commission "cannot approve a 'beneficial use' calculation that [Arizona] has neither provided nor supported . . . .").

By Arizona's own account, the cost-based formula rate for calculating monthly transmission service charges, set forth in Transmission Agreement Section 9, "was designed to recover all of [Arizona's] costs associated with the line" over the life of the Agreement. 2016 Filing at 4, ER 182. First, all costs other than the fixed components of depreciation and amortization expenses had been flowed through on an actual basis during the period of transmission service. Cancellation Order P 39, ER 30. Second, the calculations that Arizona submitted to support the negotiated valuation demonstrated that Arizona had "fully depreciated and recovered in rates the initial cost of constructing the [Arizona] line over its service life," leaving only the net book value of its later capital additions as undepreciated investment. *Id.* n.54, ER 30; *see also* 2016 Filing, Ex. APS-2, ER 300-01 (calculations). Thus, the Commission found no record evidence to support any under- or over-recovery of costs. Cancellation Order P 39, ER 30; *see also* Rehearing Order P 15, ER 8 (Arizona "neither alleged nor provided cost support for any under- or over-recoveries").

Arizona challenges the "absurd result" of "reduc[ing] the expiration payment to $0," allowing its ratepayers to pay nothing for the benefit of using the Arizona line going forward. Br. 37.[7] Arizona, however, failed to demonstrate the value of

[7] Here, Arizona is incorrect — its ratepayers will pay for use of the Arizona line, only without an added premium: "By denying Arizona's unsupported

that benefit of prospective use. Indeed, Arizona provided no evidence to support any specific value besides the Net Investment.

The only basis that Arizona offered for the "beneficial use" amount was that, because the Arizona line was still useful as the end of its assumed 50-year service life neared, Arizona recalculated its costs over an extended service life. *See* 2016 Filing at 5-6, ER 183-84. But Arizona did not even specify the period of time that it used for that extended life — let alone support that estimate with any evidence. *See* Cancellation Order P 37, ER 29. That failure was dispositive: "we cannot approve a 'beneficial use' calculation that rests on a service life estimate that [Arizona] has neither provided nor supported here." *Id.* P 38, ER 29; *see also* Rehearing Order P 17, ER 9.

Consistent with its cost-based focus, the Commission pointed — only by way of analogy — to its long-established approach to acquisition premiums. *See* Cancellation Order P 40, ER 30. Under that policy, the Commission limits the value of acquired facilities in cost-of-service rates, disallowing amounts above depreciated original cost unless the utility can demonstrate "specific, tangible, non-speculative, quantifiable benefits in monetary terms," subject to "a heavy burden of

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'beneficial use' calculation and regulatory asset proposal, the Commission ensured that [Arizona's] customers "will pay only the cost of the undepreciated [Arizona line's] capital additions, not the cost plus $12,688,457." Rehearing Order P 23, ER 11.

proof." *Id.*, ER 31 (citing cases); *accord* Rehearing Order P 19, ER 10. Though Arizona argues that this case does not present the same concerns as acquisition premiums (Br. 39-40), the basic principles of cost-of-service ratemaking do apply: that is, expenditures beyond the net book value of the facilities can be charged to customers only if they provide specific dollar benefits to those customers. *See, e.g.*, *Kan. Pipeline Co.*, 81 FERC ¶ 61,005, at p. 61,018 (1997).

Arizona insists (Br. 39) that ratepayers will not pay more for use of the Arizona line "than is appropriate" and that it "simply seeks to recover $12.7 million from its own ratepayers consistent with basic cost of service[]ratemaking principles" — but those claims go to the very failure in this case: Arizona failed to show that its valuation is "appropriate" or that a $12.7 million reimbursement is consistent with cost-of-service principles. For that reason, the Commission found the reimbursement to be a "non-cost-based premium that [Arizona] seeks to assign to its future [transmission] customers . . . ." Cancellation Order P 39, ER 30.

D. The Commission Properly Concluded That Arizona's Proposed Payment Would Constitute Retroactive Ratemaking And Violate The Filed Rate Doctrine

As discussed *supra*, Arizona's only proffered basis for its "beneficial use" value was the "unspecified extended service life" of the Arizona line. Cancellation Order P 37, ER 29. Despite its effort to cast its calculation as forward-looking (Br. 34), Arizona's proposal, as filed, was explicitly retrospective. Using the

revised service life, Arizona revised the estimates and assumptions used to develop the depreciation rates it had charged Edison over the previous five decades, and calculated a reimbursement to Edison based on the difference in depreciation. *Id.* "[Arizona and Edison] agreed to recalculate the depreciation . . . to reflect the current expected useful life. This calculation shows that the depreciation charged to [Edison] during the 50 year term of the [Transmission Agreement] was overstated . . . ." 2016 Filing at 6, ER 184, *quoted in* Rehearing Order P 16, ER 9.

Simply put, "[t]his is improper." Cancellation Order P 38, ER 29. The Commission's depreciation methodology and precedent preclude such retroactive recalculation. Rehearing Order P 18, ER 9. Under the Commission's straight-line, remaining life depreciation method, utilities may revise estimated service life only prospectively, over the remaining life. Cancellation Order P 38, ER 29 (citing precedent). Though Arizona tries to justify charging its ratepayers for the prospective use of the Arizona line, its calculation is entirely retrospective — its proposal would "effectively restate" the past depreciation rate and justify a payment "that amounts to a refund for the difference" between the depreciation that Arizona actually collected over the term of the Agreement and what it would have collected if the rate had always been based on a longer service life. *Id.*, ER 29-30.

More important, Arizona's revisionism would violate the filed rate doctrine and the prohibition on retroactive ratemaking. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (under the filed rate doctrine, no regulated entity may charge a rate other than that which the Commission fixes, absent a waiver, and the Commission may not retroactively alter a rate that it has fixed); *accord Pub. Utils. Comm'n of Cal.*, 462 F.3d at 1063 ("One of the fundamental tenets in FERC jurisprudence is the rule against retroactive ratemaking."). Depreciation was a fixed component of the Transmission Agreement's formula rate. *See* Sec. 9.1.1.2, ER 216-17. The proposed reimbursement would refund Edison the difference between the filed rate that it actually paid for five decades and a new, revised rate for that same period. *See* Rehearing Order P 17, ER 9. "[Arizona's] entire case for its asserted $43,337,647 in 'beneficial use' . . . hinged on an unsupported and impermissible retroactive calculation of its depreciation charges over the life of the Agreement . . . . *Id.* P 16, ER 8. Accordingly, the Commission properly rejected Arizona's retroactive adjustment to its depreciation rates.

III. THE COMMISSION REASONABLY CONCLUDED THAT THE EXPIRATION AGREEMENT MUST BE FILED UNDER THE FEDERAL POWER ACT

Arizona also disputes the Commission's interpretation of the Expiration Agreement (which it calls "Implementation Agreement"). Br. 45-52. In the orders challenged on review, the Commission determined that the Expiration Agreement

was subject to the filing requirements of the Federal Power Act. Cancellation Order P 32, ER 26-27. Because Arizona had not filed the Expiration Agreement with the Commission pursuant to section 205, the Commission directed it to do so and referred the failure to file to the Office of Enforcement for further inquiry. *See id.* (In referring the matter, the Commission noted that Arizona had repeatedly failed to file FERC-jurisdictional agreements in a timely manner. *Id.*[8])

On appeal, Arizona contends that the Expiration Agreement was not FERC-jurisdictional. *See* Br. 45-46. The Commission, however, reasonably found that the Expiration Agreement modified the termination date for the Transmission Agreement. *See* Cancellation Order P 32, ER 27 ("the Expiration Agreement revises the earlier [Transmission] Agreement by setting a new termination date"); Rehearing Order P 26, ER 12 (same).

Arizona argues that it had previously informed the Commission, through filings in the 2013-2014 proceeding (*see supra* p. 6), that the Transmission

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[8] The Commission cited three such instances within the preceding three years. *Id.* n.45, ER 27 (citing FERC dockets). *See* Letter Order, *Ariz. Pub. Serv. Co.*, FERC Docket No. ER13-976 (Apr. 4, 2013) (accepting an agreement that Arizona had discovered during a review following a compliance audit initiated in 2010 by FERC's Office of Enforcement); Letter Order, *Ariz. Pub. Serv. Co.*, FERC Docket No. ER14-1876 (June 26, 2014) (accepting a 2002 agreement that "was inadvertently never filed with the Commission" until 2014); Letter Order, *Ariz. Pub. Serv. Co.*, FERC Docket No. 15-1386 (May 7, 2015) (accepting a 2013 agreement that "was inadvertently not filed with the Commission" until 2015).

Agreement would expire in July 2016. Br. 49. In fact, Arizona's filings in that earlier proceeding referred obliquely to "the date on which the [Transmission Agreement] terminates pursuant to its own terms" — not specifying July 2016 or any other date. *See supra* p. 6. In any event, Arizona fails to explain the legal import of such claimed notice, and neither the 2013 Order nor the January 2014 letter order referred to July 2016, let alone made any ruling as to the Transmission Agreement's termination date.

The Transmission Agreement itself does not specify July 6, 2016 or any other termination date. *See* Rehearing Order P 25, ER 12. Rather, the sole provision defining the term of the Agreement specifies that "This Transmission Agreement shall continue in force and effect during the term of the New Lease [referring to a 1966 lease from The Navajo Tribe of Indians, for the land on which the Four Corners Plant was built], *and any and all renewals or extensions thereof*." Transmission Agreement, Sec. 26.1, ER 261 (emphasis added). *Cf. id.* Secs. 5.19, 5.23, 5.29, ER 200, 201, 203 (defining references to leases).

In its Rehearing Request (at 23, ER 56), Arizona explained that the termination date derived from the 1966 lease, which was set to expire on July 6, 2016. That lease, however, was extended by an amendment in 2011: "The 1960 Lease and the 1966 Lease (and the Annual Payments payable thereunder) are extended to July 6, 2041 . . . ." Amendment and Supplement No. 3 to

Supplemental and Additional Indenture of Lease, Sec. 3.3, ER 95; *cf. id.* Secs. 1.1, 1.2, ER 92-93 (defining 1960 Lease and 1966 Lease). Thus, the extension of the lease "automatically extended the [Transmission] Agreement's termination date to July 6, 2041 . . . ." Rehearing Order P 25, ER 12.

On appeal, Arizona argues that the lease extension itself was not subject to the Commission's jurisdiction and was not on file with the Commission. Br. 48. Neither claim affects the relevance of the extension in construing the Transmission Agreement.[9] Arizona also contends that the lease extension is irrelevant because Edison was named as a lessee in the 1966 lease but excluded from the 2011 amendment. *See* Br. 48; Rehearing Request at 24, ER 57. The Commission, however, found that the lease extension "automatically extended" the Transmission Agreement's termination date, "and therefore automatically bound both [Arizona] and [Edison], as parties to the Agreement." Rehearing Order P 25, ER 12. The Commission's reading of the only "Term" definition in the Transmission Agreement (Sec. 26.1), together with the language in Section 3.3 of the Lease

[9] Arizona further states that the lease extension "was not before FERC in any of the proceedings" (Br. 48) — which is correct in that the lease extension was not the subject of any FERC proceeding. In any event, the Commission did have the opportunity to consider the document, which Arizona itself submitted with its Rehearing Request and discussed therein (*see* p. 24 & nn.63-64, ER 57).

Extension — "The 1960 Lease and the 1966 Lease . . . are extended" — is reasonable.

Because the lease extension had extended the Transmission Agreement's termination date to 2041 by its own terms, the termination of that Agreement on July 6, 2016 was provided *only* in the Expiration Agreement — which therefore "affects or relates to rates, terms, or conditions" for FERC-jurisdictional transmission service. Cancellation Order P 34, ER 26-27. Arizona now contends that the Expiration Agreement "merely noted" the termination date in the background recitals, which Arizona distinguishes from "the substantive portions" of the document. *See* Br. 47.[10] But Section 2.1 of the Expiration Agreement, titled "Expiration of Transmission Agreement," states that the parties agree that the Transmission Agreement "will expire according to its terms on July 6, 2016," and goes on to provide for mutual releases of further obligations as of that date. ER 76.

Nor does the Expiration Agreement "merely effectuate[]" provisions of the Transmission Agreement. Br. 50 (citing *Town of Norwood v. FERC*, 217 F.3d 24 (1st Cir. 2000); and *Towns of Concord v. FERC*, 844 F.2d 891 (1st Cir. 1988)).

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[10] Arizona did not raise this argument with specificity on rehearing, as required under section 313(b) of the Federal Power Act, 18 U.S.C. § 825*l*(b). *See, e.g.*, *Cal. Dep't of Water Res. v. FERC*, 341 F.3d 906, 910-11 (9th Cir. 2003) (citing cases). Of course, the Commission did not even have an opportunity to examine the Expiration Agreement until Arizona first provided a copy with its Rehearing Request. *See supra* p. 8.

Arizona invokes cases in which the underlying agreements provided for their termination by letter, without a further filing before the Commission. *See Concord*, 844 F.2d at 896; *Norwood*, 217 F.3d at 27-30. *Cf.* Rehearing Order P 8, ER 4 (distinguishing cases because the letters exercised elections provided in the contracts). Here, by contrast, the Transmission Agreement made no similar provision — indeed, the Commission had already made clear, in its January 2014 letter order in the 2013-2014 proceeding, that Arizona must submit a Federal Power Act section 205 filing when the Transmission Agreement terminated. *See supra* pp. 6-7.

For all of these reasons, the Commission appropriately concluded that the Expiration Agreement is subject to its jurisdiction under the Federal Power Act. That determination warrants judicial respect. *See, e.g.*, *Pub. Utils. Comm'n of Cal. v. FERC*, 143 F.3d 610, 615 (D.C. Cir. 1998) ("We defer to FERC's 'interpretation of its authority to exercise jurisdiction' if it is reasonable.") (citation omitted) (upholding Commission's assertion of jurisdiction over tariff); *Automated Power Exch., Inc. v. FERC*, 204 F.3d 1144, 1151-54 (D.C. Cir. 2000) (deferring to Commission's assertion of jurisdiction over market operator).

CONCLUSION

For the reasons stated, the petition should be denied and the challenged FERC orders should be affirmed.

Respectfully submitted,

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May 25, 2018

STATEMENT OF RELATED CASES

Per Circuit Rule 28-2.6, counsel is not aware of any related case pending in this Court or any other court.

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May 25, 2018

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C) and 9th Cir. R. 32-1, I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 2013, in 14-point Times New Roman) and contains 6,941 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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May 25, 2018

ADDENDUM
Statutes & Regulation

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§ 824c. Issuance of securities; assumption of liabilities

(a) Authorization by Commission

No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after August 26, 1935.

(b) Application approval or modification; supplemental orders

The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) Compliance with order of Commission

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, §312, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, §1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Documents.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§ 825*l*. Review of orders

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

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

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85–791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as 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 chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

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

(c) Employment of attorneys

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

(d) Prohibitions on violators

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

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

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

(A) electric energy; or

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

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

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial 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

AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

SOURCE: Order 271, 28 FR 10573, Oct. 2, 1963, unless otherwise noted.

Subpart A—Application

§ 35.1 Application; obligation to file rate schedules, tariffs and certain service agreements.

(a) Every public utility shall file with the Commission and post, in conformity with the requirements of this part, full and complete rate schedules and tariffs and those service agreements not meeting the requirements of §35.1(g), clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy subject to the jurisdiction of this Commission, the classifications, practices, rules and regulations affecting such rates, charges, classifications, services, rules, regulations or practices, as required by section 205(c) of the Federal Power Act (49 Stat. 851; 16 U.S.C. 824d(c)). Where two or more public utilities are parties to the same rate schedule or tariff, each public utility transmitting or selling electric energy subject to the jurisdiction of this Commission shall post and file such rate schedule, or the rate schedule may be filed by one such public utility and all other parties having an obligation to file may post and file a certificate of concurrence on the form indicated in §131.52 of this chapter: *Provided, however,* In cases where two or more public utilities are required to file rate schedules or certificates of concurrence such public utilities may authorize a designated representative to file upon behalf of all parties if upon written request such parties have been granted Commission authorization therefor.

(b) A rate schedule, tariff, or service agreement applicable to a transmission or sale of electric energy, other than that which proposes to supersede, cancel or otherwise change the provisions of a rate schedule, tariff, or service agreement required to be on file with this Commission, shall be filed as an initial rate in accordance with §35.12.

(c) A rate schedule, tariff, or service agreement applicable to a transmission or sale of electric energy which proposes to supersede, cancel or otherwise

change any of the provisions of a rate schedule, tariff, or service agreement required to be on file with this Commission (such as providing for other or additional rates, charges, classifications or services, or rules, regulations, practices or contracts for a particular customer or customers) shall be filed as a change in rate in accordance with § 35.13, except cancellation or termination which shall be filed as a change in accordance with § 35.15.

(d)(1) The provisions of this paragraph (d) shall apply to rate schedules, tariffs or service agreements tendered for filing on or after August 1, 1976, which are applicable to the transmission or sale of firm power for resale to an all-requirements customer, whether tendered pursuant to § 35.12 as an initial rate schedule or tendered pursuant to § 35.13 as a change in an existing rate schedule whose term has expired or whose term is to be extended.

(2) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to give the party furnishing service the unrestricted right to file unilateral rate changes under section 205 of the Federal Power Act:

Nothing contained herein shall be construed as affecting in any way the right of the party furnishing service under this rate schedule to unilaterally make application to the Federal Energy Regulatory Commission for a change in rates under section 205 of the Federal Power Act and pursuant to the Commission's Rules and Regulations promulgated thereunder.

(3) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to withhold from the party furnishing service the right to file any unilateral rate changes under section 205 of the Federal Power Act:

The rates for service specified herein shall remain in effect for the term of _____ or until _____, and shall not be subject to change through application to the Federal Energy Regulatory Commission pursuant to the provisions of Section 205 of the Federal Power Act absent the agreement of all parties thereto.

(4) Rate schedules covered by the terms of paragraph (d)(1) of this section, but which are not covered by paragraphs (d)(2) or (d)(3) of this section, are not required to contain either of the boilerplate provisions set forth in paragraph (d)(2) or (d)(3) of this section.

(e) No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge or compensation for or in connection with electric service subject to the jurisdiction of the Commission, or impose any classification, practice, rule, regulation or contract with respect thereto, which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown.

(f) A rate schedule applicable to the sale of electric power by a public utility to the Bonneville Power Administration under section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act (Pub. L. No. 96–501 (1980)) shall be filed in accordance with subpart D of this part.

(g) For the purposes of paragraph (a) of this section, any service agreement that conforms to the form of service agreement that is part of the public utility's approved tariff pursuant to § 35.10a of this chapter and any market-based rate agreement pursuant to a tariff shall not be filed with the Commission. All agreements must, however, be retained and be made available for public inspection and copying at the public utility's business office during regular business hours and provided to the Commission or members of the public upon request. Any individually executed service agreement for transmission, cost-based power sales, or other generally applicable services that deviates in any material respect from the applicable form of service agreement contained in the public utility's tariff and all unexecuted agreements under which service will commence at the request of the customer,

are subject to the filing requirements of this part.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 541, 40 FR 56425, Dec. 3, 1975; Order 541–A, 41 FR 27831, July 7, 1976; 46 FR 50520, Oct. 14, 1981; Order 337, 48 FR 46976, Oct. 17, 1983; Order 541, 57 FR 21734, May 22, 1992; Order 2001, 67 FR 31069, May 8, 2002; Order 714, 73 FR 57530, 57533, Oct. 3, 2008; 74 FR 55770, Oct. 29, 2009]

§ 35.2 Definitions.

(a) *Electric service*. The term *electric service* as used herein shall mean the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale for resale in interstate commerce, and may be comprised of various classes of capacity and energy sales and/or transmission services. *Electric service* shall include the utilization of facilities owned or operated by any public utility to effect any of the foregoing sales or services whether by leasing or other arrangements. As defined herein, *electric service* is without regard to the form of payment or compensation for the sales or services rendered whether by purchase and sale, interchange, exchange, wheeling charge, facilities charge, rental or otherwise.

(b) *Rate schedule*. The term *rate schedule* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing and may take the physical form of a contract, purchase or sale or other agreement, lease of facilities, or other writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A rate schedule is designated with a Rate Schedule number.

(c)(1) *Tariff*. The term *tariff* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section offered on a generally applicable basis, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A tariff is designated with a Tariff Volume number.

(2) *Service agreement*. The term *service agreement* as used herein shall mean an agreement that authorizes a customer to take electric service under the terms of a tariff. A service agreement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A service agreement is designated with a Service Agreement number.

(d) *Filing date*. The term *filing date* as used herein shall mean the date on which a rate schedule, tariff or service greement filing is completed by the receipt in the office of the Secretary of all supporting cost and other data required to be filed in compliance with the requirements of this part, unless such rate schedule is rejected as provided in § 35.5. If the material submitted is found to be incomplete, the Director of the Office of Energy Market Regulation will so notify the filing utility within 60 days of the receipt of the submittal.

(e) *Posting* (1) The term posting as used in this part shall mean:

(i) Keeping a copy of every rate schedule, service agreement, or tariff of a public utility as currently on file, or as tendered for filing, with the Commission open and available during regular business hours for public inspection in a convenient form and place at the public utility's principal and district or division offices in the territory served, and/or accessible in electronic format, and

(ii) Serving each purchaser under a rate schedule, service agreement, or tariff either electronically or by mail in accordance with the service regulations in Part 385 of this chapter with a copy of the rate schedule, service agreement, or tariff. Posting shall include, in the event of the filing of increased rates or charges, serving either electronically or by mail in accordance with the service regulations in Part 385 of this chapter each purchaser under a

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 25, 2018. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 17-73244

I, Carol J. Banta , certify that this brief is identical to the version submitted electronically on [date] May 25, 2018 .

Date May 25, 2018

Signature s/ Carol J. Banta

(either manual signature or "s/" plus typed name is acceptable)