ORAL ARGUMENT NOT YET SCHEDULED

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

Nos. 07-1141, 16-1223, 16-1224, and 16-1225 (Consolidated)

AMEREN SERVICES COMPANY, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

James P. Danly
General Counsel

Robert H. Solomon
Solicitor

Carol J. Banta
Senior Attorney

Elizabeth E. Rylander
Attorney

For Respondent Federal Energy Regulatory Commission
Washington, DC 20426

Final Brief: January 26, 2018

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

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying agency docket are as stated in the Briefs of both Petitioners.

B. Rulings Under Review

1. Tariff Proceeding, Docket No. ER04-691

a. *Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,108 (Apr. 25, 2006) ("Guarantee Order"), R. 1719, JA 18;

b. *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113 (Oct. 26, 2006) ("First Rehearing Order"), R. 1826, JA 454;

c. *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,212 (Mar. 15, 2007) ("Second Rehearing Order"), R. 1907, JA 586;

d. *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,241 (June 12, 2009) ("Fifth Rehearing Order"), R. 2342, JA 1407; and

e. *Midwest Indep. Transmission Sys. Operator, Inc.*, 155 FERC ¶ 61,127 (May 2, 2016) ("Sixth Rehearing Order"), R. 2510, JA 1500.

2. Complaint Proceeding, Docket Nos. EL07-86, *et al.*

a. *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121 (May 6, 2009) ("First Paper Rehearing Order"), R. 2318, JA 1300; and

b. *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 155 FERC ¶ 61,124 (May 2, 2016) ("Second Paper Rehearing Order"), R. 2507, JA 1484.

C. Related Cases

This case has not previously been before this Court or any other Court, and to counsel's knowledge there are no related cases pending elsewhere. A number of previously-consolidated petitions for review (in Nos. 06-1423, 07-1138, 08-1002, 08-1004, 08-1395, 09-1006, 09-1007, 09-1008, 09-1189, 09-1191, 09-1192, 09-1195, 09-1209, 10-1217, 11-1345, and 12-1131) have been voluntarily dismissed.

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander

January 26, 2018

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES (continued): **PAGE**

TABLE OF AUTHORITIES

COURT CASES (continued): **PAGE**

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES (continued): **PAGE**

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES (continued): **PAGE**

STATUTES:

Federal Power Act

OTHER MATERIALS:

GLOSSARY

Ameren	Petitioner Ameren Services Company
Br.	Reference to a Petitioner's opening brief
Commission or FERC	Respondent Federal Energy Regulatory Commission
Guarantee charge	A market settlement charge that is assessed to parties whose market activities caused the costs attendant to making generators available for dispatch in the real-time energy market
Guarantee rate	The monetary rate necessary to compensate generators for making themselves available for dispatch in the real-time market
Interim Rate	Replacement allocation of costs approved in the complaint proceeding
JA	Joint Appendix
P	Paragraph in a FERC order
R.	Record item
System Operator	Midcontinent Independent System Operator, Inc. (formerly, Midwest Independent Transmission System Operator, Inc.)
Westar	Petitioner Westar Energy

GLOSSARY

Commission Orders[*]

Complaint Order	*Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,205 (Nov. 28, 2007), R. 2021, JA 706 (not on review)
Energy Markets Tariff Order	*Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163 (2004) (not on review)
Fifth Rehearing Order	*Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,241 (June 12, 2009), R. 2342, JA 1407
First Paper Rehearing Order	*Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121 (May 6, 2009), R. 2318, JA 1300
First Rehearing Order	*Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113 (Oct. 26, 2006), R. 1826, JA 454
Fourth Rehearing Order	*Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,156 (Nov. 7, 2008), R. 2142, JA 951 (not on review)
Guarantee Order	*Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,108 (April 25, 2006), R. 1719, JA 18
Paper Hearing Order	*Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,161 (Nov. 10, 2008), R. 2146, JA 975 (not on review)

[*]A one-page table of relevant FERC orders is attached at the back of this brief.

GLOSSARY

Commission Orders

Second Compliance Order	*Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,132 (Nov. 5, 2007), R. 2019, JA 672 (not on review)
Second Paper Rehearing Order	*Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 155 FERC ¶ 61,124 (May 2, 2016), R. 2507, JA 1484
Second Rehearing Order	*Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,212 (Mar. 15, 2007), R. 1907, JA 586
Sixth Rehearing Order	*Midwest Indep.Transmission Sys. Operator, Inc.*, 155 FERC ¶ 61,126 (May 2, 2016), R. 2510, JA 1500
Third Rehearing Order	*Midwest Indep.Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,131 (Nov. 5, 2007), R. 2020, JA 683

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

Nos. 07-1141, 16-1223, 16-1224, and 16-1225 (Consolidated)

AMEREN SERVICES COMPANY, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

COUNTER-STATEMENT OF JURISDICTION

To obtain judicial review of orders of the Federal Energy Regulatory Commission ("Commission" or "FERC"), Petitioners must satisfy the requirements of Article III of the United States Constitution and must be "aggrieved" by the challenged orders, as required by section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). *See*, *e.g.*, *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011) (party is not "aggrieved" unless it can establish constitutional and prudential standing). As discussed more fully in Part III.A of the Argument,

Petitioner Westar Energy ("Westar") does not appear to be aggrieved by the orders it challenges on review; rather, its purported aggrievement arises from a separate set of orders for which it did not seek agency rehearing or judicial review. *Cf. PNGTS Shippers' Grp. v. FERC*, 592 F.3d 132, 137 (D.C. Cir. 2010) ("The burden is on the petitioner to show 'the specifics of the aggrievement alleged.'") (citation omitted).

STATEMENT OF THE ISSUES

Midcontinent Independent System Operator, Inc ("System Operator") (formerly, Midwest Independent Transmission System Operator, Inc.) is a regional transmission organization that operates the interstate electric grid in 15 states and one Canadian province. The System Operator also runs markets for wholesale electricity: a day-ahead market, in which parties make offers in advance to buy and sell energy; and a real-time market, in which they transact immediately.

These consolidated appeals arise from two separate proceedings concerning the design and application of a charge that is assessed to participants in the System Operator's real-time market, in order to ensure that generators will be available to produce electricity on short notice ("Guarantee charge"). First, in a proceeding under Federal Power Act section 205, 16 U.S.C. § 824d, the Commission considered which market participants were required to pay the Guarantee charge under the existing, previously-approved tariff. In that same proceeding, the agency

also examined what market activities were captured in the calculation of the existing Guarantee charge. In a separate proceeding under Federal Power Act section 206, 16 U.S.C. § 824e, the Commission agreed that the existing rate was not just and reasonable, and considered what market activities should be captured in the calculation.

The crux of each issue was the correct treatment of virtual supply offers, which are financial transactions not associated with actual production or delivery of energy. Stated simply, the Commission evaluated the extent to which such offers were allocated the Guarantee charge and included in its calculation under the existing tariff (section 205), and to what extent they properly should be included in a revised calculation (section 206).

The agency proceedings resulted in more than 20 Commission orders. (For the Court's convenience, a chart appended at the back of this brief supplies a chronology of the relevant orders in the two Commission proceedings.) During that time the Commission resolved numerous issues concerning the System Operator's administration of the original tariff language, evaluated potential changes to that language, and considered the impacts of that language on market participants going back to the opening of the energy markets and going forward after the language was modified.

Ultimately, however, this appeal presents only a limited number of issues,

raised by just two parties to those proceedings:

(1) In the section 205 proceeding: Whether the Commission reasonably exercised its remedial discretion in waiving refunds:

(a) arising from the System Operator's violation of its tariff, for the period from the opening of the energy markets until the Commission ruled on that filed rate violation, where the Commission found that all market participants had made economic decisions that could not be undone, based on their understanding of the applicable tariff formula at the time; and

(b) arising from confusion that the Commission itself had created with a misstatement of the Guarantee charge formula, for the period from the ruling on the tariff violation until the Commission comprehensively explained the correct calculation;

(2) In the section 206 proceeding: Whether the Commission reasonably exercised its remedial discretion in setting the refund date for the new Guarantee charge formula on the date of its approval, rather than on the date the complaint was filed, based on the Commission's finding that market participants could not have anticipated what the new rate would be and adjusted their decisions accordingly; and

(3) Assuming jurisdiction, whether the Commission reasonably held that the refund effective dates in the separate proceedings were independent of each other,

and based on considerations specific to each proceeding.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes are contained in the attached Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Power Act

The Commission has jurisdiction over rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. Federal Power Act section 201, 16 U.S.C. § 824; *see generally New York v. FERC*, 535 U.S. 1 (2002). Under section 205(c) of the Federal Power Act, 16 U.S.C. § 824d(c), every public utility must file with the Commission, and make available for public inspection, tariffs that show the rates, terms, and conditions upon which they provide Commission-jurisdictional service. The Commission must assure that the rates and services described in public utility tariffs are just and reasonable, and not unduly discriminatory or preferential. Federal Power Act section 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e); *see, e.g., FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 766-68 (2016) (describing federal regulation and development of energy markets).

Section 206 of the Federal Power Act, 16 U.S.C. § 824e, authorizes the Commission to investigate, on its own motion or upon complaint, existing rates and terms of service. The entity instituting the section 206 investigation – either

the Commission or a complaining party – bears the burden to show that the existing rate or term is unjust and unreasonable. 16 U.S.C. § 824e(b); *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009). If the Commission finds that an existing rate is "unjust, unreasonable, unduly discriminatory or preferential," it must determine and set the new just and reasonable rate. 16 U.S.C. § 824e(a); *see generally Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011) (discussing Federal Power Act section 206 burden).

The Commission's authority to remedy and replace an existing rate under Federal Power Act section 206, 16 U.S.C. § 824e(a), is prospective only. Section 206(b) provides that the Commission shall establish a refund effective date no "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." 16 U.S.C. § 824e(b). Upon making necessary findings, the Commission can determine a revised rate "to be thereafter observed and in force." *Id*.

B. The Development of Regional Energy Markets

In recent years the Commission has encouraged utilities to provide non-discriminatory, competitive access to transmission over broad geographic areas, and to make competitive and reliability improvements to the wholesale market for electric power. *See Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-37 (2008). The Commission has also encouraged formation of

regional transmission organizations — voluntary associations of utilities whose electric transmission lines interconnect to form a grid. *See Elec. Power Supply Ass'n*, 136 S. Ct at 768; *Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607, 611-12 (D.C. Cir. 2001).

The System Operator is such an organization. *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 248-49 (D.C. Cir. 2007). It directs the operation of its members' transmission facilities and, among many other functions, operates competitive markets for electricity. *Id.* at 250; *see also Elec. Power Supply Ass'n*, 136 S. Ct at 768 (same). As relevant here, the System Operator runs a "day-ahead" market, which allows utilities to make advance arrangements for energy sales and transmission, and a "real-time," or spot market. *Wisconsin*, 272 F.3d at 250. Both opened on April 1, 2005, in accordance with a new Energy Markets Tariff.

II. IMPLEMENTATION OF THE SYSTEM OPERATOR'S ENERGY MARKETS

A. The Day-Ahead and Real-Time Energy Markets

In a day-ahead energy market, generation resources submit bids to supply energy, and prospective buyers submit bids to purchase it, a day before the energy is necessary. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 768; FERC, *Energy Primer: A Handbook of Energy Market Basics* 84 (Nov. 2015), *available at* https://www.ferc.gov/market-oversight/guide/energy-primer.pdf. These bids have both a locational and a temporal component: they express willingness to buy or

sell electricity during specific hours of the day, at specific pricing nodes located on the grid under the System Operator's control. *Wisconsin*, 493 F.3d at 250. The System Operator constructs supply and demand curves that relate to each hour at each pricing node, and, from those curves, produces a day-ahead locational market price for each hour. *Energy Primer* at 84. Supply offers that fall below that price, and purchase offers above it, "clear" the market and are scheduled for the following day. *Id.*; *see also Elec. Power Supply Ass'n*, 136 S. Ct at 768-69 (providing numeric example).

As an operating day progresses, the quantities of electricity that are supplied to the market — or demanded from it — may not match the day-ahead schedules. *Energy Primer* at 84. The System Operator therefore runs a second, "real-time" energy market. Generators may offer to produce electricity in real time if they have capacity available that did not clear the day-ahead market. *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163 at P 523 (2004) ("Energy Markets Tariff Order"). If they are needed, the System Operator sends them real-time dispatch signals (instructions for how much electricity to produce) during the operating day. *Energy Primer* at 84. Real-time transactions are settled at the real-time locational market price, which will be different from the day-ahead price. *Id.* at 84-85.

B. Virtual Supply Offers and Virtual Demand

Market participants in the System Operator's day-ahead energy market may buy and sell power "virtually," *i.e.*, without requiring physical generation or load. "Virtual traders do not actually supply or receive electricity but instead stake out market positions that are effectively bets on how electricity prices will change over time. In other words, they engage in a kind of arbitrage." *FERC v. City Power Mktg., LLC*, 199 F. Supp. 3d 218, 221 (D.D.C. 2016); *see also Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 236 (D.C. Cir. 2013) (same). Virtual bids and supply offers are factored into the determination of locational market prices, alongside their physical counterparts. *Energy Primer* at 86. Cleared virtual supply offers in the day-ahead energy market, at a particular time and location, create a financial obligation for the participant to buy back the bid quantity in the real-time market, at the same time and location. *Id.* Conversely, cleared virtual demand creates a financial obligation to sell the bid quantity in the real-time market. *Id. See also Black Oak*, 725 F.3d at 236 (marketers' trades are offsetting, and they profit or lose based on price fluctuations in the time between their purchases and their sales).

So, for example, if an electricity trader expects real-time prices at a particular pricing node to be higher than day-ahead prices at the same node, the trader will offer to buy energy at that node in the day-ahead market. *City Power Mktg.*, 199 F. Supp. 3d at 223. If its bid clears the day-ahead market, then the

trader will have to sell a corresponding amount of energy at the same node in real time – and will make a profit equal to the difference between the purchase price and the sale price. *Id.* Virtual traders "provide important benefits to bid-based markets by helping to ensure that [day-ahead] and [real-time] prices do not diverge significantly, as well as by providing price discovery and liquidity to the market." *ISO New Eng., Inc.*, 113 FERC ¶ 61,055 at P 30 (2005).

C. Physical Dispatch and the Revenue Sufficiency Guarantee

The System Operator must make sure that it dispatches generators in such a way that they produce energy where and when it is needed, with an eye to minimizing price. It does so using a computer algorithm that selects generators to run by taking into account factors that include the prices and locations of available supply and anticipated load, and transmission constraints that may impede the flow of power. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,051 at P 19 (2005). Resources committed through this process are dispatched on an economic basis. Energy Markets Tariff Order P 523; *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 768 (bids are accepted in order of cost, starting with the least expensive).

Without assurances that they will be called upon to produce enough energy to recover their costs, generators stand to lose money if they make themselves available for dispatch. *See* Aff. of Ronald R. McNamara at 3, R. 1633, JA 1, 4.

The Energy Markets Tariff therefore guarantees that generators will recover the costs of making themselves available, so that offering their services into the real-time energy market should be, at worst, revenue-neutral. Energy Markets Tariff Order P 581. Each day, the System Operator determines which generators have not recovered their basic costs through the real-time energy market, and provides revenue sufficiency guarantee ("Guarantee") payments to eliminate any shortfall. *Id.*

The System Operator does not fund the Guarantee, but instead collects funds to pay it by assessing a Guarantee charge to market participants who transact in the real-time energy market. *Id.* P 582; *Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶ 61,108 at P 31 (2006) ("Guarantee Order"), R. 1719, JA 18, 29. Market participants whose demand deviates from their day-ahead financial position, and whose actual supply deviates from their dispatch instruction, must pay the Guarantee charge. Guarantee Order P 31, JA 29.

D. Integration of the Guarantee Charge and the Guarantee Rate Into the Energy Markets Tariff

The System Operator proposed, and the Commission accepted, the Guarantee charge in 2004, as part of the Energy Markets Tariff. *See* Energy Markets Tariff Order PP 582-91. Because the extensive litigation in the underlying Commission proceedings centered on the proper interpretation and application of the relevant tariff language, this brief quotes that language in full.

At the inception of System Operator's energy markets in 2005, the charge was assessed to market participants that physically withdrew energy on a given day, based on factors that included the per-unit Guarantee charge rate:

> On any Day when a Market Participant actually withdraws any Energy the Market Participant shall be charged a Real-Time Revenue Sufficiency Guarantee Charge. The Market Participant's Real-Time Revenue Sufficiency Guarantee Charge for that Hour shall equal the product of: (i) the Market Participant's total uncovered Load withdrawn during the Operating Day (in [megawatt-hours]), all Virtual Supply for the Market Participant in the Day-Ahead Energy Market, and Resource Uninstructed Deviation quantities ([megawatt-hours]), and (ii) the per-unit Real-Time Revenue Sufficiency Guarantee charge.

Original [Tariff] Sheet Nos. 577 and 578, *quoted in Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,156 at P 29 (2008) ("Fourth Rehearing Order"), R. 2142, JA 951, 962. The per-unit Guarantee charge rate, in turn, was determined based on the total cost of keeping units available for dispatch after the close of the day-ahead market, divided by the number of megawatts by which total market activity differed in real time from the amount projected in the day-ahead market:

> The per unit Real-Time Revenue Sufficiency Guarantee Charge for any given Day shall equal: (i) the aggregate Real-Time Revenue Sufficiency Guarantee Charge in that Hour attributed to Resources committed in any [Reliability Assessment Commitment] processes conducted in the Operating Day divided by (ii) the sum of the total uncovered Load withdrawn in the Operating Day (in [megawatt-hours]), all Virtual Supply for that Market Participant in the Day-Ahead Energy Market, and for deviations from Dispatch Instructions,

> of all Market Participants withdrawing during that Hour for the Operating Day.

Id.

In accepting the tariff provisions, the Commission noted that charges of this type were "quite common," Energy Markets Tariff Order P 586, but that the System Operator's proposal for allocating the charges differed from what the Commission had approved for other large systems. *Id.* PP 586-87. The Commission found the proposal reasonable because the parties that cause higher costs for the region (for example, parties that schedule all of their energy requirements in the real-time market), and the parties that would benefit from generator commitment, would fund it. *Id.* P 587. For example, the proposal would allocate some costs to virtual bidders, who would not pay under a more conventional scheme allocating generator shortfall costs to load. *Id.*

III. THE COMMISSION PROCEEDINGS AND ORDERS[1]

A. Section 205 Proceeding: Correct Application of the Existing Rate

1. The System Operator's Filing

In October 2005, six months after energy market start-up, the System Operator sought to amend the real-time Guarantee charge to remove references to virtual supply, among other changes. *See* Guarantee Order PP 3-5, JA 19. The

[1] A one-page table of relevant orders is appended at the back of this brief.

System Operator also sought a waiver of the filed rate doctrine in order to make its proposed tariff revisions effective retroactive to the start of the energy markets. *See id.* P 13, JA 21.

In support of both requests, the System Operator explained that since its energy markets opened, it had not included virtual supply offers in the Guarantee charge calculation, because virtual supply offers do not include actual energy deliveries and cannot be physically committed in the generator selection process. *Id.* P 12, JA 21. The System Operator explained that its Business Practice Manuals ("Manuals") and tariff training materials stated that virtual supply offers would not be included in the Guarantee charge calculation, even though its tariff had always said they would. *Id.*[2] The System Operator stated that parties had relied on the Manuals and not the tariff, and argued that refunds or market resettlements would not be appropriate. *Id.* P 14, JA 21.

2. Guarantee Order

The Commission began its analysis of the System Operator's filing by interpreting the tariff language that was already on file. *See* Guarantee Order

---

[2] The Manuals, which are not kept on file with the Commission, provide general information about System Operator's operating practices so that market participants will know how the procedures described in the tariff will be carried out. *Midwest Indep. Sys. Operator, Inc.*, 121 FERC ¶ 61,131 at P 18 & n.34 (2007) ("Third Rehearing Order"), R. 2020, JA 683, 692.

PP 26-30, JA 26-28. The tariff identified virtual supply offers as an element of the Guarantee charge, and the Commission had previously relied on that language to find that the tariff reasonably allocated Guarantee costs to entities that caused higher costs for the region. *Id.* P 26, JA 26-27 (citing Energy Markets Tariff Order P 587). Consequently, to the extent that System Operator had not charged virtual supply offers the Guarantee charge, it had violated the terms of its tariff. *See id.* PP 26-27, JA 26-27 (filed rate doctrine prohibits utilities from charging rates other than those properly filed with the Commission). The Commission noted the contrary statements in the Manuals, but found that the Manuals "should comply with the terms of the tariff, not the other way around." *Id.* P 30, JA 28.

Accordingly, the Commission ordered the System Operator to recalculate the rate for the first 13 months of market operations and exercised its discretion to require refunds to customers to reflect the correct allocation of Guarantee costs. *Id.* PP 26, 29, JA 26-27, 28.

The Commission also rejected the System Operator's proposed changes to eliminate references to virtual supply offers from the Guarantee charge and the Guarantee rate. *Id.* PP 48-49, JA 35-36. The System Operator wanted energy market participants to bear costs in proportion to the degree that their actions imposed costs on the marketplace, and in relation to the benefit they received. *Id.* PP 31-32, JA 29. The Commission, however, found that virtual supply offers can

cause generator costs to increase, and therefore affect real-time revenue sufficiency, so virtual supply transactions should remain in the calculation. *Id.* P 48, JA 35.

3. First Rehearing Order

Many parties requested rehearing, on numerous grounds. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113 at P 6 & Appendix A (2006) ("First Rehearing Order"), R. 1826, JA 454, 456, 514-15. Ameren objected to the Commission's interpretation of the effective tariff rate — specifically, its finding that the Guarantee charge only applies to market participants that withdraw energy in real time. Ameren Reh'g Request at 12, R. 1756, JA 168, 179.

Arguing for a broader allocation of Guarantee charges, Ameren claimed that the Energy Markets Tariff, read as a whole, indicates that withdrawal of energy is not limited to physical withdrawals. *Id.* at 12-13, JA 179-80. The bases of the Guarantee charge — market participants' total load purchased in real time, all virtual supply offers for that market participant, and quantities of resources' deviations from the System Operator's dispatch instructions — apply whether or not the participant withdraws energy. *Id.* at 12, JA 179. Ameren therefore worried that if the tariff did not allocate Guarantee charges to market participants on the same basis that the charges were collected, a "mismatch" might result — i.e., System Operator might not collect enough revenues to pay generators, or might

have to reallocate costs to market participants that did not cause them. *Id.* at 14, JA 181. *See also* First Rehearing Order P 129, JA 493-94 (summarizing rehearing request).

In the First Rehearing Order, the Commission denied rehearing on all issues except the grant of refunds. On that issue — as discussed more fully in Part II.B.1 of the Argument, *infra* — the Commission concluded that market participants who had relied on statements in the System Operator's Manuals regarding allocation of Guarantee charges had engaged in virtual transactions "with the reasonable expectation" that such transactions would not be allocated charges. First Rehearing Order P 94, JA 482-83. Thus, the Commission found nothing in the record to suggest that they had received an inequitable windfall. *Id.* The Commission further found that ordering refunds would be inequitable because market participants could not revisit their economic decisions. *Id.* P 95, JA 483.

Responding to Ameren's argument, the Commission noted that all transactions in the real-time market are physical, and found that "withdrawing energy" in the Guarantee rate referred to physically withdrawing energy. *Id.* PP 139, 141, JA 496, 497. The tariff language governing the Guarantee charges is based on whether the market participant is paying for real-time energy, which requires making a physical withdrawal. *Id.* P 139, JA 496. Guarantee charges are allocated to such customers based on load, virtual supply offers, and resource

deviations — factors that cause additional unit commitment, and therefore additional costs. *Id.* The Guarantee charge would recover all costs if the charge divisor (the denominator) and the market participant allocation have the same definition. *Id.* P 145, JA 498.

4. Second Rehearing Order

Eight parties, including Ameren, requested rehearing of the First Rehearing Order on various grounds. In March 2007, the Commission denied rehearing on all issues. *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,212 (2007) ("Second Rehearing Order"), R. 1907, JA 586.

On the issue of refunds, the Commission provided further explanation of how it had balanced the equities in deciding not to order refunds. *See id.* PP 87-98, JA 614-21; *see also infra* Argument, Part II.B.1. The Commission again explained that, regardless of which rule parties had followed, they had made rational choices, and that it hesitated to undo those economic decisions. Second Rehearing Order PP 92-93, JA 617. Moreover, refunds could not be made accurately because they would not reflect reduced price convergence between the day-ahead and real-time markets that may have occurred if there had been fewer virtual transactions. *Id.* P 93, JA 617. The Commission recognized that some market participants may have paid more than their share of Guarantee charges, but it found that based on

the record it could not determine how many, or which, market participants might have overpaid, or by how much. *Id.* P 97, JA 619-20.

As to the tariff interpretation, the Commission did agree with part of Ameren's argument. The Commission maintained its position that the Guarantee charge is assessed only on market participants withdrawing energy in real time. Second Rehearing Order P 58, JA 605. But with regard to Ameren's claim that there was a potential mismatch between the Guarantee charge and the Guarantee rate, the Commission found, for the first time, that "payment of the charge may result in less than full recovery of [Guarantee] costs since the divisor to the charge includes all virtual supply — not just virtual supply offered by market participants withdrawing energy[.]" *Id.* To the extent that Guarantee costs were not fully recovered through the Guarantee charge, they would be recovered through "uplift" charges assessed to all market participants. *Id.*

The Commission also found that it was on the wrong procedural footing to amend the tariff as Ameren suggested. *See id.* PP 22, 56-57, JA 593-94, 605 (explaining that the Commission was implementing an effective tariff provision under Federal Power Act section 205, and could not assign costs based on its own findings about the rate). So "[w]hile the allocation of [G]uarantee costs arguably could be refined or improved," implementing changes to the rate beyond the scope

of the proceeding would have to be done pursuant to Federal Power Act section 206. *Id.* P 22, JA 594; *see also id.* P 56, JA 605 (same).

No party sought rehearing of either issue. Ameren petitioned for judicial review of all three orders (Case No. 07-1141).

5. Third Rehearing Order (Not on Review)

Some parties did seek rehearing on other issues, including the order of refunds from the date of the Guarantee order forward. On November 5, 2007, the Commission denied rehearing on all issues. *Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,131 (2007) ("Third Rehearing Order"), R. 2020, JA 683.

B. Section 205 Proceeding: Clarification of the Allocation Formula

1. Second Compliance Order[3] (Not on Review)

In an April 2007 compliance filing, the System Operator reinstated all Commission-approved tariff language to the Energy Markets Tariff. R. 1924; *see Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,132 at P 2 (2007) ("Second Compliance Order"), R. 2019, JA 672. On November 5, 2007, the Commission accepted the filing in the Second Compliance Order. Among

[3] The System Operator had made an earlier compliance filing, on which the Commission had issued a compliance order; neither is relevant to this appeal, except to explain why the April 2007 filing and the Commission's order accepting it are called "Second."

other revisions, the compliance filing reinserted language that applied the Guarantee charge on any day when a market participant actually withdraws energy. *Id.* P 14, JA 675-76. In response to Ameren, which again recommended that the Commission revise the tariff to minimize uplift charges, the Commission again interpreted the language of the effective tariff, and found that there was no mismatch or shortfall of Guarantee costs recovered. *See id.* P 26, JA 679-80.

2. Fourth Rehearing Order (Not on Review)

Numerous parties, including Ameren, sought rehearing or clarification. On November 7, 2008, the Commission granted those requests in part, clarifying that it had erred in the Second Rehearing Order. *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,156 at P 30 (2008) ("Fourth Rehearing Order"), R. 2142, JA 951, 962-63. Its statement that the numerator of the Guarantee rate calculation included all virtual supply — not just virtual supply offered by market participants who later withdrew energy — was wrong, and would have impermissibly established a new rate. *Id.* To the extent that the System Operator's billing did not reflect the correct interpretation, the Commission ordered it to provide refunds from April 25, 2006 (the date of the Guarantee order), through March 14, 2007 (the day before the Second Rehearing Order). *Id.*

3. Fifth Rehearing Order

Numerous parties requested rehearing of the Fourth Rehearing Order. On June 12, 2009, the Commission dismissed those requests, but nevertheless provided "additional guidance" in response. *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,241 at P 2 (2009) ("Fifth Rehearing Order"), R. 2342, JA 1407, 1408. In particular, with respect to the misstatement in the Second Rehearing Order, the Commission noted that the order "is no longer subject to rehearing, so the Commission cannot now rectify its error directly." Fifth Rehearing Order P 40, JA 1421. But the Commission went on to reaffirm its explanation in the Fourth Rehearing Order that "there is no rate mismatch." *Id.* P 43, JA 1422-23.

In addition, because of the confusion that the Second Rehearing Order had created, the Commission exercised its discretion to waive refunds from April 25, 2006 (the date of the Guarantee Order) through November 4, 2007 (the day before the Commission addressed the mismatch issue comprehensively in the Second Compliance Order). Fifth Rehearing Order P 41, JA 1421-22. *See* Argument, Part II.B.2, *infra*.

4. Sixth Rehearing Order

Ameren and others requested rehearing, challenging the waiver of refunds. Westar also sought rehearing, objecting that the date from which refunds would be

paid —November 5, 2007, after the waived period — was unjust, unreasonable, and discriminatory because it differed from the refund date set in the complaint proceeding (discussed below). *See* Request for Reh'g of Westar Energy, Inc. at 11, R. 2352, JA 1428, 1438. On May 2, 2016, the Commission denied rehearing on all issues, as discussed more fully in the Argument, Parts II.B.2 and III, *infra*. *Midwest Indep. Transmission Sys. Operator, Inc.*, 155 FERC ¶ 61,126 (2016) ("Sixth Rehearing Order"), R. 2510, JA 1500.

Both Ameren (Case No. 16-1223) and Westar (Case No. 16-1225) petitioned for judicial review.

C. Section 206 Proceeding: Prospective Revision of the Tariff

1. Ameren's Complaint

During the course of the section 205 proceeding, the Commission resisted commenters' requests to change the Guarantee rate prospectively. *See*, *e.g.*, Second Rehearing Order PP 56-57, JA 605. The existing Guarantee Rate was just and reasonable, and the Commission could not make changes to it beyond the scope of the proceeding. *See id.* P 22, JA 593-94. But in response to comments and suggestions about how to clarify or revise the rate, including its reference to withdrawals of energy, the Commission noted that the cost allocation "arguably could be refined or improved." *Id.*

In August 2007, Ameren and several other parties filed complaints under Federal Power Act section 206, 16 U.S.C. § 824e, challenging the justness and reasonableness of the Guarantee rate and proposing replacement cost allocation methodologies. *See Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 121 FERC ¶ 61,205 at PP 1-9 (2007) ("Complaint Order"), R. 2021, JA 706, 707-11, *on reh'g*, 125 FERC ¶ 61,162 (2008). In November 2007, the Commission found that, under Federal Power Act section 206, the complainants established that the existing rate was not just and reasonable. Complaint Order P 80, JA 732. There was not enough evidence in the record to support proposed revisions to the Guarantee rate, so the Commission set the complaints for paper hearing (for direct consideration by the Commission, not first by an administrative law judge) in order to further investigate issues of cost causation. *Id.* PP 34, 82, JA 717, 733.

2. Paper Hearing Order (Not on Review)

A year later, following the paper hearing, the Commission found the effective tariff provision to be unreasonable, and the complainants' proposed rate changes reasonable. *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,161 (2008) ("Paper Hearing Order"), R. 2146,

JA 975.[4] The Commission found no basis in cost causation to impose the Guarantee charge on parties that actually withdrew energy on a particular day, while exempting parties that did not withdraw energy. *Id.* P 39, JA 989. It ordered the System Operator to delete the phrase "actually withdraws energy" from the rate, and to make refunds back to the refund effective date of August 10, 2007. *Id.* PP 121, 141-47, JA 1013, 1017-19.

3. First Paper Rehearing Order

Numerous parties requested rehearing. The Commission denied all challenges to its approval of the replacement cost allocation, but granted rehearing of its decision to require refunds from the date of the complaints. *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121 (2009) ("First Paper Rehearing Order"), R. 2318, JA 1300.

Requests for rehearing and other filings showed that the sudden rate change had caused substantial adverse impacts on market participants, including a decrease in virtual trading activity and increases in market participants' credit exposure that were severe enough to cause payment defaults and to drive market participants out of business. *Id.* P 156, JA 1359-60. For that reason, the Commission recognized that requiring refunds had "caused difficulties and market

[4] The Commission held the proceeding in abeyance pending completion of a stakeholder process, and began the paper hearing in August 2008. *Id.* n.3.

uncertainty well in excess of the financial impact the Commission anticipated." *Id*. Moreover, denying refunds was consistent with other cases in which the Commission had declined to require utilities to re-run their markets following a change in rate design. *Id.* P 157, JA 1360.

4. Second Paper Rehearing Order

Ameren and other parties requested rehearing of the Commission's decision to waive refunds. As discussed more fully *infra*, in Part II.B.3 of the Argument, the Commission denied rehearing, further explaining its reasoning. *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 155 FERC ¶ 61,124 at PP 28-37 (2016) ("Second Paper Rehearing Order"), R. 2507, JA 1484, 1495-98.

Ameren's appeal in Case No. 16-1224 followed.

SUMMARY OF ARGUMENT

This case concerns the Commission's responsibility under the Federal Power Act to balance the various interests of all parties involved in regional, auction-based energy markets. In each of the challenged orders, the Commission fully considered all parties' arguments and properly exercised its responsibilities — including its broad discretion to determine appropriate remedies — under the Federal Power Act.

Of the many matters that the Commission addressed in more than 20 orders issued in two related proceedings, the questions that remain arise from the

Commission's decisions not to require refunds for three distinct periods. In each instance, the Commission initially ordered refunds, then considered parties' arguments and record evidence on rehearing and found that the balance of equitable factors weighed against refunds.

First, the Commission reasonably decided not to require refunds to remedy the System Operator's violation of its tariff. Refunds for filed rate violations are not mandated by the Federal Power Act; the Commission has broad remedial discretion to determine whether refunds are appropriate. Here, the Commission found that market participants who had relied on the System Operator's own interpretations in its Business Practice Manuals had acted in good faith and made rational decisions — decisions that would be rendered uneconomic if costs were reallocated, and that participants could not revisit. The Commission further concluded that the record evidence was insufficient to find that any market participants received an inequitable windfall. Therefore, the Commission reasonably determined that the balance of the equities weighed against ordering refunds prior to the date of the Guarantee Order, in which it had found the violation.

Second, though the Commission required refunds to implement the correct tariff calculation going forward, it later determined that those refunds should be waived because the Commission's own misstatement created further confusion

about the calculation of the Guarantee charge. Again balancing equitable factors, the Commission concluded that its error, as well as its general practice of denying refunds in cost allocation cases (where parties cannot revisit their past decisions), supported waiving refunds up to the date of the Second Compliance Order, in which the Commission had comprehensively clarified the application of the tariff formula.

As to the third refund decision challenged here, the Commission reasonably decided to waive refunds from implementation of a new replacement rate. Based on record evidence of the new rate's impacts on the market, the Commission found that market participants, though on notice that the rate would be changed, had not been able to anticipate the replacement allocation and adjust their market decisions to it. The Commission also turned, again, to its general practice of denying refunds in cost allocation cases, and further explained that rerunning the markets to determine refunds would necessarily be inaccurate, as the calculation could not take into account the changes in market participants' behavior under a different rule.

In addition, the Court lacks jurisdiction to consider Westar's challenges to the Commission's refund determinations. Westar's objections center on several orders that Westar failed to challenge on agency rehearing or judicial review. Because the only orders that Westar had challenged appear, if anything, to have

benefited it, Westar has not demonstrated that it was aggrieved by those orders, as required for judicial review under Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b). In any event, the Commission reasonably explained that the refund dates in the separate proceedings — applying the existing tariff under Federal Power Act section 205 and revising the tariff prospectively under Federal Power Act section 206 — appropriately could differ, and that each was based on specific facts and considerations in the respective proceedings.

Finally, as to the original Guarantee provision in the System Operator's tariff, the Commission reasonably determined that "actually withdraws any Energy" referred to a physical withdrawal of electricity in real time. The Commission did not improperly narrow the term "Energy"; Ameren's argument to the contrary relies on financial concepts that are absent from the real-time market, in which physical withdrawals of energy occur. For that reason, the Commission appropriately concluded that, if the term "virtual supply offers" — not "Energy" — is used consistently in the numerator and the denominator of the Guarantee rate, there will be no under-recovery of Guarantee costs.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Indep. Power Partners v. FERC*,

165 F.3d 944, 948 (D.C. Cir. 1999). 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 broad deference, because "the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *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.").

Similarly, this Court reviews the Commission's remedial decisions by an abuse-of-discretion standard. *See, e.g.*, *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d

218, 225 (D.C. Cir. 1999) ("*Louisiana 1999*"); *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998) (courts "do not ordinarily interfere" with the Commission's exercise of remedial discretion so long as the determination has a "rational basis") (citations omitted).

The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b). Substantial evidence "requires 'more than a scintilla' but 'less than a preponderance' of evidence . . . ." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) (citation omitted).

II. THE COMMISSION REASONABLY EXERCISED ITS REMEDIAL DISCRETION IN EACH DECISION TO WAIVE REFUNDS

In the orders on review, the Commission determined whether to order refunds for three distinct time periods: (1) from the opening of the System Operator's energy markets on April 1, 2005 to the day before the issuance of the Guarantee Order, April 24, 2006 (for purposes of this brief, the "2005-2006 Filed Rate Refunds"); (2) from the issuance of the Guarantee Order on April 25, 2006 to the issuance of the Second Compliance Order on November 5, 2007 (the "2006-2007 Mismatch Refunds"); and (3) from the filing of Ameren's complaint on August 10, 2007 to the issuance of the Paper Hearing Order on November 10, 2008 (the "2007-2008 Complaint Refunds"). In each case, the Commission ultimately concluded that refunds were not appropriate. Ameren challenges the

Commission's decisions as to all three periods. *See* Ameren Br. 15-17. As discussed in Part III.A, *infra*, Westar challenges only the orders that addressed the Mismatch Refunds, but appears to base its arguments largely on the Commission's rulings on the Complaint Refunds.

We begin with an overview of key standards and principles that apply to all of the Commission's refund decisions.

A. The Commission Has Broad Discretion To Determine Remedies, Including Whether To Order Refunds, Based On Its Balancing Of Equities

The Commission has broad remedial discretion under the Federal Power Act. Indeed, this Court has long held that the Commission's discretion is "at its 'zenith'" when fashioning remedies. *Towns of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)); *see also Louisiana 1999*, 174 F.3d at 224 (court's review of agency's choice of remedies to correct a violation is "'particularly narrow'") (citations omitted).

The Commission's remedial authority includes discretion *not* to order refunds. *See Concord*, 955 F.2d at 72-73 (holding that the Federal Power Act permits, but does not mandate, refunds, and that the Act "quite clearly confers" discretion); *see also La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1302 (D.C. Cir. 2014) ("*Louisiana 2014*"). Even where a utility has violated the filed rate

doctrine, the Commission has discretion not to order refunds. *See Concord*, 955 F.2d at 73; *accord Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 2000). *Cf. Louisiana 1999*, 174 F.3d at 224-25 (affirming Commission's decision not to direct refunds for tariff violation); *Concord*, 955 F.2d at 76 (same); *cf. Koch*, 136 F.3d at 816-18 (affirming Commission's finding of a filed rate violation but reversing its order of refunds). For that reason, the Court has "refused to constrain agency discretion by imposing a presumption in favor of refunds." *Concord*, 955 F.2d at 76; *see also Louisiana 2014*, 772 F.3d at 1302.

Because "refunds are a form of equitable relief, akin to restitution" (*Concord*, 955 F.2d at 75), the Commission exercises its remedial discretion by weighing the equities in each case. *See Louisiana 2014*, 772 F.3d at 1302 (Congress has given "'the difficult problem of balancing competing equities and interests'" to the Commission) (quoting *Koch*, 136 F.3d at 816). Its determination must be "based upon a reasonable accommodation of all the relevant considerations and not inequitable under the circumstances." *Conn. Valley*, 208 F.3d at 1045 (citing *Concord*, 955 F.2d at 75-76); *see also Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003); *Koch*, 136 F.3d at 816; *Louisiana 2014*, 772 F.3d at 1306. As noted *supra*, this Court reviews the Commission's remedial decisions — whether to order refunds or not to do so — by

an abuse-of-discretion standard. *See, e.g.*, *Louisiana 1999*, 174 F.3d at 225; *Koch*, 136 F.3d at 816.

Finally, in considering the relevant equitable factors in each case, the Commission distinguishes between refunds of overcharges and reallocation of costs. *See Black Oak Energy, LLC v. PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,040 at P 25 (2011), *reh'g denied*, 139 FERC ¶ 61,111 (2012), *rev'd on other grounds*, *Black Oak Energy, LLC v. FERC*, 725 F.3d 230 (D.C. Cir. 2013); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 155 FERC ¶ 61,120 at PP 20-28 (2016) ("*Louisiana 2016*"), *reh'g denied*, 156 FERC ¶ 61,221 (2016), *appeal pending*, *La. Pub. Serv. Comm'n v. FERC*, D.C. Cir. No. 16-1382 (briefing completed). "The Commission's approach to refunds has . . . been shaped by the way certain equitable considerations are typically associated with certain specific fact patterns." *Louisiana 2016*, 155 FERC ¶ 61,120 at P 20.

The Commission has a general policy of granting full refunds for overcharges (*Consol. Edison*, 347 F.3d at 972) because, "[i]f a utility has collected revenues from its customers that it is not entitled to under its tariff, fairness dictates that the excess revenues should be refunded to customers." *Louisiana 2016*, 155 FERC ¶ 61,120 at P 27; *accord Black Oak*, 136 FERC ¶ 61,040 at P 25. But where potential refunds arise from cost allocation or rate design changes, with no over-collection of revenue, "other factors come into play," such as a risk of under-

recovery by the utility. *Louisiana 2016*, 155 FERC ¶ 61,120 at P 27. In addition, a different allocation "could have led to different decisions by consumers or a utility" — and that "may be unfair to utilities or customers who cannot alter their past purchase or sale decisions in light of that new rate." *Id.* P 28. Thus, the Commission has a general practice of denying refunds in cost allocation cases. *Id.* P 30. *See also Black Oak*, 136 FERC ¶ 61,040 at P 25 & n.36 ("[I]n a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds.") (citing FERC precedents); *accord Louisiana 2016*, 155 FERC ¶ 61,120 at P 25 & n.58 (citing FERC precedents). *See also infra* pp. 47-49.

B. In Each Refund Decision, The Commission Appropriately Considered All Relevant Factors And Reasonably Balanced The Equities

The three sets of potential refunds that are at issue in these appeals arose in different contexts and on different grounds. The Commission considered the various factors that were relevant to each context, consistent with its precedents and practice, and explained its reasoning as to each set.

1. The Commission Reasonably Decided Not To Require Filed Rate Refunds (April 2005-April 2006)

There is no dispute in this case that the System Operator violated its tariff. Upon making that finding, the Commission initially ordered refunds to remedy the

violation. Guarantee Order PP 26, 29, JA 27, 28. On rehearing, however, the Commission concluded that the balance of the equities weighed against ordering refunds for the period before the Guarantee Order. First Rehearing Order PP 92-95, JA 482-83. In both the First and Second Rehearing Orders, the Commission explained that it based its decision on several relevant factors. *See id.*; Second Rehearing Order PP 87-98, JA 614-21.

First, the Commission considered the choices of market participants based on conflicting information. The System Operator had misapplied its own tariff, even providing an erroneous interpretation in its Business Practice Manuals. Notwithstanding Ameren's suggestion that "sophisticated participants" could not reasonably rely on the System Operator (Br. 23), the Commission, consistent with its precedent, found it would be "unfair to market participants" to assume that they could not regard the System Operator's interpretations of its tariff in its own publications "as coming from a credible source." First Rehearing Order P 94, JA 483 (quoting *PPL EnergyPlus, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 115 FERC ¶ 61,383 at P 29 (2006), in which the Commission had found reliance on a system operator's tariff interpretation in its manual to be reasonable).

For that reason, the Commission found that market participants who relied on the System Operator's interpretations in its Manuals had acted rationally. *See* First Rehearing Order P 94, JA 483 ("participants engaged in virtual transactions

with the reasonable expectation that virtual transactions would not be allocated [Guarantee charges]"); Second Rehearing Order P 89, JA 615 ("we find that the parties who relied on the Business Practice Manuals to make their decisions behaved reasonably"); *id.* P 95, JA 618. (The Commission reasonably limited that finding to the period before the Commission made clear that the System Operator had violated its tariff. Denying requests from some market participants to waive refunds for a longer period, the Commission explained that it "[did] not consider market participants' continued reliance [after April 2006] on Business Practices Manuals to be reasonable. . . . [W]e find it was unreasonable for parties to continue to rely on Midwest ISO staff statements that contradicted the . . . [tariff] after issuance of the [Guarantee Order]." Third Rehearing Order P 26, JA 695.)

Ameren argues that the Commission's analysis skewed in favor of market participants who relied on the erroneous Manuals and against those who relied on the filed rate. Br. 28. But the Commission concluded that "all of the parties" — those who relied on the tariff and those who relied on the Manuals — had "acted in good faith, and . . . made rational choices based on what they believed to be the governing rule . . . ." Second Rehearing Order P 92, JA 617. Of course, as Ameren contends (Br. 22), good faith does not excuse the violation of a filed rate. In exercising its discretion to remedy that violation, however, the Commission

appropriately considered the behavior of the market participants as relevant to the balance of equities. *Cf. Concord*, 955 F.2d at 75 (refunds are similar to restitution, which is appropriate "only when 'money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it'") (citation omitted), *cited in* First Rehearing Order P 94, JA 482-83.

Having determined that the market participants had made rational choices, the Commission further found that the record did not show that any had received an "inequitable windfall." First Rehearing Order P 94, JA 483 (citing *Koch*, 136 F.3d at 816-17 (vacating Commission's order of refunds where utility "did not gain a windfall")). Ameren (at Br. 24-25) points only to the System Operator's estimate that an order of refunds for the period from April 1, 2005 to May 11, 2006 would necessitate reallocation of "up to $250 million" of Guarantee charges. Motion to Stay and Request for Expedited Treatment of the Midwest Independent Transmission System Operator, Inc. at 10, FERC Docket No. ER04-691 (May 11, 2006), R. 1728, JA 68, 77; *but cf.* Second Rehearing Order P 97 n.79, JA 620 (noting record evidence that some market participants disputed that amount). That estimate, however, showed "only that there may be a significant amount of money at stake" in the overall allocation — but did not answer the key question of whether any market participant received an inequitable windfall as a result of the allocation. Second Rehearing Order P 97, JA 619.

The Commission could not discern from the System Operator's filing "how many market participants may have overpaid, how many may have underpaid, which market participants fall into which category, or how many dollars they may have gained or lost." *Id.* Indeed, the Commission found it possible that some may have both overpaid and underpaid, with unknown net positions. *Id.* The Commission noted that, while a number of parties had claimed to have received too little, none had presented numerical evidence. *Id.* Though some parties "may have paid more than their share of [Guarantee] charges" (First Rehearing Order P 95, JA 483) — as with any erroneous allocation of costs — that does not automatically prove a windfall to others that requires a remedy.[5] Accordingly, the Commission found the record evidence "insufficient . . . to conclude that market participants suffered or enjoyed an inequitable windfall . . . ." Second Rehearing Order P 97, JA 620.

Indeed, the Commission concluded that refunds themselves would be "an unfair and inequitable remedy," because market participants cannot revisit past economic decisions made under the actual conditions in the market. First

---

[5] Ameren tries to recast the allocation of costs — where some parties may have paid too much and others too little — as the simpler case of a utility that overcharged its customers. *See* Br. 27. But the tariff violation in this case resulted in erroneous allocation among market participants, not in overcollection by the tariffed utility (here, the System Operator).

Rehearing Order P 95, JA 483; *N.Y. Indep. Sys. Operator, Inc.*, 92 FERC ¶ 61,073 at p.61,307 (2000) (denying refunds related to energy markets because, among other factors, "customers cannot effectively revisit their economic decisions in these circumstances and parties cannot retroactively alter their conduct"), *cited in* First Rehearing Order P 95. Given the market dynamics of virtual supply and demand offers, ordering refunds could render past virtual transactions uneconomic. *Id.*; *see supra* pp. 9-10 (discussing effects of virtual trading on market dynamics); *see also* Second Rehearing Order P 93, JA 617 (noting one party's argument on rehearing that refunds could not be made accurately because they would not reflect the reduced convergence in market prices that might have resulted from fewer virtual transactions); *id.* P 98 n.81, JA 620 (repeating that "concern regarding the accuracy"). As discussed *supra* at pp. 34-35, this concern for fairness as to past market decisions is a primary basis for the Commission's general approach to cost allocation refunds. *See also infra* pp. 47-49; *Louisiana 2016*, 155 FERC ¶ 61,120 at P 28. Nor is that Commission precedent limited to the context of prospective rate design changes, as Ameren claims (Br. 29). *See, e.g.*, *N.Y. Indep. Sys. Operator*, 92 FERC ¶ 61,073 at p.61,307 (denying refunds for filed rate violation), *cited in* Second Rehearing Order P 94 & n.74, JA 617.

Finally, demonstrating its thorough evaluation of all relevant factors, the Commission weighed, then reconsidered, the possible effects on market certainty.

When it first decided not to require refunds, the Commission explained that doing so "would create substantial uncertainty and undermine faith in the [System Operator's] markets." First Rehearing Order P 95, JA 483. On further rehearing, however, the Commission considered Ameren's counterargument that the System Operator's tariff violation itself had been "disruptive"; the Commission agreed, noting that the volume of virtual trades had decreased after the Commission had ruled on the violation, as market participants had adjusted to account for the correct costs of virtual transactions. Second Rehearing Order P 98, JA 620. But the Commission reaffirmed its view that refunds also would be disruptive. *Id.* Given that "market uncertainty and disruption result from either refund scenario," the Commission found those factors did not tip the balance of equities either way — thus, its decision "[did] not turn on the circumstances of market settlement, but rather on the other bases detailed" in the orders. *Id.*, JA 620-21.

2. The Commission Reasonably Decided Not To Require Mismatch Refunds (April 2006-November 2007)

The second period for which the Commission considered refunds is that between the issuance of the Guarantee Order and the Second Compliance Order. On rehearing of the Guarantee Order, the Commission had chosen not to require refunds back to the beginning of the System Operator's energy markets, as discussed *supra*, but had ordered that Guarantee charges be allocated in accordance with the tariff from April 25, 2006 forward. *See* Second Rehearing Order P 102,

JA 621-22; *see also* First Rehearing Order P 95, JA 483. The Commission had ruled on the tariff violation in the Guarantee Order, so all parties were then on notice that the Manuals were wrong and that the tariff required allocation to virtual suppliers; therefore, "to the extent" the System Operator had not properly allocated Guarantee charges after that date, refunds were due. Second Rehearing Order P 102, JA 622 ("Our finding here strikes an appropriate balance between the interests of market participants that reasonably relied on the Business Practices Manuals and the interest of the Commission in ensuring the tariff is implemented . . . .");.

As discussed *supra* p. 21, the Commission made an error in the Second Rehearing Order that created confusion as to a possible "mismatch" in the Guarantee charge formula. *See* Fourth Rehearing Order P 30, JA 962-63. The Commission clarified the proper formula in the Second Compliance Order (at P 26, JA 679-80) and addressed its own earlier mistake on rehearing of that order (Fourth Rehearing Order P 30, JA 962-63). The Commission maintained that it expected the System Operator to bill Guarantee charges based on the correct tariff interpretation. *See id.*, JA 963. To the extent that the System Operator had not been doing so, the Commission directed it to provide refunds from April 25, 2006 (the date of the Guarantee Order) through March 14, 2007 (the effective date of the tariff provision in the compliance filing). *Id.*

On further rehearing, however, the Commission acknowledged that its error in the Second Rehearing Order had created confusion, which had not been remedied on rehearing of that order because no party had objected. For that reason, the Commission exercised its discretion to waive refunds up to the date when it had clarified the correct interpretation in the Second Compliance Order, on November 5, 2007. *See* Fifth Rehearing Order PP 41-42, JA 1421-22. "The Commission determination on that date with respect to the entire rate calculation, and a review of the entire tariff provision for the first time since market start, provided sufficient notice to parties" of the charges to be allocated from that date forward. *Id.* P 42, JA 1422.

Here, again, the Commission based its decision to waive refunds on equitable considerations. First, the Commission understood that its own error had created confusion. The Commission had not ruled that the Guarantee charge applied to all virtual supply offers, rather than only to those of market participants that made physical withdrawals of energy — indeed, it could not have made such a change in that section 205 proceeding. Fifth Rehearing Order P 41, JA 1422. But the Commission recognized that its statement "led parties to believe the Commission was ruling on [that] issue." *Id.* Second, the Commission acknowledged that it had not fully resolved that confusion until the Second Compliance Order. Sixth Rehearing Order P 26, JA 1510-11. "In light of th[at]

confusion," the Commission reasonably decided not to require the System Operator to reallocate charges for that period. Fifth Rehearing Order P 41, JA 1421 (citing *Koch*, 136 F.3d at 816-18, in which this Court found that an order of refunds would undermine market confidence). The Commission further explained, again, that this case did not involve "an over-collection of a charge, i.e., an unlawful overcharge." Sixth Rehearing Order P 30, JA 1513 (citing *Black Oak*, 136 FERC ¶ 61,040 at P 25 & n.36). Therefore, the Commission's general practice of denying refunds in cost-allocation cases also supported its exercise of discretion to waive refunds here. *Id.*

Ameren contends that the Commission should have required the 2006-2007 Mismatch Refunds to put market participants in what their positions would have been, to remedy the Commission's legal error. *See* Br. 39 (citing *Xcel Energy Servs., Inc. v. FERC*, 815 F.3d 947, 956 (D.C. Cir. 2016)). In *Xcel*, the Commission had committed a legal error, by failing to suspend newly-filed rates pending review, that resulted in collection of unlawful rates. 815 F.3d at 949, 956. The Commission believed it lacked authority to remedy its error, but the Court held that the Commission did have the authority to require corrective refunds. *Id.* at 956. But "[t]hat principle applies where the Commission has erred in determining the just and reasonable rate" — a rate determination that the Commission did not make here. Sixth Rehearing Order P 29, JA 1512; *see also id.*

P 31, JA 1513 ("We see no filed rate implications . . . . [T]he Commission . . . took no actions that contradicted a filed rate."). Here, the Commission recognized its remedial authority, but exercised its discretion not to order refunds, based on the circumstances; the Commission concluded that its misstatement was not a legal error that must be remedied by refunds. *Id.* P 28, JA 1512.

3. The Commission Reasonably Decided Not To Require Complaint Refunds Prior To The Establishment Of The Interim Rate (August 2007-November 2008)

On August 10, 2007, Ameren and other parties filed a complaint to change the formula for the Guarantee charge to include all virtual suppliers in the allocation. *See* Complaint Order PP 1-9, JA 707-11. The Commission found that the existing rate may not be just and reasonable, but that the proposed methodologies had not been shown to be appropriate replacements. *Id.* P 4, JA 708. It established a refund effective date of August 10, 2007 and set the matter for paper hearing to determine a replacement rate. *Id.*

Nearly a year later, the Commission ruled that the existing cost allocation was unjust and unreasonable, and approved a replacement allocation (called the "Interim Rate"). Paper Hearing Order P 2, JA 976. The Commission exercised its discretion to order refunds back to August 2007, reasoning that the parties had known since then that the Guarantee charge was subject to change, and thus had ample opportunity "to adjust their activities to avoid incurring potential refund

costs." *Id.* P 142, JA 1018. The Commission acknowledged that, with two alternative allocations proposed by the parties, "as well as abundant evidence of other factors that affect . . . Guarantee charges," it would have been "impossible for parties to forecast with certainty the ultimate rate to be approved." *Id.* P 143, JA 1018. Nevertheless, the Commission found it reasonable to expect parties to anticipate the removal of the energy withdrawal language (such that charges would be allocated to virtual suppliers) and to "adjust their activities accordingly." *Id.*

On rehearing, however, the Commission reaffirmed its approval of the Interim Rate but reversed the order of refunds. First Paper Rehearing Order P 1, JA 1301. Having further considered evidence and arguments submitted by the parties, the Commission found "good cause to exercise our discretion" not to require refunds. *Id.* P 154, JA 1358. The Commission changed the effective date of the rate change to November 10, 2008, the date of the Paper Hearing Order that established the Interim Rate. *Id.*

Ameren claims that the Commission failed to reconcile its earlier statements about notice with its decision "to waive refunds on notice grounds." Br. 44. But the Commission did not base its denial of refunds on notice — to the contrary, it dismissed that factor: "The fact that market participants were on notice of the possibility of refunds is not relevant here." Second Paper Rehearing Order P 32, JA 1496. Notice of a possible rate change means that refunds, if later ordered, will

not constitute retroactive ratemaking or violate the filed rate doctrine, but it does not control whether refunds shall be granted. *See id.* (citing *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007); *NSTAR*, 481 F.3d at 801 ("the filed rate doctrine and bar on retroactive ratemaking are satisfied . . . 'when parties have notice that a rate is tentative and may be later adjusted with retroactive effect'") (citation omitted); *see also supra* pp. 32-33 (explaining that refunds are not mandatory or even presumptive). Here, though market participants were on notice that the allocation of Guarantee charge costs would be changed, the Commission found it was "unreasonable to expect [them] to adjust their economic decisions . . . to accommodate the eventual rate change correctly." Second Paper Rehearing Order P 32, JA 1496; First Paper Rehearing Order P 155, JA 1358.

That finding was in line with the Commission's general practice in cost allocation cases. Second Paper Rehearing Order P 32, JA 1496; *see supra* pp. 34-35. Ameren disputes the Commission's reliance on that practice, arguing that the Commission tried to "back cast" a newfound policy, applying it "retrospectively to a proceeding that began in 2007 and in which FERC 'exercised discretion' in 2009." Br. 49-50.[6] The Commission, of course, exercised its discretion regarding

[6] Ameren also challenges the Commission's stated reasoning *in its own orders* as "*post hoc* rationalization" (Br. 49). *But see Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50 ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

refunds in *all* the orders on review, even where it cited consistency with a general practice.

Moreover, since its first exercise of that remedial discretion in this series of cases — in the First Rehearing Order, issued in October 2006 — the Commission has repeatedly considered the fairness of requiring refunds where parties cannot revisit past market decisions. *See* First Rehearing Order P 95, JA 483; Second Rehearing Order P 94, JA 617-18 (issued in March 2007); First Paper Rehearing Order P 157, JA 1360 (issued in May 2009); Second Paper Rehearing Order P 29-31, JA 1495-96 (issued in May 2016). That factor is a "key consideration" in the Commission's general practice of denying refunds in cost allocation cases. Second Paper Rehearing Order P 29, JA 1495; *accord Louisiana 2016*, 155 FERC ¶ 61,120 at PP 28, 30 ("unfairness" to parties "who cannot alter their past actions" is a "primary ground[]" for Commission's general practice in cost allocation cases); *Union Elec. Co.*, 64 FERC ¶ 61,355, at p.63,468 (1993) (denying refunds in connection with a rate design change because the parties "already made their past economic decisions and cannot revisit those decisions"); *cf. Pub. Serv. Comm'n of Wis. v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,205 at P 46 & n.107 (2016) (upholding grant of refunds that did not similarly implicate past market decisions because the proceeding did not involve energy markets; distinguishing from Commission's application of its general practice in the First

Paper Hearing Order), *appeal pending*, *Verso Corp. v. FERC*, D.C. Cir. Nos. 15-1098, *et al.* (briefing completed).[7] Indeed, in its 2011 *Black Oak* decision, the Commission cited the First Paper Rehearing Order for its "similar[]" determination not to grant refunds "in a section 206 complaint case involving a change in market design and thus in the allocation of costs . . . ." 136 FERC ¶ 61,040 at P 27.

Importantly, the Commission did not merely cite its general practice and leave the analysis at that. Rather, it discussed several "specific factors" of the sort this Court found lacking in *Louisiana 2014*. 772 F.3d at 1303. As with the other refund decisions at issue in this appeal, the Commission's finding was grounded in the particular dynamics of the System Operator's energy markets. Energy market participants do not merely buy and sell energy; they engage in bidding strategies based on predicting differences in day-ahead and real-time prices. *See supra* pp. 9-10. Moreover, those predictions and strategies affect the market outcomes. *See id.* Therefore, allocation of Guarantee charge costs is "a function of a wide range of factors," the interaction of which is difficult to predict — and "it is particularly hard to do so when a market participant also must understand, and account for, other market participants' expectations of an ongoing Commission proceeding and

[7] The *Wisconsin* order issued in September 2016, over four months after the last orders challenged in this appeal. *See Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005) (court "will not reach out to examine a decision" issued after the order on review).

how those other participants alter their behavior in response." First Paper Rehearing Order P 155, JA 1358-59.

Record evidence supported that finding of unpredictability. In initially requiring refunds to be calculated from the complaint date, the Commission had expected that parties would be able to pay the refunds and continue participating in the markets because "they have had ample opportunity to adjust their activity to account for" the possible rate change. Paper Hearing Order P 156, JA 1022. On rehearing, however, the evidence showed otherwise. For example, the Independent Market Monitor identified a dramatic drop in virtual trading activity after the Commission established the Interim Rate; a regional committee noted that numerous market participants had already defaulted on their refund obligations. First Paper Rehearing Order P 156, JA 1359. The Commission itself had not predicted those effects: "we see that the . . . refund and resettlement requirements have caused difficulties and market uncertainty well in excess of the financial impact the Commission anticipated." *Id.*, JA 1359-60. *Cf.* Paper Hearing Order P 158, JA 1022 (Commission expected virtual trading and price convergence to remain consistent under the Interim Rate). Even parties who supported refunds cited their own inability, before the Interim Rate was set, to tailor economic decisions to account for the future allocation. *See* Second Paper Rehearing Order P 31, JA 1496 (citing rehearing requests). "It is because of this pervasive

uncertainty that the Commission hesitated to undo decisions of market participants retroactively." *Id.*

Thus, this case differs from *Louisiana 2014* because market participants' past decisions were not "in the abstract." 772 F.3d at 1306, *cited in* Br. 30. Nor was concern for past decisions "the *only* factor" in the Commission's analysis. *Id.* at 1306. The Commission also considered the practicality of rerunning the markets to determine refunds. Given the interaction between bidding strategies and price differentials, efforts to calculate refunds to implement the Interim Rate back to August 2007 would "necessarily be inaccurate because they cannot take into account the changes in behavior that those market participants would have made if they could be certain" of the ultimate rate. First Paper Rehearing Order P 157, JA 1360. Those computations would be "complex, and likely to encourage needless litigation." *Id.*

Accordingly, the Commission appropriately considered all relevant equitable factors in deciding to waive refunds prior to establishment of the Interim Rate, and its exercise of its remedial discretion should be respected. *See, e.g.*, *Concord*, 955 F.2d at 75-76.

III. EVEN ASSUMING THAT WESTAR CAN ESTABLISH ITS STANDING, ITS APPEAL FAILS ON THE MERITS

A. Westar Has Not Explained How It Is Aggrieved By The Orders That It Challenges On Review

As we noted *supra* pp. 1-2, Westar has failed to meet its burden to show that it is aggrieved by the orders it challenges on review. Westar's arguments appear to center on the Commission's decision in the First Paper Rehearing Order (to which Westar refers as the May 2009 Order) that refunds under the Interim Rate would run from the date on which that Rate was approved (in November 2008) rather than from the complaint date (in August 2007). That is, Westar apparently objects to being responsible for Guarantee charges between November 2007 and November 2008 that virtual suppliers were not required to pay, due to the delayed implementation of the revised allocation under the Interim Rate. *See, e.g.*, Br. 17, 21-22. That objection arguably could have constituted the necessary aggrievement for purposes of challenging the First Paper Rehearing Order.

But Westar did not seek judicial review of that order or the Second Paper Rehearing Order — indeed, it did not even request agency rehearing of the First Paper Rehearing Order. Instead, Westar sought rehearing only of the Fifth Rehearing Order (to which Westar refers as the June 2009 Order), and judicial review of that and the Sixth Rehearing Order. *See* Br. 9, 20. Even in that rehearing request, Westar's objections seemed directed toward the First Paper

Rehearing Order. The request cannot be construed as seeking rehearing of both orders, however, because Westar filed on July 13, 2009 — timely as to the Fifth Rehearing Order but 68 days after the First Paper Rehearing Order. *See* 16 U.S.C. § 825*l*(a) (an aggrieved party may apply for rehearing of an order within 30 days after issuance); *id.* § 825*l*(b) (court cannot consider any objection not raised in the rehearing request, absent reasonable ground for failure to raise); *see also, e.g., Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002) (courts adhere strictly to that requirement).

To the extent that Westar challenges the Fifth Rehearing Order at all, it seems to object to the allocation of Guarantee charges according to the original tariff — that is, allocation to suppliers that withdrew energy, but not to virtual suppliers without withdrawals — with refunds to implement that allocation from November 5, 2007 forward. *See* Br. 21-22. But "the Commission took no action pertaining to those refunds in the Fifth Rehearing Order . . . ." Sixth Rehearing Order P 34, JA 1513. The Commission reaffirmed the clarification of the formula on rehearing of the Second Compliance Order — in the *Fourth* Rehearing Order (*see* PP 1-2, JA 951; Br. 24-25). It also directed the System Operator to bill market participants based on that formula, with refunds from April 25, 2006 through March 14, 2007. Fourth Rehearing Order P 30, JA 963. For that reason, the Commission properly found that Westar's argument constituted "an out-of-time

request for rehearing" of the Fourth Rehearing Order. Sixth Rehearing Order P 34, JA 1514.

In its short explanation for its Article III standing, Westar claims that the Fifth and Sixth Rehearing Order "caused Westar to incur additional [Guarantee] charges between November 5, 2007 and November 10, 2008." Br. 20. But the Fifth Rehearing Order (the subject of Westar's only rehearing request) did not impose any further refund obligations — to the contrary, it *reversed* the previous order of refunds for that entire period and eight additional months, because of the confusion created by the Commission's "mismatch" error. Fifth Rehearing Order P 41, JA 1421-22; *see supra* Part II.B.2 (discussing the Mismatch Refunds). Therefore, if the Fifth Rehearing Order had any effect on Westar, it appears that effect was to *relieve* Westar of responsibility for any refunds from April 25, 2006 to November 5, 2007.

In sum, Westar failed to seek rehearing: (1) of the order that clarified the allocation formula under the existing tariff, under which Westar was required to pay Guarantee charges (the Second Compliance Order); (2) of the order that required refunds on that basis back to April 2006 (the Fourth Rehearing Order); or (3) the order that waived refunds for the new Interim Rate, under which costs would be allocated to virtual suppliers (the First Paper Rehearing Order). Instead, Westar sought rehearing and judicial review only of orders that, if anything,

benefited Westar by shortening the time period for which it would pay refunds. Therefore, Westar has failed to explain how it was aggrieved by the orders that it challenges on appeal.

B. Assuming Jurisdiction, The Commission Reasonably Determined The Refund Dates For The Existing Rate And The Replacement Rate Separately, Based On Considerations Specific To Each Proceeding

Because Westar did not seek rehearing of *any* of the orders that imposed or waived the refunds that it now challenges, none of its objections on appeal was properly presented to the Commission. Nevertheless, the Commission did address some of Westar's arguments to this Court, responding to Westar or to other parties.

The Commission made clear — in response to another party's argument — that its rulings on refunds in the section 206 complaint proceeding had "no bearing" on refunds in the section 205 proceeding. Fifth Rehearing Order P 42, JA 1422. The Commission similarly explained that the November 2007 refund date in the section 205 proceeding appropriately could differ from the November 2008 refund effective date in the section 206 proceeding. Sixth Rehearing Order P 33, JA 1513. That is simply a function of the Federal Power Act: the existing lawful rate, approved in 2004, remained in effect throughout the section 205 proceeding (because the Commission had rejected the System Operator's proposal to modify it), even while the rate was challenged in a separate section 206 proceeding. Even where the Commission finds that the existing rate may be unjust

and unreasonable, it remains in effect until the Commission sets a just and reasonable replacement (here, in the Paper Hearing Order). Thus, the Commission's decision, in the section 206 proceeding, as to the appropriate refund effective date had no bearing on the ongoing section 205 proceedings concerning the allocation under the original formula. The Commission properly considered the refund date in the section 205 proceeding "based on a matter that is specific" to that case (i.e., the mismatch confusion), and made its decision "on specific facts and considerations relevant to this proceeding." Sixth Rehearing Order P 33, JA 1513.

IV. THE COMMISSION PROPERLY DECLINED TO REVISE THE EXISTING TARIFF RATE IN THE SECTION 205 PROCEEDING

At the time of energy market start-up in 2005, the Energy Markets Tariff stated that "[o]n any Day when a Market Participant actually withdraws any Energy the Market Participant shall be charged a Real-Time Revenue Sufficiency Guarantee charge." Fourth Rehearing Order P 29, JA 962; *see supra* pp. 12-13 (quoting full tariff provision). The Commission interpreted this sentence to mean that the Guarantee charge "is only applied to market participants withdrawing energy in real-time." Guarantee Order P 26, JA 27. *See also* First Rehearing Order P 139, JA 496 (charges are based on whether the market participant is making a physical withdrawal of energy); Second Rehearing Order P 55, JA 604 (same). Such participants were assessed the Guarantee charge for all of their

transactions (virtual and physical) on the day of their withdrawal. *See* Guarantee Order P 26, JA 27; First Rehearing Order P 45, JA 468. But purely virtual market participants, who had not taken energy off the grid, were not subject to the charge. *See* First Rehearing Order P 45, JA 468 (virtual supply is assessed Guarantee charges only on days when the market participant actually withdraws energy).

Ameren did not agree with the Commission's view of the effective rate, and sought clarification twice. *See id.* P 129, JA 493-94 (summarizing Ameren's request for clarification that all parties making virtual supply offers must pay the Guarantee charge); Second Rehearing Order PP 42-52, JA 601-04 (same). It argued before the Commission, as it does on appeal, that the agency improperly narrowed the tariff definition of the term "Energy" when it held that the Guarantee rate applies only to the transactions of market participants that made actual withdrawals of energy. Br. 31-34. Ameren contends that "Energy" incorporates bids and offers, and that the Commission erroneously did not consider those when reading the tariff. *Id*.

As a consequence of this allegedly mistaken tariff interpretation, Ameren perceived a mismatch between the number of megawatt-hours used to calculate the Guarantee charge, and the number of megawatt-hours to which that charge was applied. *See* First Rehearing Order P 129, JA 494; Second Rehearing Order P 45,

JA 602. Ameren's concern is that if a market participant does not actually withdraw energy on a given operating day, it pays no Guarantee charges, even though it may have made virtual transactions that would increase the total amount of Guarantee charges that the market incurs — causing an overall under-recovery of Guarantee costs. *See* Ameren Reh'g Request at 14, JA 181; First Rehearing Order P 129, JA 494.

But the definition of "Energy" does not, in fact, control the application of Guarantee charges. The Commission explained that, in the real-time market, all transactions are physical. First Rehearing Order P 139, JA 496. Financial transactions can only be made in advance, in the day-ahead market. *See Energy Primer* at 86. So while the tariff definition of Energy includes bids and offers, such financial activities "are market positions and are separate and distinct from the actual physical withdrawal of energy in the real-time market." First Rehearing Order P 141, JA 497. *See also id.* ("withdrawing energy means physically withdrawing energy"); Second Rehearing Order P 55, JA 604 (no basis in the tariff to understand that an energy withdrawal means a supply of energy). The definition of Energy therefore does not require the Commission to find that "the 'Energy' that is withdrawn . . . includes Virtuals," Br. 32, because there are no purely financial transactions in the time frame that physical withdrawals occur.

Though Ameren sought a different interpretation that would have applied the Guarantee charge to more market participants, the Commission kept its focus on the actual tariff before it: "the fact that the current tariff interpretation, *i.e.*, cost assignment to market participants withdrawing energy, differs from a possible and yet-to-be determined formulation in a prospective, yet-to-be-filed tariff amendment that may allocate [Guarantee] costs to all virtual supply offers irrespective of whether they withdraw energy, is not illogical or arbitrary." Second Rehearing Order P 57, JA 605. The Commission's reasonable interpretation of the tariff it approves and administers is entitled to judicial respect. *See*, *e.g.*, *Koch*, 136 F.3d 814 (*Chevron*-like deference to the Commission's tariff interpretations).

Nor does the definition of Energy control whether the tariff language produces a mismatch between the amount of Guarantee costs incurred and the amount recovered. In the Fourth Rehearing Order, the Commission reproduced the effective rate and explained that the definition of "virtual supply offers" for an individual market participant (in the rate numerator) matches the definition of "virtual supply offers" for the entire marketplace (in the denominator), and that is what controls. Fourth Rehearing Order P 30, JA 962-63. Ameren did not seek rehearing of this finding. Given that there is no mismatch, Ameren's claim (Br. 34) that the Commission further erred by allowing unrecovered Guarantee costs to be spread among other market participants (i.e., the Commission's mistaken

description of a mismatch in the Second Rehearing Order, P 58, JA 605) is meritless.

Finally, the Commission determined that the effective rate, applied only to market participants making actual withdrawals of energy, was neither unjust nor unreasonable: "We find nothing inconsistent in a tariff provision that makes market participants eligible for [Guarantee] costs based on their purchase of energy in the real-time market and then allocating their share of [Guarantee] costs based on factors that would cause unit commitment after the day-ahead market closes . . . ." First Rehearing Order P 140, JA 497. Arguments against that rate amounted to collateral attacks on the 2004 Energy Markets Tariff Order, in which the rate was approved. *Id.* P 144, JA 498. *See Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122, 1126 (D.C. Cir. 2011) (argument is an untimely collateral attack if someone in petitioner's position "would have perceived a very substantial risk" that an order meant what the Commission now says it meant).

CONCLUSION

For the reasons stated, Westar's petition in No. 16-1225 should be dismissed for lack of jurisdiction; alternatively, the petition should be denied on the merits. In the remaining dockets, Ameren's petitions should be denied and the challenged orders should be affirmed in all respects.

Respectfully submitted,

James P. Danly
General Counsel

Robert H. Solomon
Solicitor

Carol J. Banta
Senior Attorney

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel.: (202) 502-8466
Fax: (202) 273-0901

November 15, 2017
Final brief: January 26, 2018

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(B), (f), and (g), 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 13,862 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel.: (202) 502-8466
Fax: (202) 273-0901

January 26, 2018

ADDENDUM
Statutes

TABLE OF CONTENTS

PAGE

§ 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

Ameren Services Company et al. v. FERC
D.C. Cir. Nos. 07-1141, 16-1223, 16-1224, and 16-1225 (Consolidated)

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 January 2018, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

Sean Thomas Beeny — Email
McCarter & English, LLP
1015 15th Street, NW
12th Floor
Washington, DC 20005-2605

Glenn S. Benson — Email
Perkins Coie LLP
700 13th Street, NW
Suite 600
Washington, DC 20005-3960

Samina M. Bharmal — Email
Eversheds Sutherland (US) LLP
700 6th Street, NW
Suite 700
Washington, DC 20001-3980

Thomas L. Blackburn — Email
Bruder, Gentile & Marcoux, LLP
1701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20006-5807

Shaun Boedicker — Email
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Justin Cockrell — Email
DC Energy, LLC
8065 Leesburg Pike
6th Floor
Vienna, VA 22182

Barry Cohen — Email
McCarter & English, LLP
1015 15th Street, NW
12th Floor
Washington, DC 20005-2605

Stephanie Anne Conaghan — Email
Thompson Coburn LLP
1909 K Street, NW
Suite 600
Washington, DC 20006-1167

Brian C. Drumm — US Mail
Brickfield Burchette Ritts & Stone, PC
1025 Thomas Jefferson Street, NW
Eigth Floor, West Tower
Washington, DC 20007-5201

Larry F. Eisenstat — Email
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2595

John Nowell Estes III — Email
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005

Carmen Louis Gentile — Email
Bruder, Gentile & Marcoux, LLP
1701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20006-5807

Joseph Charles Hall — Email
Eversheds Sutherland (US) LLP
700 6th Street, NW
Suite 700
Washington, DC 20001-3980

Dennis James Hough Jr. — Email
Duane Morris LLP
505 9th Street, NW
Suite 1000
Washington, DC 20004-2166

Rabeha Shereen Kamaluddin — Email
Dorsey & Whitney LLP
1801 K Street, NW
Suite 750
Washington, DC 20006

Victoria Marie Lauterbach — Email
Wright & Talisman, PC
1200 G Street, NW
Suite 600
Washington, DC 20005-1200

Ilia Levitine — Email
Duane Morris LLP
505 9th Street, NW
Suite 1000
Washington, DC 20004-2166

Neil Lawrence Levy — Email
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006-4706

Cortney Madea — Email
NRG Energy, Inc.
804 Carnegie Center Drive
Princeton, NJ 08540

Paul Alessio Mezzina — Email
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006-4706

Erin Margaret Murphy — Email
Midcontinent Independent System Operator, Inc.
720 City Center Drive
Carmel, IN 46032

Floyd L. Norton — Email
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

G. Philip Nowak — Email
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036-1564

Joelle Kay Ogg — Email
DC Energy, LLC
8065 Leesburg Pike
6th Floor
Vienna, VA 22182

Debra Ann Palmer — Email
Reed Smith LLP
1301 K Street, NW
Suite 1000, East Tower
Washington, DC 20005-3317

Ashley Charles Parrish — Email
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006-4706

Alan I. Robbins — Email
Jennings, Strouss & Salmon, PLC
Suite 801
1350 I Street, NW
Suite 810
Washington, DC 20005

Steven Jay Ross — Email
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Abraham Silverman — Email
NRG Energy, Inc.
804 Carnegie Center Drive
Princeton, NJ 08540

Ruta Kalvaitis Skucas — Email
Pierce Atwood, LLP
1875 K Street, NW
Suite 700
Washington, DC 20006

Carol A. Smoots — Email
Pierce Atwood, LLP
1875 K Street, NW
Suite 700
Washington, DC 20006

Regina Y. Speed-Bost — Email
Reed Smith LLP
1301 K Street, NW
Suite 1000, East Tower
Washington, DC 20005-3317

C. Fairley Spillman — Email
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036-1564

Stephen Matthew Spina — Email
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

Alan J. Statman — US Mail
Wright & Talisman, PC
1200 G Street, NW
Suite 600
Washington, DC 20005-1200

Philip J. Steger — Email
Dorsey & Whitney LLP
50 South Sixth Street
Suite 1500
Minneapolis, MN 55402

David R. Straus — Email
Thompson Coburn LLP
1909 K Street, NW
Suite 600
Washington, DC 20006-1167

David G. Tewksbury — Email
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006-4706

Wendy Barrett Warren — Email
Wright & Talisman, PC
1200 G Street, NW
Suite 600
Washington, DC 20005-1200

Robert A. Weishaar Jr. — Email
McNees, Wallace & Nurick
1200 G Street, NW
Suite 800
Washington, DC 20005

Michael J. Wentworth — Email
Blank Rome LLP
1825 Eye Street, NW
Washington, DC 20006-5403

Brett Kyle White — Email
Wright & Talisman, PC
1200 G Street, NW
Suite 600
Washington, DC 20005-1200

Elizabeth Ward Whittle — Email
Nixon Peabody LLP
799 9th Street, NW
Suite 500
Washington, DC 20001-4501

Raymond Wuslich
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006-3817

Email

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: 202 502-8466
Fax: 202 273-0901
Email: elizabeth.rylander@ferc.gov

PARTIAL LIST OF PROCEEDINGS AND ORDERS CONCERNING THE GUARANTEE RATE AND GUARANTEE CHARGE

	Tariff proceeding (§ 205)	Compliance orders (Apr. 2007 Filing) (§ 205)	Complaint orders (§206)	Orders on paper hearing (§ 206)
Apr. 2006	115 FERC ¶ 61,108 (Guarantee Order)			
Oct. 2006	117 FERC ¶ 61,113 (1st Rehearing Order)			
Mar. 2007	118 FERC ¶ 61,212 (2d Rehearing Order)			
Nov. 5, 2007	121 FERC ¶ 61,131 (3d Rehearing Order)*	121 FERC ¶ 61,132 (2d Compliance Order)*		
Nov. 28, 2007			121 FERC ¶ 61,205 (Complaint Order)*	
Nov. 7, 2008		125 FERC ¶ 61,156 (4th Rehearing Order)*		
Nov. 10, 2008			125 FERC ¶ 61,162 (Complaint Rehearing Order)*	125 FERC ¶ 61,161 (Paper Hearing Order)*
May 2009				127 FERC ¶ 61,121 (1st Paper Rehearing Order)
June 2009		127 FERC ¶ 61,241 (5th Rehearing Order)		
May 2016		155 FERC ¶ 61,126 (6th Rehearing Order)		155 FERC ¶ 61,124 (2d Paper Rehearing Order)

***Orders that were not challenged in these petitions for review**