ORAL ARGUMENT NOT YET SCHEDULED

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

No. 17-1275

EXELON CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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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 Brief of Petitioner.

B. Rulings Under Review

1. Order Accepting Tariff Filing, Subject to Condition, *ISO New England, Inc.*, 155 FERC ¶ 61,029 (Apr. 12, 2016), R. 50, JA 156; and

2. Order Denying Rehearing and Request for Clarification, *ISO New England, Inc.*, 161 FERC ¶ 61,115 (Oct. 20, 2017), R. 80, JA 216.

C. Related Cases

This case has not previously been before this Court or any other court. This Court previously considered petitions for review of earlier Commission orders that established rules for competitive auctions in the ISO New England regional electricity capacity market, in *Maine Public Utilities Commission v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), *rev'd in part sub nom. NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 558 U.S. 165 (2010), *on remand, New England Power Generators Association v. FERC*, 707 F.3d 364 (D.C. Cir. 2013), and that made changes to the capacity market rules, in *New England Power Generators Association v. FERC*, 757 F.3d 283 (D.C. Cir. 2014); *New England Power Generators Association v. FERC*, 881 F.3d 202 (D.C. Cir. 2018); and *NextEra Energy Resources, LLC, et al. v. FERC*, Case No. 17-1110, 2018 WL 3625395 (D.C. Cir. July 31, 2018).

Two other recent cases have involved the results of ISO New England capacity auctions: *Public Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016) (dismissing, for lack of jurisdiction, appeal concerning the results of the eighth capacity auction); *Utility Workers Union of America Local 464, et al. v. FERC*,

Case Nos. 16-1068 and 16-1408, 2018 WL 3542631 (D.C. Cir. July 24, 2018) (concerning results of the ninth and tenth auctions).

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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**

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

TABLE OF AUTHORITIES

STATUTES: **PAGE**

OTHER MATERIALS:

TABLE OF AUTHORITIES

OTHER MATERIALS (continued): **PAGE**

GLOSSARY

Br.	Opening brief of Petitioner Exelon Corporation
Commission or FERC	Respondent Federal Energy Regulatory Commission
Devon Power 2006	*Devon Power LLC*, 115 FERC ¶ 61,340 (2006)
Devon Power 2011	*Devon Power LLC*, 137 FERC ¶ 61,073 (2011)
Exelon	Petitioner Exelon Corporation
FPA	Federal Power Act
ISO New Eng. 2014	*ISO New Eng. Inc.*, 146 FERC ¶ 61,014 (2014)
JA	Joint Appendix
Market Monitor	ISO New England's Internal Market Monitor
P	Paragraph in a FERC order
Rehearing Order	Order Denying Rehearing and Request for Clarification, *ISO New Eng. Inc.*, 161 FERC ¶ 61,115 (Oct. 20, 2017), R. 80, JA 216
System Operator	ISO New England Inc. (commonly called ISO-NE), the independent system operator that operates the electrical grid and energy markets in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont
Tariff Order	Order Accepting Tariff Filing, Subject to Condition, *ISO New Eng. Inc.*, 155 FERC ¶ 61,029 (Apr. 12, 2016), R. 50, JA 156

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

This is the latest in a series of cases concerning the ongoing efforts of the Commission, regional transmission operators, and wholesale electricity market participants to create and implement rate designs that promote the development of sufficient resources and that reasonably allocate costs among market participants. The orders on review involve rules for New England's regional capacity market that are designed to prevent the exercise of market power. The regional system operator, ISO New England Inc. ("System Operator"), proposed market reforms

that included creating a new category of retirement bids for capacity resources to exit the market, subject to review and potential mitigation by the System Operator's market monitor to prevent the exercise of market power through uneconomic retirement. The Commission approved the proposal in the challenged orders.

The question presented on appeal is:

Whether that process for mitigating retirement bids deprives capacity suppliers of rate-filing rights under section 205 of the Federal Power Act, 16 U.S.C. § 824d.

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

Section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). It includes the power to set rates for electricity capacity, either directly or indirectly through a market mechanism, and to review capacity requirements that

affect those rates. *See Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 482-84 (D.C. Cir. 2009) ("*Connecticut*").[1]

All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA § 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e).

Section 206 of the Federal Power Act, 16 U.S.C. § 824e, authorizes the Commission, on its own initiative or on a third-party complaint, to investigate whether existing rates are lawful. In such a proceeding, the complainant bears "the burden of proof to show that any rate . . . is unjust, unreasonable, unduly discriminatory, or preferential . . . ." FPA § 206(b), 16 U.S.C. § 824e(b); *see also Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (stating complainant's burden of proof). If the Commission finds that the burden has been met, it must determine and set the new just and reasonable rate. FPA § 206(a), 16 U.S.C. § 824e(a).

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

B. Developing Supplier Competition And Regional Markets

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

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

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

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

These regional entities also run auction markets for wholesale electricity sales. *See FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 762-63 (2016). Such organized regional markets are subject to FERC market rules that help mitigate the exercise of market power, to price caps in some instances, and to oversight of market behavior and conditions by the Commission and by regional entities' own market monitors. *See, e.g.*, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904, FERC Stats. & Regs. ¶ 31,252, 119 FERC ¶ 61,295 at P 955 (2007), *on reh'g and clarification*, Order No. 697-A, 73 Fed. Reg. 25,382, FERC Stats. & Regs. ¶ 31,268, 123 FERC ¶ 61,055 at P 395 (2008), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011); *Old Dominion Elec. Coop. v. FERC*, No. 16-1111, 2018 WL 2993205 at *3 (D.C. Cir. June 15, 2018) ("Commission regulations require transmission organizations . . . to self-monitor their markets").

The System Operator, ISO New England Inc., is the regional entity that operates the regional transmission system and administers bid-based energy markets across six northeastern States (Connecticut, Maine, Massachusetts, New

Hampshire, Rhode Island, and Vermont). *See generally NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 796 (D.C. Cir. 2007).

II. THE NEW ENGLAND REGIONAL CAPACITY MARKET

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

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

That shift has been particularly pronounced in New England. *See* ISO New England, Inc. Internal Market Monitor, *2014 Annual Markets Report* at 3-4 (May 20, 2015), https://www.iso-ne.com/static-assets/documents/2015/05/2014-amr.pdf. In 1990, natural gas-fired plants produced only 5 percent of the electricity consumed in New England, and coal-fired plants produced 18 percent. *Id.* at 3 n.7. By 2012, gas-fired plants' share had increased to 51 percent, and coal-fired plants'

share had decreased to about 6 percent. *Id.* At the same time, renewable resources, primarily wind and solar generation, have made up a larger share of total new generating resources. *See* https://www.eia.gov/todayinenergy/detail.php?id=30112.

In the middle of this transition, the regulatory paradigm fundamentally changed for wholesale suppliers of electricity in New England. Prior to 2006, decisions about the adequacy of utilities' resource fleets were made by a voluntary association of the region's electric utilities. *See Connecticut*, 569 F.3d at 479 (describing history of New England's resource adequacy construct). That approach, by design, procured more resources than the region needed to maintain reliability. *See Devon Power LLC*, 115 FERC ¶ 61,340, P 20 n.27 ("*Devon Power 2006*"), *on reh'g*, 117 FERC ¶ 61,133, P 100 (2006) (noting region-wide capacity surplus).

Recognizing the disadvantages of that model, the region's stakeholders, including the New England states, chose to abandon it in favor of competitive market forces. *See Connecticut*, 569 F.3d at 479-80. As a result, the System Operator implemented a wholesale market for electricity capacity — the forward capacity market — that was specifically intended to maintain reliability by attracting adequate resources at the least cost. *Id.* at 480.

B. The Forward Capacity Market

Having ruled on numerous appeals concerning new energy market rate designs over the last decade, this Court is well-acquainted with the problems of maintaining system reliability, especially in areas of high demand along the eastern seaboard, and with the various mechanisms that the Commission has approved in regional markets (including New England) for the purpose of promoting reliability. *See Connecticut*, 569 F.3d 477 (capacity market in New England); *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) ("*Maine*") (same) (reversed in one unrelated respect in *NRG Power Mktg.*, 558 U.S. 165); *Blumenthal*, 552 F.3d 875 (transition to capacity market in New England); *New Eng. Power Generators Ass'n v. FERC*, 707 F.3d 364 (D.C. Cir. 2013) (standard for review of auction rates); *New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283 (D.C. Cir. 2014) (additional mitigation measures for capacity market); *New Eng. Power Generators Ass'n v. FERC*, 879 F.3d 1192 (D.C. Cir. 2018) (interaction between pricing mechanisms in energy and capacity markets); *New Eng. Power Generators Ass'n v. FERC*, 881 F.3d 202 (D.C. Cir. 2018) (capacity market rules). *See also, e.g.*, *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283 (D.C. Cir. 2011) (transitional capacity auctions in mid-Atlantic region); *Pub. Serv. Elec. & Gas Co. v. FERC*, 324 F. App'x 1 (D.C. Cir. 2009) (mid-Atlantic capacity market); *Elec. Consumers*

Res. Council v. FERC, 407 F.3d 1232 (D.C. Cir. 2005) (capacity market in New York).

The Commission approved New England's forward capacity market as part of a settlement agreement among regional stakeholders in 2006. *See Maine*, 520 F.3d at 469; *Connecticut*, 569 F.3d at 480. The System Operator administers the capacity market using an auction mechanism pursuant to the rules adopted in that agreement, which are set forth in its FERC-jurisdictional tariff ("Tariff"). Load-serving entities in New England purchase options to buy quantities of energy (i.e., capacity) three years in advance. *See Blumenthal*, 552 F.3d at 879; *see generally NRG Power Mktg.*, 558 U.S. at 168-72 (describing New England's capacity market). A forward capacity market encourages the entry of new suppliers; the lag time between auctions and delivery allows competition from new suppliers that lack the installed capacity to deliver electricity now but could develop that capacity within three years of winning a bid. *See Md. Pub. Serv. Comm'n*, 632 F.3d at 1285 (dismissing challenge to a pricing model designed to encourage increased investment in capacity); *see also Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 12 (D.C. Cir. 2015) (explaining that capacity payments provide revenues to maintain operations of existing generation resources and to encourage development of new resources); *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 82-83 (3d Cir. 2014) ("Capacity auctions, also, at least in theory, incentivize the

development of new generation resources by establishing a market-based means by which those resources can recover their investment costs.").

Capacity prices are set through the annual forward capacity auction. First, the System Operator "determines the net amount of capacity required by the region." *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1168 (D.C. Cir. 2016) (citing *ISO New Eng. Inc.*, 148 FERC ¶ 61,201, P 2 (2014)). The capacity auction is a descending price auction under which generators and other suppliers willing to provide capacity submit bids reflecting the price at which they are willing to supply capacity. *Id.*; *see also Connecticut*, 569 F.3d at 480 (describing auction). Each bid reflects the lowest price the bidding resource will accept before it leaves the capacity market for that year (called a "de-list" bid). *See New Eng. Power Generators*, 757 F.3d at 298 (explaining bidding process); *ISO New Eng.*, 148 FERC ¶ 61,201, P 2 (describing capacity auction process). Any bid that "clears" the auction receives the regional auction-clearing price. *See New Eng. Power Generators*, 757 F.3d at 298. New England's capacity market also includes a locational component, conducting auctions in different zones based on transmission constraints between subregions. *See id.* at 298-99; *Maine*, 520 F.3d at 469.

The System Operator conducts the annual capacity auction to procure capacity commitments for a 12-month period ("Capacity Year") from June 1

through May 31. *See Devon Power 2006* P 16. The results of the capacity auctions are as follows:

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

10	2016	2019-2020	$7.03
11	2017	2020-2021	$5.30
12	2018	2021-2022	$4.63

* Indicates downward mitigation of price

See ISO New England Inc., *Key Grid and Market Stats: Markets*, https://iso-ne.com/about/key-stats/markets (last visited July 2, 2018).

C. Procedures For Reviewing Bids And Exits Before Each Auction

New England's capacity auction mechanism includes features to prevent the exercise of either buyer-side or supplier-side market power. *See New Eng. Power Generators*, 757 F.3d at 287; *Devon Power 2006* at P 27. Prior to each capacity auction, the System Operator is required to conduct a detailed review of all resources that seek to enter, remain in, or exit the capacity market. *See ISO New Eng. Inc.*, 146 FERC ¶ 61,014 at P 4 (2014) ("*ISO New Eng. 2014*"). To that end, the System Operator's Internal Market Monitor[2] reviews all of the auction bids and

[2] The System Operator has both an Internal Market Monitor, which is a department within the System Operator responsible for detecting and mitigating anticompetitive behavior in the regional markets, and an External Market Monitor, an outside entity that prepares assessments and reports on the markets and reviews the quality of the Internal Market Monitor's mitigation efforts. *See* ISO New England Inc., *Market Monitoring and Mitigation: Internal Market Monitor*, https://www.iso-ne.com/markets-operations/market-monitoring-mitigation/internal-monitor/; ISO New England Inc., *Market Monitoring and Mitigation: External Market Monitor*, https://www.iso-ne.com/markets-

proposes mitigation of bids according to the Tariff. After the System Operator and Market Monitor conduct their review, the System Operator is required to submit a filing with the Commission describing the results of the qualification process and establishing the parameters of the upcoming auction. *See ISO New Eng. 2014* P 2. The System Operator then runs the auction using those parameters and submits the auction results to the Commission in yet another filing under Federal Power Act section 205. *See, e.g.*, *Pub. Citizen*, 839 F.3d at 1174 (dismissing, on jurisdictional grounds, appeals concerning the results of the eighth capacity auction); *Util. Workers Union of Am. Local 464 v. FERC*, Nos. 16-1068, *et al.* 2018 WL 3542631 (D.C. Cir. July 24, 2018) (appeals of orders accepting results of the ninth and tenth capacity auctions).

Under the Tariff, there are multiple types of exit bids. *See ISO New Eng. 2014* P 4 n.7. For example, resources may submit "static de-list bids" to leave the capacity market for just one year; a supplier must submit such a bid before the auction, subject to review by the Market Monitor. *See New Eng. Power Generators*, 757 F.3d at 287-88. A "dynamic de-list bid" allows a resource to exit during the auction without such review. *See id.*

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operations/market-monitoring-mitigation/external-monitor/. In this Brief, "Market Monitor" refers to the Internal Market Monitor.

Prior to the orders challenged in this case, the Tariff provided only two ways for a resource to leave the capacity market permanently: (1) submit a "permanent de-list bid" stating the auction price below which the resource would exit the capacity market but continue to participate in the System Operator's other markets; or (2) submit a retirement request (a "Non-Price Retirement Request"), to retire all or part of a capacity resource prior to the capacity year associated with the relevant capacity auction. *See ISO New Eng., Inc.*, 155 FERC ¶ 61,029, P 2 (2016), R. 50, JA 156 ("Tariff Order"). Both of these departure options were governed by rules imposing strict procedural and substantive requirements on the resource owner, and those requirements were tied directly to the annual auction in which the departure was sought. *See ISO New Eng. 2014* PP 2-4 (discussing Tariff provisions).

The Internal Market Monitor would review every exit bid for consistency with the cost limits in the Tariff, and the System Operator would review all retirement requests for reliability implications. The Tariff allowed the System Operator to attempt to negotiate an out-of-market contract if the retirement raised reliability concerns, but it could not require the continued operation of the resource. Tariff Order P 2, JA 157.

III. THE COMMISSION PROCEEDINGS AND ORDERS

A. The System Operator's Proposed Retirement Reforms

In December 2015, the System Operator submitted revisions to its Tariff to modify the capacity market rules. *See* ISO New England Transmittal Letter at 1, R. 1, JA 20. Specifically, the System Operator proposed reforms that were intended "to provide a means for capacity suppliers to price the potential retirement of existing resources and to address market power issues that can be associated with the retirement of existing resources in certain circumstances." *Id.*

In recent years, the previous excess supply of capacity in New England has "effectively disappeared." *Id.* at 7, JA 26. The System Operator and its Internal and External Market Monitors concluded that new market rules were needed to address the potential for uneconomic retirement of an existing resource — that is, retirement of a resource that is still profitable — to reduce supply and increase prices to benefit the rest of the supplier's resource portfolio. *Id.*; *see also id.* n.14 (citing reports by External Market Monitor); Prepared Testimony of Jeffrey D. McDonald at 3-6, R. 1, JA 46, 48-51 (testimony of Internal Market Monitor).

The System Operator proposed a new type of bid to replace the Non-Price Retirement Request. The new Retirement De-List Bid (for a resource to exit all regional markets permanently) would reflect the net present value of the resource, using a discounted cash flow approach to account for the resource's remaining

economic life, plus operating and capital costs. The same approach would also apply to the existing Permanent De-List Bid (for a resource to exit only the capacity market); both types are now called Retirement Bids (to which this brief will refer without capitalization). *See* Transmittal Letter at 6, 8, JA 25, 27.

All retirement bids would be reviewed by the Internal Market Monitor. As with static de-list bids, the Market Monitor would consult with the supplier about the underlying cost assumptions and would issue a determination on the appropriateness of the bid. The System Operator would then include either the supplier's bid or a mitigated bid developed by the Market Monitor in its pre-auction informational filing to the Commission under section 205 of the Federal Power Act, 16 U.S.C. § 824d. *See* Transmittal Letter at 12-13, JA 31-32. The System Operator noted that this process — review by the Market Monitor followed by the System Operator's filing for review by the Commission — was already employed for "a variety of [forward capacity market] auction inputs," including permanent and static de-list bids. *See id.* at 13, JA 32.

Following the review process, a capacity supplier would have three options: (1) to participate in the auction with its retirement bid, as determined through the mitigation review process; (2) to retire the resource unconditionally, as under the existing rules (but the System Operator could mitigate the impact on the market by using the approved bid as a proxy de-list bid in the auction); or (3) to conditionally

retire or permanently de-list, meaning the resource can stay in the market if the auction clears above its original (unmitigated) bid, or retire if it does not. *See id.* at 11-12, JA 30-31.

B. The Tariff Order

On April 12, 2016, the Commission issued the Tariff Order, in which it largely accepted the System Operator's proposal. The Commission considered a number of aspects of the reforms that are not challenged on appeal. *See* Tariff Order PP 27-32, JA 163-65 (need for reform); PP 33-44, JA 165-69 (over-mitigation); PP 45-64, JA 169-78 (Market Monitor review); PP 65-77, JA 178-83 (pricing); PP 86-95, JA 187-91 (binding retirement bids). As to filing rights, the Commission found that the new mitigation process for retirement bids "is simply incorporated into the existing [Market Monitor] mitigation function" that market participants agreed to adopt in the 2006 settlement, and which provides suppliers with an opportunity to dispute any proposed mitigation before the Commission. *Id.* PP 78-85, JA 183-87. The Commission also conditioned its acceptance on the inclusion of a materiality threshold to limit mitigation to retirement bids that differ significantly from the Market Monitor's calculation. *See id.* P 62, JA 177.[3]

[3] In a subsequent compliance order, the Commission accepted the System Operator's proposal of a 10-percent threshold. *ISO New Eng. Inc.*, 156 FERC ¶ 61,067 (2016).

C. The Rehearing Order

Exelon, together with the New England Power Generators Association and another individual supplier, timely filed a Request for Rehearing and Clarification, R. 53, JA 192 ("Rehearing Request"). On October 30, 2017, the Commission denied rehearing on all issues. *ISO New Eng., Inc.*, 161 FERC ¶ 61,115 (2017), R. 80, JA 216 ("Rehearing Order"). The Commission devoted most of its response to the only issue now presented on appeal — suppliers' filing rights under section 205 of the Federal Power Act, 16 U.S.C. § 824d. As discussed more fully in the Argument, *infra*, the Commission found that the mitigation process for retirement bids did not fundamentally alter the existing bid review process in a manner that infringed on suppliers' rights, and went on to explain that it expected the process to be flexible and reasonable. *See* Rehearing Order PP 12-23, JA 220-26.

This appeal 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 electricity markets. More specifically, this case is about market power — growing concerns about the possibility of regional market manipulation in resource retirements, and revision of pre-auction review and mitigation processes to include new exit options. In the challenged orders, the Commission appropriately

considered all parties' arguments in the context of the New England capacity market and its own policy judgments, and properly exercised its responsibilities under the Federal Power Act.

The orders on review rest on two key principles underlying auction-based markets in general and the New England capacity market in particular: first, that market-based rates, including auction mechanisms, can meet the Federal Power Act's requirement of "just and reasonable" rates (FPA § 205(a), 16 U.S.C. § 824d(a)) only if they are free from the exercise of market power; and second, that resource bids and mitigation are inputs to the auction mechanism, which determines the System Operator's wholesale rate for capacity.

From the outset of market-based ratemaking, courts have found the absence of market power determinative. For the Commission to find that market forces will produce just and reasonable rates, it must find that any potential market power has been mitigated. In the context of auction-based markets, courts and the Commission have approved various rules and review processes to guard against anticompetitive behavior that could distort market prices. Here, the Commission reasonably agreed with the System Operator that the potential exercise of market power through uneconomic retirement justified the proposed reforms.

The Commission further found that the revised process for reviewing and mitigating retirement bids was similar to the existing process for mitigating some

other exit bids, and did not fundamentally alter that process in a way that infringed on suppliers' rate-filing rights. Bids into the capacity auction, including retirement bids and mitigated bids, are inputs into the auction mechanism under the System Operator's Tariff; together with the input for regional demand and the auction parameters under the Tariff, those inputs produce the System Operator's wholesale capacity rate, not rates for individual suppliers. For that reason, this Court's opinion in *Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) — which upheld utilities' statutory right to file changes to their own rates — is inapposite.

Furthermore, the Commission addressed the mitigation process at length, explaining the flexibility of the cost analysis, limitations on the Market Monitor's review, and the Commission's own approach in considering informational filings. The Commission's orders effectuate its responsibilities under the Federal Power Act, by striking an appropriate balance between protecting suppliers' rights and interests and ensuring that the New England capacity market produces just and reasonable rates.

ARGUMENT

I. STANDARD OF REVIEW

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

FERC, 165 F.3d 944, 948 (D.C. Cir. 1999). The "scope of review under [that] standard is narrow." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (citation omitted). The relevant inquiry is whether the agency has "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 287 (D.C. Cir. 2006) ("[Because] matters of rate design . . . are technical and involve policy judgments at the core of FERC's regulatory responsibilities . . . the court's review of whether a particular rate design is just and reasonable is highly deferential."). The Commission's policy assessments also are afforded "great deference." *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). *See also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014) ("the Commission must have considerable latitude in developing a methodology responsive to its regulatory challenge") (internal quotation marks and citations omitted); *New Eng.*

Power Generators, 757 F.3d at 293 (court "properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions") (internal quotation marks and citation omitted).

"[Where] the Commission's interpretation of the [Federal Power] Act's requirements is reasonable, [courts] defer to its judgment." *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 665 (D.C. Cir. 2017). This Court also "defer[s] to the Commission's interpretations of its own precedents." *NSTAR Elec. & Gas*, 481 F.3d at 799.

II. REVIEW AND MITIGATION OF POTENTIAL MARKET POWER IN RETIREMENT BIDS ARE NECESSARY TO ENSURE THAT MARKET-BASED RATES ARE JUST AND REASONABLE

This Court has long held that the reasonableness of market-based rates depends on the absence of market power. Indeed, concern about market power precedes the advent of auction-based electricity markets. In an early case upholding market-based pricing under the Natural Gas Act, the Commission found that a pipeline's markets were sufficiently competitive to preclude it from exercising significant market power; on appeal, this Court agreed that the "market discipline" imposed by competition would hold prices to just and reasonable levels. *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993), *cited in Blumenthal*, 552 F.3d at 882.

Following that economic principle, courts have consistently maintained that, to allow market-based pricing instead of cost-of-service rates, the Commission must determine that sellers "do not have, or adequately have mitigated, market power . . . ." *Blumenthal*, 552 F.3d at 882 (citing cases); *see also Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012-13 (9th Cir. 2004) (citing cases); *Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 917 (9th Cir. 2011) (upholding policy on market-based ratemaking because the Commission "has adopted a rigorous screening process to detect market power"). Moreover, even after initial approval of market-based rates, the Commission must continue to monitor markets for anticompetitive behavior. *See Blumenthal*, 552 F.3d at 882 (finding that the Commission "reasonably relied on its continuing oversight of the New England market to guard against potential abuses of market power"); *Mont. Consumer Counsel*, 659 F.3d at 919 (with screening for market power and ongoing oversight, Commission meets its statutory obligation to ensure that rates are just and unreasonable); *cf. Lockyer*, 383 F.3d at 1014 (finding that the Commission had not rigorously followed its post-approval reporting requirements for market-based transactions during the Western energy crisis in 2000-2001). Thus, mitigating market power is central to the Commission's oversight of market-based rate designs: "Ensuring markets are producing just and reasonable rates is the

Commission's responsibility, which responsibility includes the exercise of mitigation when appropriate." Tariff Order at P 85 n.123, JA 187.

This is necessary context for the orders on review. The tightening supply of capacity in New England created structural opportunities for exercises of market power; a supplier could exercise market power by retiring from the market, "thereby affecting all other resources participating in the market . . . ." Rehearing Order P 16, JA 223; Tariff Order P 32, JA 165 (noting that both the Internal Market Monitor and the External Market Monitor had "identified a potential inefficiency" in the forward capacity market: "a deficiency in the mitigation scheme that allows a resource owner to engage in physical withholding by retiring a profitable resource"). *See generally* Transmittal Letter at 7, JA 26 (explaining concerns of the System Operator and its Internal and External Market Monitors and consideration of mitigation reforms with stakeholders). The System Operator developed mitigation rules to address the potential for uneconomic retirement of capacity resources "in order to ensure that the Forward Capacity Market remains workably competitive." Transmittal Letter at 7, JA 26; *see also* Rehearing Order P 3, JA 217 (the System Operator "proposed changes to mitigate market power that could potentially be exercised through premature retirement of an economic resource to increase capacity prices"). The System Operator's proposal, and the Commission's approval thereof, went to the fundamental principle that potential

exercises of market power could result in a capacity auction rate that would not be just and reasonable under the Commission's and courts' precedents.

Consistent with such precedents, the New England capacity market construct has, from its inception, included a variety of rules "to address high concentrations of market power" among both buyers and sellers. *Devon Power 2006* P 27; *see also New Eng. Power Generators*, 757 F.3d at 291 ("As it is FERC's obligation to ensure that rates are appropriate, we must respect its decision to maintain just and reasonable rates through curbing or mitigating buyer-side market power."); *see generally Elec. Power Supply Ass'n*, 136 S. Ct. at 779 (addressing pricing problems in the wholesale electricity market "falls within the sweet spot of FERC's statutory charge"). Some rules were designed to minimize incentives to manipulate the market, such as by limiting types of bids that can set the auction clearing price and by setting an administratively-determined price under certain conditions. *See Devon Power 2006* P 27. Other rules provided for the Market Monitor to review suppliers' bids above or below specified price thresholds, including certain types of de-list bids. *See id.* P 28; *see also ISO New Eng. Inc.*, 135 FERC ¶ 61,029, P 323 (2011) (accepting revised procedures for review and mitigation of de-list bids), *aff'd sub nom. New Eng. Power Generators*, 757 F.3d at 287-88, 298 (discussing mitigation rules). As discussed *infra*, the Commission reasonably concluded that the System Operator's process for mitigating retirement

bids was similar to the existing process for reviewing and mitigating other de-list bids that raised market power concerns.

III. THE SYSTEM OPERATOR'S REVIEW AND MITIGATION PROCESS IS CONSISTENT WITH THE RATE FILING PROVISIONS OF THE FEDERAL POWER ACT

Exelon's challenge to the orders on appeal is premised on its asserted right to file its own rate for providing capacity. *See, e.g.*, Br. 1-2, 26-27. But the bids of suppliers such as Exelon are not rates; rather, they are inputs into the auction mechanism that produces the System Operator's rate. All capacity purchasers pay, and all capacity suppliers receive, the auction clearing price — not the prices bid by individual suppliers.

The New England capacity market is a construct of FERC-approved rules that govern the components of suppliers' bids, the determination of the amount of demand, the conditions on entry into and exit from the market, and the selection of resources. Suppliers submit bids that function as inputs into that mechanism. *See* Rehearing Order PP 13, 15, JA 220, 222 (suppliers' bids are inputs to the System Operator's rate); *see also id.* P 16, JA 223 (the Market Monitor's mitigation also is an input). The amount of capacity needed in the region is another input. *See Maine*, 520 F.3d at 480 ("The Forward Market simply takes the capacity requirement as a given and uses it as an input into the auction mechanism."); *accord Connecticut*, 569 F.3d at 478. The System Operator applies the rules of the

mechanism using those inputs to generate a single capacity price to be paid to all resources that are selected in the auction. That resulting price is the wholesale rate of the System Operator, charged to all load-serving entities under the System Operator's tariff — not the rate of any individual supplier. *See* Rehearing Order PP 13, 17, JA 220, 223; *see also* Br. 44 (agreeing that the auction clearing price "is an administrative construct that does not represent any particular supplier's bid"); *Devon Power LLC*, 137 FERC ¶ 61,073 at P 21 (2011) ("*Devon Power 2011*") ("the rates produced by the forward capacity auction are . . . determined unilaterally by the [System Operator's] tariff"), *aff'd sub nom. New Eng. Power Generators*, 707 F.3d 364.

In addition, the Commission has previously found that "[t]he results of the capacity auctions . . . do not constitute contracts between buyers and sellers." *Devon Power 2011* P 22. The utilities purchasing capacity "have no role in the auction at all," but merely pay the System Operator "a standard rate" generated by the tariff mechanism. *Id.* P 23. Therefore, Exelon also is mistaken in arguing that the System Operator is "a mere 'middleman'" in arranging contracts between capacity suppliers and customers. Br. 42 (quoting *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1195 (D.C. Cir. 2005)); *see also* Br. 10. Indeed, Exelon bases its claim on a case that *predates* the adoption of the forward capacity auction in New England. *PPL Wallingford* described the System Operator's role in

matching bids in the New England Power Pool, on review of Commission orders from 2003 — prior to the 2006 approval of the capacity market settlement. *See* 419 F.3d at 1195-97. Moreover, Exelon's argument directly contradicts precedent that *does* address the New England capacity market: "[I]t cannot be said that [the System Operator] is acting as an agent for capacity buyers." *Devon Power 2011* P 24. Purchases through the auction "are made unilaterally via [the System Operator's] tariff" and the System Operator "is at the center of this capacity market." *Id.* (The Commission, in its Rehearing Order (at P 13 n.12), relied on *Devon Power 2011* for this very point, yet Exelon ignores that precedent entirely.)

Accordingly, the capacity market construct — in which individual suppliers' bids are inputs into the auction mechanism, and exercise of market power would affect all other suppliers participating in the market — is distinctly different from cost-of-service rates that an individual supplier might file with the Commission under section 205 of the Federal Power Act, 16 U.S.C. § 824d. *See* Rehearing Order P 16 & n.20, JA 223. That auction mechanism is likewise distinctly different from the transmission service rates at issue in *Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002). *See* Rehearing Order P 13, JA 220.

In that case, the Court held that transmission-owning utilities could not be deprived of their rights, under section 205 of the Federal Power Act, to file changes to the rates and terms of transmission service that an independent system

operator provided using their facilities. *Atl. City*, 295 F.3d at 9-10. But because capacity suppliers' bids are *not* rates, but inputs into the auction construct that is used to generate the System Operator's wholesale rate, *Atlantic City* is inapposite. *See* Rehearing Order P 13, JA 220.

In addition, *Atlantic City* arose from a wholly involuntary surrender of filing rights. In entering into an agreement to join an independent system operator, the transmission owners had, in fact, agreed to some limitations on their filing rights, but they objected to the Commission's requirement that they give up all authority to file unilateral changes to rate design, terms, or conditions of jurisdictional services. *See* 295 F.3d at 6-7, 9. Thus, *Atlantic City* allows for a party's voluntary compromise of its filing rights — the Court rejected the Commission's attempt to *compel* the elimination of such rights. *See id.* at 11 ("Of course, utilities may choose to voluntarily give up, by contract, some of their rate-filing freedom under section 205."). Here, the Commission reasonably found the System Operator's proposal to be closer to the former than the latter, explaining that the mitigation of retirement bids was "simply incorporated into" the existing bid mitigation process to which market participants had agreed in the settlement that adopted the auction-based, market-based forward capacity market. Tariff Order P 85, JA 186.

For that reason, the Commission properly concluded that the proposed process for mitigating retirement bids did not "fundamentally alter the process in a

manner that infringes on" suppliers' filing rights under section 205 of the Federal Power Act. Rehearing Order P 15, JA 222. First, retirement bids will be subject to the same Market Monitor review process — employed since the inception of the capacity auction (*see id.* P 14, JA 221; *supra* pp. 12-13) — that already applied to static de-list bids: the Market Monitor will consult with the supplier on the reasonableness of its cost assumptions, then issue its determination as to whether the bid should be mitigated. *See* Rehearing Order P 14, JA 221; Tariff Order PP 7, 74, 85, JA 158, 182, 187. The process allows for "flexibility in the submitted forecasts and inputs of a Retirement Bid, so long as a supplier can show that those forecasts and inputs are reasonable." Tariff Order P 58, JA 175. The Commission expected the process "will initiate a dialogue" between suppliers and the Market Monitor. *Id.*; *see id.* PP 59-63, JA 175-78 (discussing other aspects of the process).

Nor is the Market Monitor's review unfettered. *See* Rehearing Order P 18, JA 224. The Market Monitor will use its own cost estimates only where a supplier has failed to demonstrate the reasonableness of specific cost items. *Id.* P 15 & n.17, JA 222. And the Commission required the System Operator to adopt a "materiality threshold," meaning that the Market Monitor would not substitute a mitigated bid unless the supplier's original bid was at least 10 percent higher than the bid the Market Monitor found to be justified by the supplier's costs. *See id.* ("only those suppliers that fail to demonstrate the reasonableness of their cost

estimates and exceed the materiality threshold will be mitigated"); *ISO New Eng. Inc.*, 156 FERC ¶ 61,067 (2016) (accepting compliance filing with materiality threshold). Any unresolved dispute between a mitigated supplier and the Market Monitor initiating mitigation is subject to filing with and resolution by the Commission. *See* Rehearing Order P 18, JA 224.

This process for submitting retirement bids is much the same as the existing process for static de-list bids. *See, e.g., ISO New Eng. 2014* PP 1, 28-38 (accepting System Operator's pre-auction informational filing; resolving dispute over mitigation of Exelon's static de-list bid). In both processes, the bid filing is an integral part of the mitigation process, given the Commission's responsibility to ensure that markets are producing just and reasonable rates. Tariff Order P 85 & n.123, JA 187. After the Market Monitor completes its review, the System Operator will then submit a single informational filing with the Commission listing all bids for the next auction; if a bid is mitigated the filing will include both the mitigated bid and the supplier's original bid. *See id.* PP 7, 85, JA 158, 187; Rehearing Order P 15, JA 222. Most retirement bids will be reviewed simultaneously because the review "impacts the ultimate auction clearing price for all suppliers." Rehearing Order P 15, JA 222.

Suppliers and other parties may protest the informational filing. *Id.* PP 14, 18, JA 221, 224. In the orders challenged here, the Commission explained its

flexible approach to the process. In particular, the Commission made clear that the tariff provisions do not require it to accept the Market Monitor's mitigated bid as just and reasonable if the supplier's original bid is more accurate. *See id.* P 18, JA 224.

Finally, a supplier has several options if its bid is mitigated: accept the mitigated bid, retire unconditionally, or retire conditionally at its original bid. *See* Tariff Order P 74, JA 182; *supra* pp. 16-17. The Commission emphasized that, under the conditional retirement option, the supplier is required to remain in the market *only* if the auction clears at a price that is at or above the supplier's original (unmitigated) bid. *See* Tariff Order P 61, JA 176. *Cf. New Eng. Power Generators*, 757 F.3d at 299 (noting, in upholding a threshold for mitigation of dynamic de-list bids, that such bids are "but one option in a constellation of strategies available to a supplier in making cost-effective capacity determinations"). The Commission's balanced and well-supported determination that the revised mitigation process is consistent with the Federal Power Act warrants deference from the Court. *See, e.g., Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("Our important but limited role is to ensure that the Commission engaged in reasoned decisionmaking — that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice. FERC satisfied that standard.").

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 2010, in 14-point Times New Roman) and contains 7,140 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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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

have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.[1]

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

[1] See References in Text note below.

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–473, § 4, Oct. 6, 1988, 102 Stat. 2300, provided that: ''The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such complaints may be withdrawn and refiled without prejudice.''

LIMITATION ON AUTHORITY PROVIDED

Pub. L. 100–473, § 3, Oct. 6, 1988, 102 Stat. 2300, provided that: ''Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)) shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act [16 U.S.C. 791a et seq.] to issue an order that (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company. For purposes of this section, the terms 'electric utility companies' and 'registered holding company' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].''

STUDY

Pub. L. 100–473, § 5, Oct. 6, 1988, 102 Stat. 2301, directed that, no earlier than three years and no later than four

years after Oct. 6, 1988, Federal Energy Regulatory Commission perform a study of effect of amendments to this section, analyzing (1) impact, if any, of such amendments on cost of capital paid by public utilities, (2) any change in average time taken to resolve proceedings under this section, and (3) such other matters as Commission may deem appropriate in public interest, with study to be sent to Committee on Energy and Natural Resources of Senate and Committee on Energy and Commerce of House of Representatives.

§ 824f. Ordering furnishing of adequate service

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

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

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

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

(b) Request for inventory and cost statements

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

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

§ 824h. References to State boards by Commission

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

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

(b) Cooperation with State commissions

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

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

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

(June 10, 1920, ch. 285, pt. II, § 209, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

§ 824i. Interconnection authority

(a) Powers of Commission; application by State regulatory authority

(1) Upon application of any electric utility, Federal power marketing agency, geothermal power producer (including a producer which is not an electric utility), qualifying cogenerator, or qualifying small power producer, the Commission may issue an order requiring—

(A) the physical connection of any cogeneration facility, any small power production facility, or the transmission facilities of any electric utility, with the facilities of such applicant,

(B) such action as may be necessary to make effective any physical connection described in subparagraph (A), which physical connection is ineffective for any reason, such as inadequate size, poor maintenance, or physical unreliability,

Exelon Corporation v. FERC **Docket No. ER16-551**
D.C. Cir. No. 17-1275

CERTIFICATE OF SERVICE

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

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