ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 15-1118, 15-1119 and 15-1121 (consolidated)

EMERA MAINE, *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

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APRIL 26, 2016

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the briefs of Petitioners.

B. Rulings Under Review

1. *Coakley v. Bangor Hydro-Elec. Co*., Opinion No. 531, 147 FERC ¶ 61,234 (2014), JA 1;

2. *Coakley v. Bangor Hydro-Elec. Co*., Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), JA 90; and

3. *Coakley v. Bangor Hydro-Elec. Co*., Opinion No. 531-B, 150 FERC ¶ 61,165 (2015), JA 98.

C. Related Cases

A petition for review of orders in a separate FERC complaint proceeding involving the New England Transmission Owners' return on equity is before this Court in *Emera Maine, et al. v. FERC*, No. 15-1212. That proceeding is being held in abeyance pending developments in this appeal and further agency proceedings.

/s/ *Lona T. Perry*
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April 26, 2016

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GLOSSARY

Commission or FERC	The Federal Energy Regulatory Commission
Customers	Braintree Electric Light Department, Hingham Municipal Lighting Plant, Reading Municipal Light Department, Taunton Municipal Lighting Plant, the Connecticut Public Utilities Regulatory Authority, the Attorney General of the Commonwealth of Massachusetts, Massachusetts Municipal Wholesale Electric Company, New Hampshire Electric Cooperative, Inc., the Attorney General for the State of Connecticut, the New Hampshire Public Utilities Commission, the Connecticut Office of Consumer Counsel, the Maine Office of the Public Advocate, the Rhode Island Division of Public Utilities and Carriers, the Associated Industries of Massachusetts, the New Hampshire Office of the Consumer Advocate, the Industrial Energy Consumer Group, and Power Options, Inc.
Incentives Rule	*Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *on reh'g*, 119 FERC ¶ 61,062 (2007)
Initial Decision	*Coakley v. Bangor Hydro-Elec. Co.*, 144 FERC ¶ 63,012 (2013), JA 1111
Opinion No. 531	*Coakley v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234 (2014), JA 1
Opinion No. 531-A	*Coakley v. Bangor Hydro-Elec. Co.*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), JA 90
Opinion No. 531-B	*Coakley v. Bangor Hydro-Elec. Co.*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015), JA 98

GLOSSARY

Transmission Owners	Emera Maine, formerly known as Bangor Hydro-Electric Company; Central Maine Power Company; New England Power Company, doing business as National Grid; New Hampshire Transmission LLC; Eversource Energy Service Company, formerly known as Northeast Utilities Service Company; United Illuminating Company; and Vermont Transco, LLC

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUES

This appeal involves Commission orders on a 2011 complaint filed by transmission customers and their representatives, alleging that the 11.14 percent regional base return on equity of New England transmission owners, established in 2006, was now too high in light of the significant changes in capital markets. In the challenged orders,[1] using the two-step discounted cash flow methodology, the

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[1] *Coakley v. Bangor Hydro-Elec. Co*., Opinion No. 531, 147 FERC ¶ 61,234 (2014), JA 1; *Coakley v. Bangor Hydro-Elec. Co*., Opinion No. 531-A, 149 FERC

Commission found that the transmission owners' base return on equity had become unjust and unreasonable, in violation of the Federal Power Act.

In setting a new base return on equity, the Commission departed from its general policy of placing the return at the midpoint of the zone of reasonableness, here, 9.39 percent, because the Commission found the return provided by the midpoint to be insufficient. The Commission instead set the return at the midpoint of the upper half of the zone of reasonableness, 10.57 percent. The Commission also found, consistent with Commission policy and orders granting incentive return on equity adders, that the transmission owners' total return on equity, including any incentive adders, would remain capped at the upper end of the zone of reasonableness determined in this proceeding.

On appeal, certain Transmission Owners[2] and Customers[3] challenge these orders. Transmission Owners, favoring their pre-existing 11.14 percent base return

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¶ 61,032 (2014), JA 90; and *Coakley v. Bangor Hydro-Elec. Co*., Opinion No. 531-B, 150 FERC ¶ 61,165 (2015), JA 98.

[2] Transmission Owners are Emera Maine, formerly known as Bangor Hydro-Electric Company; Central Maine Power Company; New England Power Company, doing business as National Grid; New Hampshire Transmission LLC; Eversource Energy Service Company, formerly known as Northeast Utilities Service Company; United Illuminating Company; and Vermont Transco, LLC.

[3] Customers are Braintree Electric Light Department, Hingham Municipal Lighting Plant, Reading Municipal Light Department, Taunton Municipal Lighting Plant, the Connecticut Public Utilities Regulatory Authority, the Attorney General of the Commonwealth of Massachusetts, Massachusetts Municipal Wholesale

on equity, and challenging the Commission's selection of a lower return, raise two issues:

1. Whether the Commission had statutory authority to find Transmission Owners' pre-existing 11.14 percent base return on equity unjust and unreasonable, when that return fell within the zone of reasonable returns determined for the proxy group in the discounted cash flow analysis.

2. Whether the Commission had authority, in this complaint proceeding concerning the base return on equity, to require that Transmission Owners' previously-granted incentive return on equity adders remain capped by the top of the newly-determined zone of reasonableness.

Customers, favoring a lower, 9.39 percent base return on equity, and challenging the Commission's selection of a higher return, raise the following issue:

3. Whether substantial evidence supported the Commission's determination to depart from its general policy of using the midpoint of the zone of reasonableness and to place Transmission Owners' base return on equity at the midpoint of the upper half of the zone.

Electric Company, New Hampshire Electric Cooperative, Inc., the Attorney General for the State of Connecticut, the New Hampshire Public Utilities Commission, the Connecticut Office of Consumer Counsel, the Maine Office of the Public Advocate, the Rhode Island Division of Public Utilities and Carriers, the Associated Industries of Massachusetts, the New Hampshire Office of the Consumer Advocate, the Industrial Energy Consumer Group, and Power Options, Inc.

STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF FACTS

I. DETERMINING A BASE RETURN ON EQUITY USING THE DISCOUNTED CASH FLOW METHODOLOGY

To attract capital investment for the construction of transmission facilities, a utility must offer a risk-adjusted return on equity sufficient to attract investors. *S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 179 (D.C. Cir. 2013). To determine the base return on equity, the Commission uses the discounted cash flow methodology to estimate the return required by the company's equity investors. *Id.* That methodology assumes that a stock's price is equal to the present value of the stream of expected dividends discounted at a market rate commensurate with the stock's risk. *Id.*

When the utility in question is not publicly traded, the Commission must rely on the cost of equity estimates of comparable publicly-traded companies, termed a proxy group, to assemble a zone of reasonable returns on which to base the utility's base return on equity. *Id.* For ratemaking purposes, the Commission rearranges the discounted cash flow formula to solve for the discount rate, which represents the rate of return that investors require to invest in a company's common stock (i.e., the cost of equity). Under the two-step discounted cash flow

methodology, the Commission determines a single cost of equity estimate for each member of a proxy group. The discounted cash flow model consists of two key components: the dividend yield component and the constant dividend growth component. *See* Opinion No. 531 PP 15-17, JA 10-11.

For the dividend yield component of the model, the Commission derives an average dividend yield based on the indicated dividend and the average of the monthly high and low stock prices over a six-month period, and then adjusts the dividend yield to account for the fact that dividends are paid on a quarterly basis. *Id*. For the constant dividend growth component, the Commission uses a two-step procedure, averaging short- and long-term growth estimates. *Id*. For the short-term estimate, which receives a two-thirds weighting, the Commission uses five-year forecasts for each company as published by the Institutional Brokers' Estimate System (or a comparable source). *Id*. PP 15-17, 39, JA 10-11, 21. Long-term growth, which receives a one-third weighting, is based on the long-term growth of the economy as a whole, as reflected in the Gross Domestic Product. *Id*.

Ultimately, however, the principle guiding the determination of a just and reasonable return on equity is that set forth in *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944), and *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923); namely, a just and reasonable return on equity should be "'sufficient to assure confidence in the financial integrity of the

enterprise, so as to maintain its credit and to attract capital.'" Opinion No. 531 PP 143 & 144, JA 69, 70 (quoting *Hope*, 320 U.S. at 603).

II. SECTION 219 OF THE FEDERAL POWER ACT AND THE FERC RULEMAKING ON TRANSMISSION INCENTIVES

Section 219 of the Federal Power Act, 16 U.S.C. § 824s, was enacted as part of the Energy Policy Act of 2005 in response to a long decline in transmission investment that was threatening reliability and causing billions of dollars in congestion costs.[4] To reverse this trend, section 219 directed the Commission to establish by rule incentive-based rate treatments for energy transmission for the purpose of ensuring reliability and reducing transmission congestion. Incentives Rule, Order No. 679-A P 3. Section 219 of the Federal Power Act recognized that the Commission's existing ratemaking practices were failing to produce sufficient investment, and commanded the Commission to use its discretion under section 205 of the Federal Power Act to promote capital investment in transmission. *Id.* P 14. Accordingly, in addition to the base level returns on equity produced through existing ratemaking procedures, the Commission determined to, *inter alia*, provide incentives for particular projects by providing a basis point adder to the

[4] *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 P 3 (2006), *on reh'g*, 119 FERC ¶ 61,062 (2007) (Incentives Rule).

base return on equity for specific projects that enhanced reliability or reduced congestion. *Id*. PP 14-15.

Under section 219(d), all incentive rates "are subject to the requirements of [Federal Power Act] sections [205, 16 U.S.C. §] 824d and [206, 16 U.S.C. §] 824e that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential." 16 U.S.C. § 824s(d). To meet this requirement while complying with the directive to enhance returns to encourage investment, the Commission deems returns on equity to be just and reasonable where the total return, inclusive of any return on equity incentives, remains within the range of reasonable returns determined during the discounted cash flow analysis. Incentives Rule, Order No. 679-A P 38.

III. EVENTS PRECEDING THE CHALLENGED ORDERS

A. Transmission Owners' Pre-Existing Return On Equity

In 2003, in conjunction with a proposal to establish the New England Independent System Operator as a Regional Transmission Organization, New England transmission owners filed a proposal to set the return on equity component recoverable under the New England Independent System Operator's regional rates. That return on equity proposal included a request for an incentive adder of 50 basis points for participation in the Regional Transmission

Organization, and an incentive adder of 100 basis points to encourage future transmission expansions.

In *Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006), this Court affirmed Commission orders granting the 50 basis point adder for Regional Transmission Organization participation. The Court found that the return on equity, including the adder, fell within the zone of reasonableness as it was capped at the top of the range of reasonable returns on equity for a proxy group of investor-owned transmission owners. *See id*. at 288-89.

In orders affirmed by this Court in *Conn. Dep't of Pub. Util. Control v. FERC*, 593 F.3d 30 (D.C. Cir. 2010), the Commission established the base return on equity for the New England transmission owners at 11.14 percent,[5] and also approved the 100 basis point adder for certain existing and planned transmission projects. *See Bangor Hydro-Elec. Co*., 122 FERC ¶ 61,265 PP 51, 62-64 (2008). In compliance with its Incentives Rule, however, the Commission found that any incentives for future projects would have to be justified on a case-by-case basis. *Id*. The Commission further found that the adjustment attributable to this incentive produced a 12.4 percent return on equity, below the 13.1 percent high end return on equity indicated by the discounted cash flow analysis. *Id*. P 72.

[5] This figure was based upon a proxy group range of returns on equity of 7.3 to 13.1 percent. *See id.* at 32.

In subsequent orders, following its Incentives Rule, the Commission approved incentive adders for individual projects that met the requirements of section 219 of the Federal Power Act, so long as the resulting return on equity for the projects, including the adder, did not exceed the zone of reasonableness set out in the discounted cash flow analysis. *See Ne. Utils. Serv. Co*., 124 FERC ¶ 61,044 P 83 (2008), *reh'g denied*, 126 FERC ¶ 61,052 (2009) (adder for the Middletown-to-Norwalk Project); *United Illuminating Co*., 119 FERC ¶ 61,182 P 73 (2007), *reh'g denied*, 126 FERC ¶ 61,043 (2009) (Middletown-to-Norwalk Project); *Ne. Utils. Serv. Co*., 125 FERC ¶ 61,183 P 81 (2008), *reh'g denied*, 135 FERC ¶ 61,270 (2009) (New England East-West Solution); *Central Me. Power Co*., 125 FERC ¶ 61,079 P 71 (2008), *reh'g denied*, 135 FERC ¶ 61,136 (2011) (Maine Power Reliability Program Project).

B. Customers' 2011 Complaint

In 2011, Customers filed a complaint alleging that Transmission Owners' 11.14 percent base return on equity had become unjust and unreasonable because Transmission Owners' capital costs had declined due to changes in the capital markets since the base return on equity was established in 2006. Opinion No. 531 P 3, JA 5; Complaint, R. 2 at 17-18, JA 202-03.

The Commission set the complaint for hearing. *Coakley v. Bangor Hydro-Elec. Co*., 139 FERC ¶ 61,090 (2012). In that hearing, the Administrative Law

Judge found Transmission Owners' current 11.14 percent base return on equity to be unjust and unreasonable. *Coakley v. Bangor Hydro-Elec. Co.*, 144 FERC ¶ 63,012 P 544 (2013), JA 1244 (Initial Decision). Based upon a discounted cash flow analysis, the Administrative Law Judge concluded that the just and reasonable base return on equity going forward was 9.7 percent. *Id.*

IV. THE CHALLENGED ORDERS

In the challenged orders, the Commission used a two-step discounted cash flow methodology (the two-step model uses both short-term and long-term growth projections rather than just short-term projections) to estimate the cost of equity for each of the 38 members of a national proxy group. Opinion No. 531 PP 9, 16, 39, 41, JA 7, 10, 21, 22. The resulting range of cost of equity estimates for the proxy group -- i.e., the discounted cash flow zone of reasonableness -- was from a low of 7.03 percent for El Paso Electric Company to a high of 11.74 percent for UIL Holdings Corporation. *See* Opinion No. 531 P 125, JA 62; *id.* Appendix A, JA 83-84. Neither Transmission Owners nor Customers challenge on appeal the use of the two-step discounted cash flow methodology or the resulting zone of reasonableness.

Having applied the two-step discounted cash flow model to estimate the zone of reasonable returns on equity for the proxy group, the Commission then determined where to place the just and reasonable return on equity for

Transmission Owners within that zone. Opinion No. 531 P 143, JA 69. This placement gives rise to the issues presented to the Court on appeal.

Transmission Owners argued that the Commission lacked statutory authority to find their pre-existing 11.14 base percent return on equity unjust and unreasonable, because that return falls within the discounted cash flow zone of reasonableness produced in these orders. Opinion No. 531-B P 18, JA 109. The Commission found that the zone of reasonableness under the discounted cash flow methodology merely represents the range from the lowest proxy member return on equity to the highest proxy member return on equity, and does not establish that any rate of return within that nearly 500 basis point zone is a just and reasonable return on equity for Transmission Owners. Opinion No. 531-B PP 24-25, JA 112. Rather, the zone of reasonableness in the discounted cash flow methodology is merely the first step in determining the just and reasonable return on equity for Transmission Owners at a single point within the zone. *Id*.

Under the discounted cash flow analysis, the Commission typically sets the base return on equity for a group of diverse entities, such as Transmission Owners, at the midpoint of the zone of reasonableness, here 9.39 percent. Opinion No. 531 P 142, JA 69. Transmission Owners argued, however, that a base return on equity at the 9.39 percent midpoint would fail to meet the requirement of *Hope* that rates be sufficient to permit the utility to attract capital. *Id*. PP 128-30, JA 63-64.

Transmission Owners asserted that a base return on equity midway between the midpoint and the upper end of the range, here 10.57 percent, was necessary to meet the capital attraction standard. *Id.*

The Commission considered record evidence that a decrease in Transmission Owners' current base return on equity of 11.14 percent to the 9.39 percent midpoint would be of a sufficient magnitude that it could undermine Transmission Owners' ability to attract capital for new transmission investment. *Id.* P 150, JA 74. A 9.39 percent base return on equity would be generally below the returns on equity approved by state commissions for electric infrastructure investment, even though interstate transmission presents unique risks to investors, placing interstate transmission investments at a competitive disadvantage. *Id.* PP 149-50, JA 73-74. The Commission also considered evidence of three other benchmark methodologies for estimating the cost of equity -- the expected earnings analysis, the risk premium analysis, and the capital asset pricing model -- and concluded that each of those methodologies supported the conclusion that the 9.39 percent midpoint was too low. *Id.* PP 146-47, JA 71-73. The Commission emphasized, however, that in considering the other methodologies, it was not departing from the discounted cash flow methodology; rather, after determining the discounted cash flow zone of reasonableness, the Commission simply used the record evidence to

corroborate its determination to set Transmission Owners' return on equity somewhere above the discounted cash flow midpoint. *Id*. P 146, JA 71.

Accordingly, although Customers objected to any base return on equity above the 9.39 percent midpoint, the Commission concluded that the 9.39 percent midpoint would not meet the capital attraction standard of *Hope*, 320 U.S. 591. Opinion No. 531 P 150, JA 74. Therefore, following its policy of looking to the central tendency, the Commission determined that it should look to the central tendency for the top half of the zone of reasonableness, and placed the base return on equity at the midpoint of the upper half of the zone, at 10.57 percent. Opinion No. 531-B P 36, JA 119; Opinion No. 531 PP 142, 151, JA 69, 75.

The Commission's discounted cash flow analysis reduced the upper end value of the zone of reasonableness from 13.1 percent in 2006 (*see* n.5 *supra*) to 11.74 percent. Accordingly, in the challenged orders, the Commission reminded Transmission Owners that their total return on equity, i.e., their base return on equity including any incentive adders, must remain within the discounted cash flow zone of reasonableness as determined in this proceeding. Opinion No. 531 PP 164-65, JA 80-81. While Transmission Owners complained that they had no notice their incentive adders would be at issue, Opinion No. 531 did not change the incentive adders the Commission previously granted to Transmission Owners. Opinion No. 531-B P 139, JA 171. Rather, the Commission simply followed its

previously-stated determination that the total return on equity, including incentive adders, is capped at the upper end of the discounted cash flow-determined zone of reasonableness. *Id.* The Commission made this limitation clear in setting its policy implementing incentive adders in its Incentives Rule, *id.* (citing Incentives Rule, Order No. 679 PP 2, 93), as well as in the orders granting Transmission Owners return on equity adders. *Id.* (citing, *e.g.*, *Ne. Utils. Serv. Co.*, 124 FERC ¶ 61,044 P 83 (2008)).

SUMMARY OF ARGUMENT

This is a classic ratemaking case, raising technical and policy issues entrusted to the Commission's judgment. Transmission Owners claim that the Commission set their base rate of return on equity at too low a level, arguing that the Federal Power Act compelled the Commission to leave their existing rate of return alone. Transmission Customers, on the other hand, claim that the Commission set the rate of return at too high a level. The Commission made a ratemaking decision between the two polar opposites, that is informed by record testimony, that is respectful of Commission policy and judicial precedent, and that is responsive to all arguments. That decision should be upheld.

In the challenged orders, the Commission agreed with the Customers that Transmission Owners' previously-established base return on equity of 11.14 percent was no longer just and reasonable. However, based on the record and the

anomalous capital circumstances presented, the Commission declined to follow its general policy of setting the base return on equity at the midpoint of the zone of reasonableness determined by the discounted cash flow analysis, 9.39 percent. The Commission instead found that a higher return -- the midpoint of the upper half of the zone, 10.57 percent -- was appropriate to provide Transmission Owners a base return on equity meeting the capital attraction standards mandated by *Hope*.

On appeal, Transmission Owners contend the Commission was obligated to retain their pre-existing 11.14 percent base return on equity because it was within the zone of reasonableness calculated under the discounted cash flow methodology. Customers, on the other hand, argue that the Commission was obligated by precedent and the record to place the base return on equity at the midpoint of the zone of reasonableness, 9.39 percent.

The Commission reasonably rejected both arguments. On Transmission Owners' claim, the Commission found that the zone of reasonableness under the discounted cash flow methodology merely represents the range from the lowest proxy member return on equity to the highest proxy member return on equity, and does not establish that any rate of return within that nearly 500 basis point zone necessarily is a just and reasonable base return on equity for Transmission Owners. Rather, the zone of reasonableness in the discounted cash flow methodology is

merely the first step in determining the just and reasonable return on equity for Transmission Owners at a single point within the zone.

As for Customers' argument, the Commission rejected use of the 9.39 percent midpoint here because the Commission concluded, based upon substantial record evidence, that a base return on equity at the 9.39 percent midpoint would fail to meet the requirement of *Hope* that rates be sufficient to permit Transmission Owners to attract capital. Record evidence indicated that a decrease in Transmission Owners' current base return on equity of 11.14 percent to the 9.39 percent midpoint would be of a sufficient magnitude that it could undermine Transmission Owners' ability to attract capital. A 9.39 percent base return on equity would be generally below the state commission-authorized returns on equity for electric infrastructure investment, when interstate transmission presents unique risks to investors, placing interstate transmission investments at a competitive disadvantage. The Commission also considered evidence of three other benchmark methodologies for estimating the cost of equity -- the expected earnings analysis, the risk premium analysis, and the capital asset pricing model -- and concluded that each of those methodologies supported the conclusion that the 9.39 percent midpoint was too low.

The Commission reasonably rejected Customers' challenges to this evidence. In particular, Customers argued that the Commission departed from

precedent in relying on methodologies other than the discounted cash flow model, and that none of this evidence supported the Commission's selection of 10.57 percent as the return on equity. The Commission explained, however, that in considering other methodologies, the Commission was not departing from the discounted cash flow methodology. Rather, the Commission used the record evidence to inform the determination that the 9.39 percent midpoint of the discounted cash flow zone of reasonableness was too low.

Having found that the 9.39 percent midpoint would not meet the *Hope* capital attraction standard, the Commission followed its precedent and determined that Transmission Owners' base return on equity should be placed in the upper half of the discounted cash flow zone of reasonableness. Following its policy of looking to the central tendency, the Commission determined that it should look to the central tendency for the top half of the zone of reasonableness, and placed the base return on equity at the midpoint of the upper half of the zone, 10.57 percent. While Customers assert that the Commission lacked an adequate basis for this determination, as the Commission found, this Court has affirmed the use of the midpoint of the relevant zone in cases involving diverse groups of utilities because the Commission properly is concerned with the full range of proxy group results in assuring that all Transmission Owners are adequately compensated.

The Commission’s discounted cash flow analysis also reduced the upper end value of the zone of reasonableness from 13.1 percent in 2006 to 11.74 percent. Accordingly, in the challenged orders, the Commission found that Transmission Owners’ total return on equity, i.e., their base return on equity including any incentive adders, must remain within the discounted cash flow zone of reasonableness as determined in this proceeding. Transmission Owners complain that they had no notice their incentive adders would be at issue, but the Opinion No. 531 proceeding did not change the incentive adders that the Commission previously granted to Transmission Owners. Rather, the Commission was simply following its previously-stated determination that Transmission Owners’ total return on equity, including incentive adders, is capped at the upper end of the discounted cash flow-determined zone of reasonableness. The Commission made this limitation clear in setting its policy implementing incentive adders in its Incentives Rule, as well as in the orders granting Transmission Owners return on equity adders.

ARGUMENT

I. STANDARD OF REVIEW

This case concerns the Commission's determinations regarding Transmission Owners' return on equity. 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). As the Supreme Court has recently stated, "[t]he 'scope of review under the 'arbitrary and capricious standard is narrow.'" *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id*. "Rather, the court must uphold a rule if the agency has "'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id*. (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). "And nowhere is that more true than in a technical area like electricity rate design: '[W]e afford great deference to the Commission in its rate decisions.'" *Id*. (quoting *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)).

This Court has specifically found this deferential standard of review applicable to Commission determinations regarding the allowed return on equity.

See, *e.g.*, *Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1006 (D.C. Cir. 2005) (applying deferential standard of review to FERC calculation of the proxy group zone of reasonableness and placement of return on equity at the midpoint of that zone). Likewise, this Court has found that FERC's determinations on return on equity adders involve matters of rate design, and, thus, the Court's review of such determinations "is highly deferential." *Me. Pub. Utils. Comm'n*, 454 F.3d at 287.

The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

II. THE COMMISSION REASONABLY EXERCISED ITS DISCRETION IN SETTING TRANSMISSION OWNERS' BASE RETURN ON EQUITY.

Prior to this proceeding, Transmission Owners had a base return on equity of 11.14 percent, which was established in 2006. In 2011 -- following the recession of late 2007 to 2009, and the ongoing economic difficulties -- Customers filed a complaint alleging that Transmission Owners' 11.14 base return on equity had become unjust and unreasonable due to changes in the capital markets. Opinion

No. 531 P 3, JA 5; Complaint, R. 2 at 17-18, JA 202-03; Complaint Exh. C-1 at 5-10, JA 227-32.

To evaluate this claim, the Commission employed the discounted cash flow methodology,[6] and determined that the reasonable range of returns for the proxy group was 7.03 percent to 11.74 percent. Opinion No. 531 P 125, JA 62. The Commission generally selects the midpoint of the range in setting base returns on equity for multiple entities, which would result in a return on equity of 9.39 percent. Opinion No. 531 PP 142, 150, JA 69, 74. However, Transmission Owners contended that the 9.39 percent midpoint would result in a base return on equity insufficient to attract capital on reasonable terms. *Id*. PP 129-30, JA 64. Having considered record evidence, including the results of other methodologies and studies, the Commission agreed that the midpoint could undermine Transmission Owners' ability to attract capital. *Id*. PP 148-50, JA 73-74. To address this concern, the Commission set the base return on equity at the midpoint of the top half of the range of proxy group returns, or 10.57 percent. *Id*. PP 151-52, JA 75-76.

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[6] In these orders, the Commission for the first time evaluated Transmission Owners' base return on equity using the two-step rather than the one-step discounted cash flow methodology (the difference rests primarily in that the two-step methodology uses long-term growth projections in addition to short-term projections, while the one-step methodology uses only short-term projections). No party has challenged on appeal the Commission's use of the two-step methodology.

On appeal, neither Transmission Owners nor Customers challenge the Commission's determination of the discounted cash flow zone of reasonableness. Rather, their challenges go to the placement of Transmission Owners' base return on equity within that zone. Transmission Owners contend that the Commission lacked statutory authority to find their pre-existing 11.14 percent base return on equity unjust and unreasonable because 11.14 percent is within the 7.03 percent to 11.74 percent discounted cash flow-determined zone of reasonableness. Transmission Owners Br. at 20-31. Transmission Owners further contend that the Commission erred in finding that their total return on equity, including previously-granted incentive adders, was capped at the upper end of the discounted cash flow zone of reasonableness. *Id.* at 31-44.

Customers, on the other hand, argue that the Commission lacked substantial evidence for deviating in this case from its general policy of setting the base return on equity at the midpoint (9.39 percent) of the discounted cash flow zone of reasonableness, and setting the rate instead at the midpoint (10.57 percent) of the upper half of the zone. Customer Br. 11-45. Both sets of arguments lack merit, as demonstrated below.

A. Transmission Owners' Challenges to the Commission's Return On Equity Determination Are Without Merit.

1. The Commission Reasonably Found Transmission Owners' Previously-Approved 11.14 Percent Base Return On Equity Unjust And Unreasonable.

Under section 206 of the Federal Power Act, 16 U.S.C. § 824e, to change an existing rate, the Commission must first find the existing rate unjust and unreasonable. *See* Opinion No. 531 P 50, JA 26. Transmission Owners claim that the Commission failed to satisfy that statutory prerequisite in this case because their pre-existing 11.14 percent base return on equity is within the "zone of reasonableness" determined under the discounted cash flow analysis. Transmission Owners Br. 21-31. In Transmission Owners' view, the zone of reasonableness produced during the discounted cash flow analysis is coextensive with the statutory just and reasonable standard. *Id*. at 28-29. *See also id*. at 21 (arguing that the Commission should have recognized the discounted cash flow zone of reasonableness as the statutory zone); 31 ("in the present case this range would permit the utility to recover a 7.03 percent return on the low end and an 11.74 percent return on the high end"). The Commission reasonably rejected this position.

a. The Commission Is Not Compelled To Accept As Just And Reasonable All Returns Located Within The Zone Of Reasonable Industry Returns Determined By The Discounted Cash Flow Analysis.

In their brief, Transmission Owners acknowledge that the Commission, under its "'well-known methodology,'" produces a "'single, specified numerical value'" as the just and reasonable return on equity. Transmission Owners Br. at 30 (quoting Opinion No. 531-B P 30, JA 115). Transmission Owners assert nevertheless that, in determining in the first instance whether an existing base return on equity is just and reasonable under section 206 of the Federal Power Act, the Commission is required to accept any return on equity that falls within the discounted cash flow zone of reasonableness. *Id.*

The Commission reasonably rejected the argument that every return on equity in the zone of reasonableness produced by the discounted cash flow analysis necessarily constitutes a just and reasonable base return on equity for the utility in question. Opinion No. 531 PP 51- 55, JA 27-29; Opinion No. 531-B PP 21-26, JA 111-13. In determining the base return on equity component of a utility's cost of service pursuant to a discounted cash flow analysis, "the term 'zone of reasonableness' has a particular, more technical meaning that differs from its meaning when used in general descriptions of what constitutes a just and reasonable rate." Opinion No. 531-B P 24, JA 112.

The Commission uses the discounted cash flow model to estimate the rate of return necessary for the utility at issue to attract equity investors. Opinion No. 531 P 50, JA 26. In that process, the Commission establishes a proxy group of companies with comparable risks, and performs a discounted cash flow analysis on each company to determine a zone of reasonable returns in the industry. Opinion No. 531-B P 24, JA 112. *See Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 57 (D.C. Cir. 1999) (cited in Opinion No. 531-B P 32, JA 116) (the discounted cash flow analysis zone of reasonableness "gauges returns experienced in the industry, ordinarily by reference to a proxy group of publicly-traded companies for which market data is available"). Here, the proxy group range of returns on equity -- i.e., the discounted cash flow zone of reasonableness -- was from a low of 7.03 percent for El Paso Electric Company to a high of 11.74 percent for UIL Holdings Corporation. *See* Opinion No. 531 P 125, JA 62; *id*. Appendix A, JA 83-84. The discounted cash flow analysis zone of reasonableness therefore is simply "the range from the lowest proxy member [return on equity] to the highest proxy member [return on equity]." Opinion No. 531-B P 24, JA 112.

Once this zone is defined, the Commission assigns the utility at issue a specific return on equity within that zone, based on the particular circumstances presented. Opinion No. 531-B P 24, JA 112; *Williston Basin*, 165 F.3d at 57. The Commission finds only that specific base return on equity to be a just and

reasonable return for that utility; it does not find any other return within the zone, either above or below the approved base return on equity, to be a just and reasonable return for the utility in question. Opinion No. 531-B P 24, JA 112; *Williston Basin*, 165 F.3d at 57. *See also* Opinion No. 531-B P 32, JA 116 ("[T]he [discounted cash flow] zone of reasonableness does not establish a continuum of just and reasonable base [returns on equity], any one of which the utility would equally be free to charge to ratepayers; rather, only the single point approved by the Commission within the [discounted cash flow] zone of reasonableness is the just and reasonable base return on equity for that utility or group of utilities."). Here, the discounted cash flow zone of reasonableness is from 7.3 percent to 11.74 percent. *Id*. P 25, JA 112. The Commission did not determine that every return on equity within that range was a just and reasonable return on equity for the Transmission Owners. *Id*.

This Court's decision in *S. Cal. Edison Co. v. FERC*, 717 F.3d 177 (D.C. Cir. 2013), supports this conclusion. Opinion No. 531 P 52, JA 27; Opinion No. 531-B P 26, JA 113. In reviewing the Commission's determination of a base return on equity, the Court acknowledged that under section 205 of the Federal Power Act, 16 U.S.C. § 824d, the Commission was required to approve the utility's rate proposal if the proposed rates were just and reasonable. Opinion No. 531 P 52, JA 27 (citing *S. Cal. Edison*, 717 F.3d at 181-82); Opinion No. 531-B

P 26, JA 113 (same). Nevertheless, the Court affirmed Commission orders rejecting the utility's proposal to use the midpoint for a single electric utility of average risk, and instead setting the base return on equity at the median, even though both the median and midpoint were within the discounted cash flow zone of reasonableness. *Id*. "To the extent SoCal Edison maintains that a 'just and reasonable' rate is a zone and not a point, suggesting that there is room for both the midpoint and the median to meet the statutory standard, whether any space exists between the median being just and reasonable and the midpoint *not* being so is a subset of the question of what rate is 'just and reasonable.'" *S. Cal. Edison*, 717 F.3d at 181-82 (citation omitted). Thus, simply falling within the zone of industry returns for purposes of the discounted cash flow analysis does not demonstrate that a base return on equity is just and reasonable for the utility at issue. Opinion No. 531 P 52, JA 27 (citing *S. Cal. Edison*, 717 F.3d at 181-82); Opinion No. 531-B P 26, JA 113 (same).

Transmission Owners' position is untenable under the statutory structure. The standard for just and reasonable rates is the same under sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d, 824e. Opinion No. 531-B PP 29-30, JA 114-15. *See, e.g.*, *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014) ("The statutory 'just and reasonable' standard is the same under section 205 and 206."). It follows that a rate that is lawful under one section must also be

lawful under the other. Opinion No. 531-B P 30, JA 115. If every return on equity within the discounted cash flow zone of reasonableness is a lawful rate that cannot be modified under section 206, then every return on equity in that zone is also a lawful rate under section 205. *Id*. Under Transmission Owners' construction, therefore, the Commission would be required to accept any return on equity proposed by a utility in a section 205 rate case that was within the discounted cash flow zone of reasonableness. Opinion No. 531 P 52, JA 27. *See also* Opinion No. 531-B P 30, JA 115 (same). The Federal Power Act has never been understood to restrict the Commission's ratemaking discretion in such a manner, and, indeed, this Court rejected that proposition in *Southern California Edison*. Opinion No. 531 P 52, JA 27; Opinion No. 531-B P 30, JA 115.

The Commission also reasonably concluded, *see* Transmission Owners Br. at 25-27, that the determination of a new just and reasonable return on equity is sufficient to prove that the existing base return on equity is unjust and unreasonable. Opinion No. 531-B PP 32-33, JA 116-17. Because the Commission finds only a single return on equity just and reasonable, "[i]t follows that showing the existing base [return on equity] established in the prior case is unjust and unreasonable merely requires showing that the Commission's [return on equity] methodology now produces a numerical value below the existing numerical value." *Id*. at P 32, JA 116. The base return on equity established by the Commission --

10.57 percent -- is the only just and reasonable return on equity determined for Transmission Owners, and therefore the Commission reasonably concluded that its analysis both established that the pre-existing 11.14 percent return on equity had become unjust and unreasonable, and that the 10.57 percent return on equity was a just and reasonable replacement. *Id.* P 33, JA 117. *See, e.g., Pub. Serv. Comm'n of N.Y. v. FERC*, 642 F.2d 1335, 1350 n.27 (D.C. Cir. 1980) (Commission determination of a new zone of reasonableness served to satisfy both its burden to show the existing rate is unjust and unreasonable and its burden to show the newly determined rate is just and reasonable).

Indeed, before the Commission, Transmission Owners argued strenuously that all of the returns on equity in the discounted cash flow analysis below the midpoint of the upper half of the range were not just and reasonable returns because they would be "insufficient to attract investment on reasonable terms." *See* Brief on Exceptions of the New England Transmission Owners, R. 321 at 32, JA 1421. *See also id.* at 36, JA 1425 (same). Only a base return on equity in the upper range of the discounted cash flow zone of reasonableness, halfway between the midpoint and the upper end of the range, would be "adequate to attract capital investment in the future." *Id.* at 36, JA 1425. Consequently, according to Transmission Owners' own arguments -- which were accepted by the Commission in setting the return in the upper half of the zone -- all of the returns in the

discounted cash flow analysis zone of reasonableness below the midpoint of the upper half of the range were *not* just and reasonable base returns on equity for Transmission Owners because they would not meet the capital attraction standards of *Hope Natural Gas* and *Bluefield Waterworks*.

b. That Incentive Return On Equity Adders Are Capped At The Upper End Of The Zone Of Reasonableness Does Not Support Transmission Owners' Claims.

Transmission Owners are correct that, in the context of incentive return on equity adders authorized for transmission projects, the Commission caps the overall return on equity for a particular project (i.e., the sum of the utility's base return on equity plus the incentive return on equity adder for the project) at the top of the zone of reasonableness determined in the discounted cash flow analysis. *See* Transmission Owners Br. at 28-29; Opinion No. 531-B P 35, JA 118. It does not, however, follow from this fact that all returns on equity within the discounted cash flow zone of reasonableness must be treated as just and reasonable for purposes of section 206 of the Federal Power Act, 16 U.S.C. § 824e. Opinion No. 531-B P 35, JA 118.

As discussed above (*see supra* pp. 6-7), section 219 of the Federal Power Act, 16 U.S.C. § 824s, requires the Commission to grant return on equity incentives to projects that increase reliability or decrease transmission congestion, while ensuring that the rates granted, inclusive of the incentives, remain just and

reasonable under sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d, 824e. *See, e.g., N.C. Utils. Comm'n v. FERC*, 741 F.3d 439, 443-44 (4th Cir. 2014) (describing the requirements of section 219 and the Commission's Incentives Rule). Accordingly, incentive adders are intended to encourage transmission investment above the level produced by a base return on equity due to the benefits provided by a certain project or projects. Opinion No. 531 P 153, JA 76. The Commission determined by rulemaking that the requirement that the resulting rates, including incentive adders, remain just and reasonable is satisfied by capping the total return on equity awarded to a qualifying project at the upper end of the discounted cash flow zone of reasonableness. Incentives Rule, Order No. 679-A P 38. This Court in *Me. Pub. Utils. Comm'n*, 454 F.3d at 288, upheld the Commission's determination that a return on equity inclusive of incentive adders remains just and reasonable when it is capped at the top of the range of reasonableness.

Thus, the Commission permits the total return on equity to exceed the base return on equity only upon a separate, independent showing that a particular project is of a type that qualifies for an adder, and a showing that the total return on equity remains within the discounted cash flow zone of reasonableness. Opinion No. 531-B P 35, JA 118. Absent both showings, the increased overall return on equity for the project produced by summing the adder and the base return on equity

would not be just and reasonable. *Id*. It is only the separate, independent finding that the project qualifies for an incentive adder that justifies increasing the return on equity for that project above the point at which the utility's base return on equity is set. *Id*.

Transmission Owners also contend that the Commission is precluded under the statute from reviewing the reasonableness of project-specific incentives on an individual basis, rather than as part of Transmission Owners' overall rate. Transmission Owners Br. at 41-44. The Commission reasonably found this argument inconsistent with the statute's directive to grant project-specific incentive returns on equity. Opinion No. 531-B P 146, JA 176. If the Commission permits project-specific incentive adders to exceed the discounted cash flow zone of reasonableness for a particular project as part of the utility's overall rate, the incentive adders granted for particular projects in effect apply to other facilities to which the Commission has not granted an incentive adder. *Id*. "An incentive [return on equity] adder may not serve to increase the [return on equity] for a transmission asset that has not been granted an incentive." *Id*. Accordingly, *Sithe/Indep. Power Partners*, 165 F.3d at 951; *Fla. Power & Light Co*., 32 FERC ¶ 61,059 at 61,162 (1985); and *Ne. Utils. Serv. Co*., 52 FERC ¶ 61,097 at 61,485-86 (1990), cited by Transmission Owners Br. at 42-43, are inapposite because they do not involve incentive returns on equity granted only with respect to particular

projects, that are required by statute to remain within the just and reasonable zone. Opinion No. 531-B P 146, JA 176.

2. Transmission Owners Had Notice That Their Incentive Adders Were Capped At The Upper End Of The Zone of Reasonableness.

In the challenged orders, the Commission found that Transmission Owners' overall return on equity, including incentive adders, could not exceed the upper bound of the zone of reasonableness of 11.74 percent. *See* Opinion No. 531 PP 161-65, JA 80-81; Opinion No. 531-A P 11, JA 96; Opinion No. 531-B PP 139-46, JA 171-76. Transmission Owners argue that incentive adders were not at issue in this proceeding, Transmission Owners Br. at 33-36, and that therefore the Commission modified Transmission Owners' incentive adders without providing adequate notice. Transmission Owners Br. at 35 (citing *Pub. Serv. Comm'n of Ky.*, 397 F.3d at 1011-12). They further argue that this lack of notice precluded them from presenting evidence further supporting the need for the incentives. *Id*. at 40-41.

In the Opinion No. 531 proceedings the Commission did not modify the incentive adders that it previously granted to Transmission Owners. Opinion No. 531-B P 139, JA 171. Rather, the Commission simply reiterated and applied its previous determination that Transmission Owners' total return on equity for a

project, including incentive adders, is capped at the upper end of the discounted cash flow-determined zone of reasonableness. *Id.*

The Commission established this limitation in setting its policy implementing incentive adders in its Incentives Rule proceeding. Opinion No. 531-B P 139, JA 171 (citing Incentives Rule, Order No. 679 PP 2, 93; Order No. 679-A P 15). The Incentives Rule explained that "an incentive rate of return sought by an applicant must be within the range of reasonable returns and the rate proposal as a whole must be within the zone of reasonableness before it will be approved." Incentives Rule, Order No. 679 P 2. The Commission's finding that incentive-based returns on equity are just and reasonable under section 205 of the Federal Power Act, 16 U.S.C. § 824d -- as required under section 219, 16 U.S.C. § 824s -- is premised upon the requirement that "the approved [return on equity], including the impact of an incentive, will be within the zone of reasonableness." Incentives Rule, Order No. 679 P 93. The Commission expressly rejected arguments that it should permit incentive returns on equity that exceed the zone of reasonableness, finding that "we believe a return within the zone will be adequate to attract new investment and consistent with the intent of Congress in section 219." *Id.* *See also* Incentives Rule, Order No. 679-A P 38 (rejecting arguments that the Commission should require a supporting cost-benefit analysis because "applicants will be required to show that all rates are just and reasonable under

section 205. For example, any [return on equity] will remain within the range of reasonable returns.")

In addition, this Court has affirmed Commission orders granting incentives to Transmission Owners based upon the finding that the incentives fell within the discounted cash flow zone of reasonableness. *Me. Pub. Utils. Comm'n*, 454 F.3d at 288 (affirming 50 basis point incentive adder for Regional Transmission Organization membership as just and reasonable because FERC capped the total return on equity at the top of the zone of reasonableness). *See also Conn. Dep't of Pub. Util. Control*, 593 F.3d at 32 (affirming 100 basis point adder for transmission projects where "even with the adder the total rate of return afforded to the transmission owners is within the range of reasonable returns"). Likewise, other Commission orders granting Transmission Owners return on equity adders for specific projects made clear that the incentive adders were capped by the discounted cash flow zone of reasonableness. Opinion No. 531-B P 139, JA 171 (citing, e.g., *Ne. Utils. Serv. Co.*, 124 FERC ¶ 61,044 P 83 (adder for the Middletown-to-Norwalk Project)). *See also supra* p. 9 (listing additional orders approving project-specific incentive adders).

Transmission Owners acknowledge that the Commission initially found their incentives just and reasonable by reference to the discounted cash flow zone of reasonableness, but they nevertheless believe the incentive, once granted, to be

inviolate regardless of any future changes in that zone. Transmission Owners Br. at 43-44. Nothing supports Transmission Owners' belief that they may continue to implement incentives that have become unjust and unreasonable. To the contrary, the Commission's rule is that the total return on equity including any incentive return on equity must remain within the zone of reasonableness. Opinion No. 531 PP 164-65, JA 80-81. *See, e.g.,* Incentives Rule, Order No. 679-A P 38 ("any [return on equity] will remain within the range of reasonable returns.").

Accordingly, the Commission has held that previously-granted incentive returns on equity may not continue to be implemented in full by the utility if it is subsequently determined that the total return on equity would exceed the zone of reasonableness. Opinion No. 531 P 164, JA 80 (citing orders). In *Pac. Gas & Elec. Co.*, 141 FERC ¶ 61,168 P 24, 26 (2012), the Commission held that a project-specific 200 basis point adder granted 10 years earlier[7] would be capped by the new zone of reasonableness to be determined at hearing. Transmission Owners assert that in *Pacific Gas* the return on equity incentives were included in the hearing, Transmission Owners Br. at 36, but they were not. Opinion No. 531-B P 141, JA 173. Rather, the Commission summarily ruled before hearing that Pacific Gas would continue to receive the adder, while "remind[ing]" Pacific Gas that any adder would be capped at the newly-determined zone of reasonableness.

[7] *See W. Area Power Admin.*, 100 FERC ¶ 61,331 PP 12-13 (2002).

Id. *See Pac. Gas & Elec. Co.*, 141 FERC ¶ 61,168 P 24 (summarily accepting continuation of adder); *id*. at P 26 ("remind[ing]" Pacific Gas that adder is limited to the range of reasonableness to be determined at hearing).

Likewise, *Trans Bay Cable, LLC*, 145 FERC ¶ 61,151 PP 18-19 (2015), and *Atlantic Path 15, LLC*, 135 FERC ¶ 61,037 (2011), *reh'g denied*, 138 FERC ¶ 61,005 (2012), concerned previously-granted incentive returns on equity of 13.5 percent.[8] Notwithstanding that the incentives had been previously granted, the Commission nevertheless set the return on equity for hearing to determine whether it remained just and reasonable, and directed the Administrative Law Judge to set the return on equity at the upper end of the range of reasonableness, not to exceed the previously-approved 13.5 percent incentive return. *Id*.

Thus, *Pub. Serv. Comm'n of Ky.*, 397 F.3d 1004, cited in Transmission Owners Br. at 35, is inapposite here. Opinion No. 531-B PP 143-44, JA 174-75. In that case, the Court concluded that the Commission had violated the parties' due process rights by awarding a return on equity incentive adder after hearing, when the Commission had expressly determined at the outset that it would not grant adders in the proceeding and they would not be addressed at hearing. *Id*. (citing

[8] These incentive awards predated the Incentives Rule and constituted an overall incentive return on equity rather than specific incentive adders. *See Trans Bay Cable LLC*, 145 FERC ¶ 61,151 P 19, and *Atlantic Path 15, LLC*, 135 FERC ¶ 61,037 P 20.

Pub. Serv. Comm'n of Ky., 397 F.3d at 1012). The Court found that, while the Commission considered arguments concerning the adder on rehearing, the parties were denied the opportunity to present evidence at hearing on the need for, or appropriate size of, the adder. *Id.*

Here, in contrast, the need for and appropriate size of the adders had already been determined, and the Commission made no changes to those determinations. Opinion No. 531-B P 139, JA 171. The Commission's rule that incentive adders would not be permitted to exceed the upper end of the discounted cash flow analysis was well established. *Id.* As a result, the issue of whether to reduce an incentive adder that would otherwise exceed the zone of reasonableness did not present any issue of material fact appropriate for hearing. *Id.* P 141, JA 173.

Thus, this proceeding did not involve the merits of Transmission Owners' incentives, but rather only whether Transmission Owners could fully implement those incentives under the discounted cash flow zone of reasonableness determined in this proceeding. Opinion No. 531-B PP 139, 142, JA 171, 174. Transmission Owners had ample opportunity to submit -- and did submit -- evidence and argument at hearing and on rehearing on the relevant factual issue, the zone of reasonableness. *Id.* P 144, JA 174.

While Transmission Owners on brief complain that, prior to Opinion No. 531, they could not have anticipated that the Commission would change to the

two-step discounted cash flow methodology, Transmission Owners Br. at 36-38, Transmission Owners made no such argument on rehearing, and therefore this Court lacks jurisdiction to hear the argument. *See* Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b) ("[n]o 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 to do so"). *See, e.g.*, *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b), imposes a "jurisdictional bar"); *Xcel Energy Servs. Inc. v. FERC*, 510 F.3d 314, 318-19 (D.C. Cir. 2007) (failure to raise an objection on rehearing to FERC deprives the court of jurisdiction).

In any event, Transmission Owners had notice that their incentives were capped by the discounted cash flow zone of reasonableness, Opinion No. 531-B PP 139, 142, 144, JA 171, 174, and so their claims of harm from the Commission's reduction of their incentives "without notice" are without merit. *See* Transmission Owners Br. at 38-40. The Commission did not revisit, much less reduce, previously-awarded incentive adders. Further, because the Commission is required by statute not only to award incentives but also to assure they (like all rates) remain just and reasonable, Transmission Owners' claims that limiting their incentives

undermines Congressional intent, Transmission Owners Br. at 38-40, are also without merit.

B. Customers' Challenges To The Commission's Return On Equity Determination Are Without Merit.

Applying the discounted cash flow model to the proxy group to estimate the zone of reasonable returns on equity for similar companies, the Commission found the relevant zone of reasonableness here to be 7.03 percent to 11.74 percent. Opinion No. 531 P 143, JA 69. Customers do not challenge this zone, but argue that the Commission lacked substantial evidence for departing from its policy to set the base return on equity at the 9.39 percent midpoint of that zone. *See* Customer Br. at 18 ("The failure to justify an upwards departure from [the 9.39 percent] midpoint is the primary defect of FERC's orders."). Customers also fault the Commission's choice to set the base return on equity at the midpoint of the upper half of the range, 10.57 percent. *Id*. at 39.

Customers' challenges to the Commission's determinations are likewise without merit. In evaluating these claims, the Supreme Court's recent decision in *FERC v. Electric Power Supply Association*, 136 S. Ct. at 784, is particularly relevant. In that case, the Supreme Court noted that "[t]he Commission, not this or any other court, regulates electricity rates." *Id*. Therefore, particularly where the disputed question "involves both technical understanding and policy judgment," the Commission should be upheld where it "addressed that issue seriously and

carefully, providing reasons in support of its position and responding to the principal alternative advanced." *Id.* The Court need not find that "FERC made the better call;" "[i]t is not our job to render that judgment, on which reasonable minds can differ." *Id.* "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." *Id.* The Commission satisfied that standard here.

1. The Commission Reasonably Departed From Its General Policy Of Placing The Base Return On Equity For A Diverse Group Of Companies At The Midpoint.

a. The Commission Reasonably Considered Record Evidence Beyond The Discounted Cash Flow Analysis To Place The Return On Equity Within The Zone.

Under the discounted cash flow analysis, the Commission typically sets the base return on equity for a diverse group of utilities, such as Transmission Owners, at the midpoint of the zone of reasonableness. Opinion No. 531 P 142, JA 69. In this case, however, Transmission Owners contended that, under the current anomalous capital market conditions (e.g., 10-year Treasury bond yields were the lowest since 1941 and public utility bonds were at a 30-year low),[9] the midpoint

[9] While Customers complain that they never called the capital conditions anomalous, Customer Br. at 19-20 & n.27, Customers clearly relied upon the dramatic change in capital conditions since 2006 in arguing that Transmission

resulting from the two-step discounted cash flow analysis did not provide a return sufficient to meet the *Hope* and *Bluefield* capital attraction standard. *Id*. PP 129-30, JA 64.

Given the unique capital market conditions, the Commission found it more difficult to determine the return necessary for Transmission Owners to attract capital, and the Commission had "less confidence that the midpoint of the zone of reasonableness established in this proceeding accurately reflect[ed] the equity returns necessary to meet the *Hope* and *Bluefield* capital attraction standards." *Id*. P 145, JA 70. *See also* Opinion No. 531-B P 49, JA 126 (same). Under those circumstances, the Commission found it reasonable and necessary to consider additional record evidence, including evidence of alternative benchmark methodologies and state commission-approved returns on equity, "to gain insight into the potential impacts of the unusual capital market conditions on the appropriateness of using the resulting midpoint." Opinion No. 531-B P 49, JA 126; Opinion No. 531 P 145, JA 70.

Owners' 11.14 percent return on equity was unjust and reasonable. *See* Opinion No. 531 PP 3, 145, JA 5, 70 (citing Exhibit C-1 to Customers' Complaint, R. 2 at 5-12, JA 227-34); Opinion No. 531-B P 15, JA 107 (Customers' complaint alleged "that the capital market conditions following the collapse of the housing bubble and the resulting economic recession were such that the [Transmission Owners'] existing [return on equity] was no longer just and reasonable").

In Customers' view, the Commission erred in considering any additional evidence to set the base return on equity within the zone of reasonableness beyond the discounted cash flow analysis. *See* Customer Br. at 15-22. In considering this additional evidence, however, the Commission did not depart from the discounted cash flow methodology, but rather used the record evidence "to inform the just and reasonable placement of the [return on equity] within the zone of reasonableness established in the record by the [discounted cash flow] methodology." Opinion No. 531 P 146, JA 71. *See also* Opinion No. 531-B P 49, JA 126 (the Commission used "this additional record evidence to corroborate our determination that placement at a point above the midpoint was warranted").

As Customers themselves recognize, the Commission has discretion, which it has exercised, to choose points other than the midpoint within the discounted cash flow zone of reasonableness where warranted by particular circumstances. *See* Customer Br. at 41. *See also* Opinion No. 531-B P 47, JA 124 ("the Commission has discretion to make, and has in fact made, adjustments to a rate based on the particular circumstances of a case"). Specifically, this Court has recognized that, once the Commission determines the range of reasonableness and the midpoint, the Commission can then assess Transmission Owners' "circumstances and 'other factors' to determine whether to make a 'pragmatic adjustment'" away from that midpoint. *Canadian Ass'n of Petroleum Producers v.*

FERC, 308 F.3d 11, 15 (D.C. Cir. 2002) (quoting *Tenn. Gas Pipeline Co. v. FERC*, 926 F.2d 1206, 1209 (D.C. Cir. 1991)).

This discretion extends to, here, considering "whether unique circumstances render the results of the Commission's [discounted cash flow] analysis less reliable than usual." Opinion No. 531-B P 47, JA 124. *See id*. P 50 & n.107, JA 126-27 (recognizing that all methods of estimating the cost of equity are susceptible to error in anomalous conditions); Opinion No. 531 P 145 n.286, JA 70 (noting the "model risk" associated with excessive reliance on a model when the surrounding conditions are outside the normal range). Indeed, before the Commission, Customers recognized as much. "We have no objection in principle to the Commission's decision to look beyond [discounted cash flow] analysis to 'gain insight into the *potential* impacts' of financial market conditions on the [discounted cash flow] metric." Customers' Rehearing Request, R. 338 at 7-8, JA 1749-50 (quoting Opinion No. 531 P 145, JA 70). *See also id*. at 33, JA 1775 ("Complainants are not here to debate whether a risk premium analysis can be informative, but only whether weight should have been placed on [Transmission Owners'] so-called 'risk premium' studies."); Request for Rehearing of Eastern Massachusetts Consumer-Owned Systems, R. 339 at 24, JA 1850 ("[Eastern-Massachusetts Consumer-Owned Systems] Witness Dr. Wilson acknowledges that the expected earnings approach can have value if properly conducted.")

On brief, Customers rely heavily on *Tennessee*, 926 F.2d 1206, and its discussion of the efficient market hypothesis, *see* Customer Br. at 15-16, 20-21, but they failed to cite *Tennessee* on rehearing or to argue that Opinion No. 531 was inconsistent with that decision. In any event, *Tennessee* does not support Customers' claims. In *Tennessee*, the Court was addressing a "zone of reasonableness" based not on a proxy group, but on two estimates of the Tennessee Gas Pipeline's own cost of equity capital, one based on a risk premium analysis, and one based on the discounted cash flow analysis. *See* 926 F.2d at 1212. The Court reversed the Commission for deviating downward from the midpoint of that zone without providing a "reasoned basis for a preference" for the risk premium analysis. *Id*. at 1213. Thus, *Tennessee* neither supports the argument that the Commission must rely solely on the discounted cash flow analysis, nor does it support the argument that the Commission may not depart from the midpoint if the Commission presents "valid reasons" for the departure. *Id.*

Further, while Customers allege that the Commission has repeatedly "reject[ed] non-[discounted cash flow] approaches as less reliable," the cited Commission orders do not support Customers' claims. *See* Customer Br. at 16 (citing *S. Cal. Edison Co.*, 131 FERC ¶ 61,020 PP 114-16 (2010), *reh'g denied*, 137 FERC ¶ 61,016 (2011), *aff'd in relevant part*, *S. Cal. Edison Co.*, 717 F.3d 177; *Pac. Gas & Elec. Co.*, 141 FERC ¶ 61,168 P 23 (2012); *Xcel Energy Servs.,*

Inc., 122 FERC ¶ 61,098 P 73, *clarified*, 125 FERC ¶ 61,092 (2008); *ITC Holdings Corp*., 121 FERC ¶ 61,229 P 43 (2007); and *Consumers Energy Co.*, Opinion No. 429, 85 FERC ¶ 61,100 at 61,361 (1998)). None of these cases concerned record evidence "of unique capital market conditions that called into question the rote application of the midpoint of the zone of reasonableness resulting from the Commission's [discounted cash flow] methodology." Opinion No. 531-B P 56, JA 131. *Southern California Edison*, 131 FERC ¶ 61,120 P 116, supports the result reached here as the Commission approved the use of three alternative methodologies to corroborate the results of the discounted cash flow methodology. Opinion No. 531-B P 56, JA 131. In *Pac. Gas & Elec. Co*., 141 FERC ¶ 61,168 P 23, the Commission set the return on equity issues for hearing without any reference to the alternative methodologies the utility submitted in support of its filing. Opinion No. 531-B P 56, JA 131. *ITC Holdings*, 121 FERC ¶ 61,229 P 43, and *Consumers Energy*, 85 FERC ¶ 61,100 at 61,362, rejected capital asset pricing model analyses for methodological shortcomings not present here. Opinion No. 531-B PP 56, 115, JA 131, 160.

Accordingly, in light of the Commission's overarching obligation to assure that Transmission Owners' rates complied with the *Hope* and *Bluefield* capital attraction standard, the Commission reasonably sought additional information regarding the proper placement of the base return of equity within the zone of

reasonableness. Opinion No. 531 P 145, JA 70. As this Court has found, "simplistic formula approaches cannot be relied upon as the sole determinants of a reasonable level of earnings for a regulated utility." *NEPCO Mun. Rate Comm. v. FERC*, 668 F.2d 1327, 1344 (D.C. Cir. 1981). Rather, "[p]rudent judgment, consideration of the earnings of comparable companies, and the requirements of the traditional *Bluefield* and *Hope* doctrines must be the basis for the determination of fair levels of earnings for regulated utilities." *Id.*

b. Record Evidence Supported Placing The Return Above The Midpoint.

To inform its decision regarding the proper placement of the base return on equity within the zone of reasonableness, the Commission looked to state commission-authorized returns on equity, as well as the results of three alternative benchmark methodologies -- the expected earnings analysis, the capital asset pricing model, and the risk premium analysis. Opinion No. 531 PP 145-46, JA 70-71. The Commission reasonably concluded that the record evidence from each of these alternative benchmark methodologies, *id.* P 147, JA 71, as well as the state-authorized returns on equity, *id.* P 148, JA 73, independently supported setting the base return on equity at a point above the midpoint in this case. Where the Commission offers alternative, independent rationales for a decision, the Court will affirm the agency if any one of the grounds for the decision is valid. *Braintree Elec. Light Dep't v. FERC*, 667 F.3d 1284, 1293 n.8 (D.C. Cir. 2012). *See also,*

e.g., *Consol. Hydro, Inc. v. FERC*, 968 F.2d 1258, 1261 (D.C. Cir. 1992) (where one ground for decision supported the Commission's orders, the Court affirmed without addressing the alternative ground).

(i). State-Authorized Returns On Equity

The Commission found that the midpoint 9.39 percent return on equity would be generally below the returns on equity set by state commissions for electric utilities within their jurisdiction. Opinion No. 531 P 150, JA 74. Over the 24-month period from October 1, 2010 through September 30, 2012, approximately 85 percent to 91 percent of state commission-authorized returns on equity were between 9.8 percent and 10.74 percent. *Id*. P 149, JA 73 (citing Exhibit No. NET-400, R. 216 at 26-27, 721-22; Exhibit No. NET-402, R. 218, JA 741; Exhibit No. NET-403, R. 219, JA 742).

Accordingly, reducing Transmission Owners' base return on equity to the 9.39 percent midpoint "'would put interstate transmission [investments] at a competitive disadvantage in the capital market in contrast with more conventional electric activities.'" *Id*. P 150, JA 74 (quoting Exhibit No. NET-400, R. 216 at 24, JA 719). The financial and business risks faced by investors in companies whose focus is electric transmission infrastructure differ in key respects when compared to other electric infrastructure investment, particularly state-regulated electric distribution. *Id*. P 149, JA 73. For example, investors providing capital for electric

transmission infrastructure face risks including the following: long delays in transmission siting, greater project complexity, environmental impact proceedings, requiring regulatory approval from multiple jurisdictions overseeing permits and rights of way, liquidity risk from financing projects that are large relative to the size of a balance sheet, and shorter investment history. *Id.* (citing Exhibit No. NET-400, R. 216 at 10-15 & 26 n.12, JA 705-10, 721; Transmission Owners Brief Opposing Exceptions, R. 326 at 95-97, JA 1682-84). The Commission did not "suggest[] that state-allowed returns . . . relate exclusively to low-risk distribution." Customer Br. 25. Rather, as noted, the Commission recognized that state-allowed returns relate to electric infrastructure investment, including distribution assets. *See* Opinion No. 531 P 149, JA 73.

The Commission does not establish utilities' base returns on equity based on state commission-authorized returns, Customer Br. at 24, and the Commission did not do so here. Opinion No. 531-B P 84, JA 144. *See also* Opinion No. 531 P 148, JA 73. The Commission merely relied on the state commission-authorized returns on equity "as evidence that the 9.39 percent midpoint of the [discounted cash flow]-produced zone of reasonableness was insufficient to satisfy the requirements of *Hope* and *Bluefield* and, therefore, that an adjustment above 9.39 percent was warranted." Opinion No. 531-B P 84, JA 144.

For the same reason the Commission found irrelevant Customers' argument that "almost nine-tenths of the referenced state-allowed returns were below 10.57 percent." Customer Br. 25-26. The Commission did not use the study evidence to set Transmission Owners' return at 10.57 percent, but only to find that a return above the 9.39 percent midpoint was warranted. Opinion No. 531-B P 85, JA 144. *See also* Opinion No. 531 P 148, JA 73. "The more relevant fact is that almost 93 percent of the state commission-authorized returns on equity are above the 9.39 percent midpoint produced by the Commission's two-step [discounted cash flow] methodology in this case." Opinion No. 531-B P 85, JA 144 (citing Exhibit No. NET-403, R. 219, JA 742).

Customers argue that the 24-month study returns on which the Commission relied reflected a "regulatory lag" before changing capital costs were reflected in the returns, while more recent record information showed that the average state-authorized return on equity had declined to 9.75 percent. Customer Br. at 25. The Commission found, however, that the 24-month study was the most recent complete study in the record. Opinion No. 531-B P 86, JA 144. The more recent evidence did not represent a comparable data set, but rather was data for only one quarter in 2013 from Regulatory Research Associates concerning the recent trend in average authorized returns on equity. *See* Exhibit SC-524, R. 537, JA 2038. In any event, the reported average of 9.75 percent supports, rather than undermines,

the conclusion that the 9.39 percent midpoint of the discounted cash flow zone of reasonableness is below most state returns on equity. Opinion No. 531-B P 86, JA 145.

(ii). Expected Earnings Analysis

Expected earnings analyses calculate the earnings an investor expects to receive on the book value of a particular stock based on analysts' forecasts of a company's earnings. Opinion No. 531-B P 125, JA 165. The expected earnings analysis here used the same proxy group as that used in the Commission's discounted cash flow analysis, and produced a midpoint of 12.1 percent and a median of 10.2 percent, both of which were above the discounted cash flow midpoint of 9.39 percent. Opinion No. 531 P 147, JA 71; Opinion No. 531-B P 120, JA 163. Noting that the expected earnings analysis had a "close relationship to the comparable earnings standard that originated in *Hope*," and that such analyses "are used by investors to estimate the [return on equity] that a utility will earn in the future," the Commission found this analysis corroborated its determination to set the Transmission Owners' base return on equity above the discounted cash flow midpoint. Opinion No. 531 P 147, JA 71; Opinion No. 531-B PP 120, 125-32, JA 163, 165-69.

Customers argue that the expected earnings analysis "provides no support for boosting the Return to 10.57 [percent]" because its median was only 10.2

percent and its midpoint, if properly calculated, would have been only 10.5 (rather than 12.1) percent. Customers Br. at 36. The Commission, however, did not rely on the expected earnings analysis to set Transmission Owners' base return on equity at 10.57 percent. It considered that analysis only to corroborate its determination that the base return on equity should be set above the 9.39 percent midpoint. Opinion No. 531 P 147, JA 71; Opinion No. 531-B PP 128, 129, 131, JA 166-68.

Next, Customers claim that the expected earnings analysis improperly included three proxy companies with unusually high expected market-to-book ratios. Customers Br. at 36. However, on rehearing to the Commission, Customers argued only that one company, Dominion Resources, had an unusually high expected market-to-book ratio. Customers' Rehearing Request, R. 338 at 44-45, JA 1786-87. Customers did not provide any evidence that Dominion Resources' (or any other companies') expected market-to-book ratios were exceptionally high. *See* Opinion No. 531-B P 131, JA 168. Moreover, as already discussed, Customers' recalculated expected earnings analysis, which excluded these three proxy companies, produced a midpoint of 10.5 percent and, therefore, corroborates the Commission's decision to place the base return on equity above the discounted cash flow midpoint of 9.39 percent. *See* Opinion No. 531-B P 131, JA 168.

Customers also contend that considering the expected earnings analysis conflicted with a rulemaking in which the Commission expressed doubts about accounting rates of return. Customers Br. at 36-37 (citing *Generic Determination of Rate of Return on Common Equity for Pub. Utils*., Order No. 420, 50 Fed. Reg. 21,302 at 21,823 (1985)). As the Commission explained, however, the expected earnings analysis did not rely on accounting return results. Opinion No. 531-B P 132, JA 168. A comparable earnings analysis can be based either on a stock's historical earnings on book value, as reflected in the company's accounting statements, or on forward-looking estimates of earnings on book value, as reflected in analysts' earnings forecasts for the company. *Id.* P 125, JA 165. The expected earnings analysis here was based on forecasted earnings, not on historical returns reflected in accounting statements. *Id.* P 132, JA 168.

Customers' claim that considering the expected earnings analysis conflicted with *Orange and Rockland Utils., Inc.*, 44 FERC ¶ 61,253 at 61,952 & n.9 (1988) (Br. at 37-38), fails as well. In that case, the Commission "rejected a proposal that would have had the effect of *setting* Orange & Rockland's base [return on equity] at Orange & Rockland's own expected return on book equity." Here, "the Commission did not *set* the [Transmission Owners'] base [return on equity] at their own expected return on book equity or endorse [a return on equity] analysis that would have that effect." Opinion No. 531-B P 128, JA 166. Rather, the

Commission considered the expected earnings analysis only to corroborate that the discounted cash flow midpoint did not provide a market cost of equity sufficient to meet the capital attraction requirements of *Hope* and *Bluefield*. *Id.*

Customers assert that the return on book equity investors expect a utility will earn is irrelevant to investors' decision whether to invest in that utility. Customers Br. at 37-38. In fact, however, "[i]nvestors rely on both the market cost of equity and the book return on equity in determining whether to invest in a utility, because investors are concerned with both the return the regulator will allow the utility to earn *and* the company's ability to actually earn that return." Opinion No. 531-B P 129, JA 167 (citing Dr. William Avera Testimony, R. 294 at 637:6-12, JA 796); *see also id.* PP 130, 132, JA 167, 168. "If, all else being equal, the regulator sets a utility's [return on equity] so that the utility does not have the opportunity to earn a return on its book value comparable to the amount that investors expect that other utilities of comparable risk will earn on their book equity, the utility will not be able to provide investors the return they require to invest in that utility." Opinion No. 531-B P 129, JA 167 (citing Exhibit No. NET-300, R. 200 at 71, JA 669 (Dr. William Avera Testimony) (explaining that, if a utility is unable to offer a return similar to that available from other opportunities of comparable risk, investors will become unwilling to supply the capital on reasonable terms)). "Because investors rely on expected earnings analyses to help estimate the opportunity cost of

investing in a particular utility," the Commission found "this type of analysis useful in corroborating whether the results produced by the [discounted cash flow] model may have been skewed by the anomalous capital market conditions reflected in the record." *Id.*

(iii). Capital Asset Pricing Model

Capital asset pricing models have three inputs: (1) the risk-free rate (which typically is, and was here, the yield on 30-year Treasury bonds); (2) published betas, which measure a stock's risk relative to the market (i.e., "the tendency of a stock's price to follow changes in the market," Exhibit No. NET-300, R. 200 at 65, JA 663 (Dr. William Avera Testimony)); and (3) a market risk premium, determined by subtracting the risk-free rate from the result produced by a study (here, a discounted cash flow analysis of S&P 500 companies paying dividends). Opinion No. 531-B PP 108-09, JA 157.

The Commission found Transmission Owners' capital asset pricing model was a generally accepted methodology routinely relied upon by investors and, therefore, appropriate to use to corroborate the Commission's own analysis. Opinion No. 531-B P 109, JA 157; Opinion No. 531 P 147, JA 71. The model's midpoint of 10.4 percent and its median of 10.9 percent affirmed the Commission's determination to set Transmission Owners' base return on equity

above the Commission's discounted cash flow analysis midpoint of 9.39 percent. Opinion No. 531 P 147 & n.293, JA 72.

Customers point out that the 10.4 percent midpoint was below the 10.57 percent return on equity set here. Customers Br. at 33. But the Commission did not consider the capital asset pricing model results to set Transmission Owners' return on equity at 10.57 percent. Rather, as with each of the alternative analyses, the Commission considered the 10.4 percent midpoint as corroborating evidence that Transmission Owners' return on equity should be set above the Commission's discounted cash flow midpoint of 9.39 percent. Opinion No. 531-B P 109, JA 157; Opinion No. 531 P 147, JA 71.

Nor is the Commission's consideration of a capital asset pricing model that includes representative betas inconsistent with *ITC Holdings Corp.*, 121 FERC ¶ 61,299 P 43 (2007). Customers Br. at 32. The Commission's concern regarding the use of betas in *ITC Holdings* -- that the capital asset pricing model there analyzed only the utility whose rates were at issue -- did not apply here, where the capital asset pricing model analyzed, as a portfolio, a proxy group of electric utilities.

Customers also complain that the capital asset pricing model's midpoint of 10.4 percent was too high because it was tied to analysts' projections of short-term earnings growth that cannot be expected to be sustained in the long-term.

Customers Br. at 33-35. The Commission incorporates a long-term growth rate in its own discounted cash flow analysis, which is applied to a specific group of public utilities, because it is unrealistic and unsustainable to expect high short-term growth rates for those specific companies to continue in perpetuity. Opinion No. 531-B P 113, JA 159. As regulated companies, it is reasonable to expect that over the long-run, the utilities "'will grow at the rate of the average firm in the economy, because regulation will generally prevent the firm from being extremely profitable during good periods, but also protects it somewhat during bad periods.'" Opinion No. 531 P 20, JA 13 (quoting *Nw. Pipeline Corp.*, Opinion No. 396-B, 79 FERC ¶ 61,309 at 62,382-83 (1997), *reh'g denied*, Opinion No. 396-C, 81 FERC ¶ 61,036 (1997)). *See also id.* at P 38, JA 20 ("[o]ver the long-run, a regulated firm may reasonably be expected to grow at the rate of the average firm in the economy.") That rationale does not apply, however to the capital asset pricing model's discounted cash flow analysis of the largely unregulated S&P 500, which is regularly updated to include only companies with high market capitalization. Opinion No. 531-B P 113, JA 159. While an individual regulated company cannot be expected to sustain high short-term growth rates in perpetuity, the Commission determined that was not true for a broadly-diversified stock index such as the S&P 500. *Id.*

Customers' complaints regarding the capital asset pricing model's size adjustment, Br. 35-36, fail as well. As is generally accepted, that model included an adjustment to account for the difference in size between Transmission Owners and the S&P 500's dividend-paying companies. Opinion No. 531-B P 117, JA 161 (citing Roger A. Morin, New Regulatory Finance 187 (Public Utilities Reports, Inc. 2006)); *see also* R. 293 (Dr. William Avera Testimony) at 860:19-861:5, JA 780-81) (explaining that a size adjustment is a necessary and uncontroversial component of a capital asset pricing model analysis). This is because, as also is generally accepted, smaller companies are riskier than larger companies. *Id.* (citing Morin, New Regulatory Finance 187; and Exhibit No. NET-300, R. 200 at 68, JA 666 (Dr. William Avera Testimony) (explaining that, because smaller companies are riskier, they have higher returns on average than larger ones)).

Customers argue that the beta component of the capital asset pricing model already captured risk and growth rate differences and, therefore, a size adjustment was unnecessary. Customers Br. at 35. Customers did not raise this argument to the Commission on rehearing (*see* R. 338, JA 1740-1826; R. 339, JA 1827-54), and cannot, therefore, raise it on appeal. *See, e.g.*, *Save Our Sebasticook*, 431 F.3d at 381; *Xcel*, 510 F.3d at 318-19; Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b).

Even if this argument were properly before the Court, it has no merit. Betas measure only risk -- an individual stock's "volatility relative to the market as a

whole. Beta reflects the tendency of a stock's price to follow changes in the market." Exhibit No. NET-300, R. 200 at 65, JA 663 (Dr. William Avera Testimony). *See also id.* at 68, JA 666 (under the capital asset pricing model, the expected return on a security consists of the riskless rate, plus a premium to compensate for the systematic risk of a particular security, represented by the beta coefficient, and a size adjustment to account for differences in required rates of return related to company size). Without a size adjustment, the capital asset pricing model would not properly account for differences in rates of return attributable to company size. *Id.* (citing *Morningstar*, "Ibbotson SBBI 2012 Valuation Yearbook," at 85).

Customers' growth rate claim fails as well. Br. at 35-36. As the Commission explained, "[w]hile it may be true that larger dividend-paying members of the S&P 500 are growing faster than the smaller dividend-paying members of the S&P 500, this does not indicate how the growth rates of the dividend-paying members of the S&P 500 compare to the [Transmission Owners] or to other groups of companies with smaller market capitalization." Opinion No. 531-B P 117, JA 161.

(iv). Risk Premium Analysis

Risk premium analyses are based on the idea that there is greater risk in a stock investment than in a bond investment and, therefore, investors expect to earn a higher return on stock investments. *See* Opinion No. 531-B P 97, JA 150 (citing Morin, New Regulatory Finance 108); *see also*, *e.g.*, Exhibit No. NET-300, R. 200 at 49, JA 652 (Dr. William Avera Testimony). Thus, the risk premium analysis in the record here compared the base returns on equity allowed by the Commission in the 66 cases from April 2006 through June 2012 relative to contemporaneous 10-year Treasury bond yields to determine the risk premium implied by those regulatory decisions. Opinion No. 531-B P 97, JA 150 (citing Exhibit No. NET-704, R. 237 at 1-4, JA 763-66); *id.* at n.205, JA 151. This analysis showed that Transmission Owners' cost of equity was between 10.7 and 10.8 percent, which was higher than the 9.39 percent discounted cash flow midpoint. *See* Opinion No. 531 P 147, JA 71; *see also* Transmission Owners Brief on Exceptions, R. 321 at 57, JA 1446. Thus, the risk premium analysis corroborated the Commission's determination that, in the circumstances here, the base return on equity should be set above the midpoint. Opinion No. 531 P 147, JA 71; Opinion No. 531-B P 98 & n.205, n. 213, JA 151, 154.

Customers contend that considering the risk premium analysis was inconsistent with the Commission's determination in *Bangor Hydro-Electric Co.*,

Opinion No. 489, 117 FERC ¶ 61,129 P 74 (2006). Customers Br. at 26. As the Commission explained, however, *Bangor Hydro* was inapposite here. Opinion No. 531-B n.205, JA 151. There, the Commission rejected a proposal to establish Transmission Owners' base return on equity based on another region's base return on equity. *Id.* Here, by contrast, the base return on equity from that other region was simply one data point among many in a risk premium analysis the Commission used to corroborate its determination that it would not be appropriate to set Transmission Owners' base return on equity at the discounted cash flow midpoint. *Id.* *See also, e.g.*, *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 743 (D.C. Cir. 2007) (Commission's reasonable interpretation of its own precedent deserves deference).

The Commission did not act inconsistently with *Pepco Holdings, Inc.*, 124 FERC ¶ 61,176 P 127 (2008), *reh'g denied*, 139 FERC ¶ 61,144 (2012), either. *See* Customers Br. at 26; Customers' Rehearing Request, R. 338 at 34, JA 1776. *Pepco* did not involve whether the Commission should consider a risk premium analysis. The paragraph Customers point to, *Pepco*, 124 FERC ¶ 61,176 P 127, responded to a protestor's claim that it was unnecessary to approve a proposed 150-basis point adder to transmission owners' previously-accepted base return on equity, because a published survey of returns on equity approved by other regulatory agencies (not a risk premium analysis regarding FERC-approved returns

on equity as here) purportedly indicated that returns on equity were declining, *id.* PP 23, 107. The Commission determined that it would not be appropriate to consider the survey in *Pepco* because, among other things, it did not provide any information regarding what model was used to calculate the returns included in the survey. *Id.* P 127.

Customers also claim that risk premium analyses are unreliable. Customers Br. at 26-27. Specifically, Customers assert that regulatory return on equity determinations cannot be compared to contemporaneous bond yields because the dates assigned to regulatory return on equity determinations are approximate. *Id.* at 27. Customers further complain that some of the return on equity decisions cited in the analysis involved returns on equity agreed to by settlement. *Id.* at 28-29.

The Commission acknowledged that the risk premium analysis here, "like any methodology for estimating the cost of equity, is not without inherent weaknesses," but noted that "it is nonetheless an approach that investors routinely rely upon." Opinion No. 531-B P 98, JA 151 (citing Morin, New Regulatory Finance 123-25). The fact that approved base returns on equity may have resulted from a settlement agreement does not mean the risk premium analysis is not sufficiently reliable for corroboration purposes. *Id.* Settling parties rely on the results of the same market-based methodologies as regulators do in making return on equity determinations. *Id.* (citing Morin, New Regulatory Finance 125).

In addition, "[g]iven the varying duration of regulatory proceedings," the Commission explained, "it is difficult, if not impossible, to ensure precise contemporaneity between long-term Treasury bond yields and the cost of equity allowed by a regulator." *Id.* Thus, it is often unavoidable to assign approximate dates to cost of equity determinations. *Id.*

Moreover, the Commission explained, even if the allegedly stale data points[10] were excluded from the risk premium analysis, the results of the analysis would not have materially changed: the risk premium average for all 66 returns on equity was 7.33 percent; the risk premium average excluding the five allegedly stale returns on equity was only marginally lower, at 7.28 percent. Opinion No. 531 P 98 & n.205, JA 151-52. Thus, excluding the allegedly stale returns on equity would not have materially reduced the analysis' 10.7-10.8 percent cost of equity. *Id.*

Customers assert that the Commission "did the wrong math," and that the correct math "reduces the study's overall result to 10.22 [percent], materially below 10.57 [percent]." Customer Br. at 31-32 & n.65. But, since the Commission considered the risk premium analysis only as corroboration for its

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[10] On rehearing Customers argued that the risk premium analysis should have excluded five of the 66 returns on equity (in orders issued in August, November and December 2008, May 2009, and June 2012) for staleness. R. 338 at 35-36, JA 1777-78.

determination to set Transmission Owners' base return on equity at some point above the discounted cash flow midpoint of 9.39 percent (and not as support for its determination to set the base return on equity at 10.57 percent), Opinion No. 531 P 147, JA 71; Opinion No. 531-B P 98 & n.205, n. 213, JA 151, 154, a risk premium analysis result of 10.22 percent would still corroborate that determination.

Customers also argue that the Commission should not have considered the risk premium analysis because it determined in Opinion No. 531 P 159, JA 79 (and in another Commission order issued that same day, *S. Cal. Edison Co.*, 147 FERC ¶ 61,240 (2014)) that it would no longer use post-hearing capital market changes in Treasury bond yields to update base returns on equity. Customers Br. at 29-30. Customers did not raise this argument to the Commission on rehearing of Opinion No. 531 (*see* R. 338, JA 1740-1826; R. 339, JA 1827-54) and, therefore, have waived their opportunity to raise it on appeal. *See, e.g.*, *Save Our Sebasticook*, 431 F.3d at 381; *Xcel*, 510 F.3d at 318-19; Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b).

In any event, Customers' argument has no merit. As the Commission explained, "[t]he premise underlying the use of U.S. Treasury bonds for the post-hearing [return on equity] adjustment is that changes in [return on equity] over time track changes in U.S. Treasury bond yields," but "capital market conditions

since the 2008 market collapse and the record in this proceeding have shown that there is not a direct correlation between changes in U.S. Treasury bond yields and changes in [return on equity]." Opinion No. 531 P 158, JA 78.[11] The risk premium analysis in fact confirms this conclusion, as it shows that for every 100 basis point drop in interest rates, there is only a 7 basis point drop in the return on equity. *See* Opinion No. 531-B P 99, JA 152. Because Treasury bond yields are still an important indicator of capital market conditions, however, they continue to inform the Commission's determination on the different issue of where the base return on equity should be set. Opinion No. 531 P 158, JA 78; *see also S. Cal. Edison*, 147 FERC ¶ 61,240 P 9 (same).

Accordingly, the Commission reasonably found the risk premium analysis here, like each of the alternative analyses, "sufficiently reliable -- not to set the [return on equity] itself -- but rather to corroborate [its] decision to place the [Transmission Owners'] base [return on equity] above the midpoint of the zone of reasonableness produced by the [discounted cash flow] analysis." Opinion No. 531-B P 98, JA 151.

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[11] The Commission determined that post-hearing return on equity updates would instead be based on the most recent financial data available at the time of the hearing, including post-test period data. Opinion No. 531 P 160, JA 79.

(v). The Magnitude Of The Decrease To The Midpoint

In addition to these specific areas, the Commission also noted that there was record evidence indicating that a decrease in the return on equity from the pre-existing 11.14 percent base return on equity to the 9.39 percent midpoint -- a 175 basis point decline -- could be of a sufficient magnitude to undermine Transmission Owners' ability to attract capital. Opinion No. 531 P 150, JA 74 (citing Exhibit No. NET-400, R. 216 at 16-19, JA 711-14). For example, "a May 3, 2012 UBS Investment Research sector comment stated, '[w]e believe companies will redeploy capital elsewhere if transmission returns are materially reduced. In our view, the cost of capital could actually increase, because as returns are set lower, valuation multiples will also be reset much lower than current levels." *Id*. P 150 n.301, JA 74 (quoting Exhibit No. NET-400, R. 216 at 18, JA 713). In addition, such a reduction in return on equity could lead investors to view investments in interstate transmission as more unstable, diminishing "'investors' confidence in FERC jurisdictional investment in transmission.'" *Id*. (quoting Exhibit No. NET-400, R. 216 at 43, JA 738). *See also id*. P 150 n.303, JA 75 (citing Exhibit No. NET-600, R. 228 at 42, JA 753) (opining that cutting the base return on equity by 150 basis points would undermine access to capital).

Indeed, while Customers point to Commissioner Norris' dissent in part, Customer Br. 15, Commissioner Norris agreed that Transmission Owners' base

return on equity should be set above the midpoint. *See* Commissioner Norris Dissenting in Part to Opinion No. 531 at 2, JA 87 ("The record in this proceeding shows that a straight-forward application of the discounted cash flow methodology would result in a dramatic decrease in [return on equity] and result in a level below that generally set by state commissions for electric distribution assets. This level risks failing to meet our *Hope* and *Bluefield* requirements that [returns on equity] be set so as to enable transmission owners to attract capital for new investment in transmission.").

2. The Commission Reasonably Exercised Its Discretion In Setting Transmission Owners' Base Return On Equity At 10.57 Percent.

Based upon the foregoing, the Commission found that Transmission Owners should be awarded a base return on equity above the midpoint of the discounted cash flow-determined zone of reasonableness. Opinion No. 531 P 151, JA 75. The Commission has traditionally looked to the central tendency to identify the appropriate return within the zone of reasonableness. *Id.* The Commission similarly concluded here that it likewise should look to the central tendency but, in light of the record in this proceeding, the Commission looked to the central tendency for the top half of the zone of reasonableness, and set the base return on equity at the point halfway between the midpoint of the zone of reasonableness and the top of the zone, 10.57 percent. *Id.*

Customers argue that the Commission's selection of that midpoint "was an arbitrary response to FERC's conclusion that the 9.39 [percent] midpoint was insufficient, for three reasons." Customer Br. at 41-42. Customers' first and third reasons concern alleged errors in the Commission's selection of the midpoint of the upper half of the zone. Customer Br. at 39-43, 44-45. Customers' second objection asserts that the error of using of the midpoint was "compounded" by issues regarding the proxy group member with the highest discounted cash flow result. *Id*. at 43-44. None of these objections has merit.

a. The Commission Reasonably Selected The Midpoint Of The Upper Half Of The Zone.

Customers' first objection is that the Commission's use of the midpoint of the upper half of the zone failed adequately to take into account the distribution of values within the zone, instead considering only the most extreme results. Customer Br. at 42 (citing *Nw. Pipeline Corp*., 99 FERC ¶ 61,305 (2002), for the proposition that the median better captures the overall information provided by the distribution of results).

As the Commission explained, however, the Commission has traditionally used measures of central tendency to determine an appropriate base return on equity. And, in cases involving the placement of the base return on equity above the central tendency of the overall zone of reasonableness, the Commission has used the central tendency of the top half of the zone. Opinion No. 531-B P 55,

JA 130; Opinion No. 531 P 152, JA 76 (citing *S. Cal. Edison Co.*, Opinion No. 445, 92 FERC ¶ 61,070, at 61,266 (2000); *Consumers Energy Co.*, Opinion No. 429, 85 FERC ¶ 61,100 at 61,363-64 (1998)).

The Commission's decision to use the midpoint of the upper half of the zone was based on record evidence in this proceeding, and is consistent with the Commission's established policy of using the midpoint when establishing a central tendency for a region-wide group of utilities. Opinion No. 531-B P 55 & nn. 114, 115, JA 130. Where the base return on equity will, as here, apply to a diverse group of companies, this Court has affirmed the Commission's conclusion that "the midpoint provides the best measure because it emphasizes the endpoints of the proxy group range, ensuring that outliers as well as average [Transmission Owners] receive just and fair compensation." *Pub. Serv. Comm'n of Ky.*, 397 F.3d at 1008 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,302 PP 9-10 (2004)). *See also id*. at 1010 (in setting one return for regional companies, the range of results is as important as the central value, and the midpoint fully considers that range because it is derived directly from the endpoints of the range); *S. Cal. Edison*, 717 F.3d at 186 (affirming use of the midpoint to set one return for regional transmission owners because the Commission "must ensure that the [return on equity] results in a reasonable rate of return as applied to all utilities in the group"). Thus, in setting one base return on

equity for a diverse set of companies, the Commission is "less interested in particular data points than in the full range covered by the group." *Pub. Serv. Comm'n of Ky.*, 397 F.3d at 1010. In contrast, *Nw. Pipeline Corp.*, 99 FERC ¶ 61,305, concerned only which measure of central tendency should be used to set the base return on equity of a single pipeline of average risk, not a group of diverse entities. Opinion No. 531-B P 55, JA 130.

Customers attempt to distinguish *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,302 (affirmed in relevant part in *Pub. Serv. Comm'n of Ky.*, 397 F.3d at 1010-11), by asserting that the midpoint was used in that case "due to concern that some of the utilities sharing a common regional return had equity costs outside the [discounted cash flow] range." Customer Br. at 42. To the contrary, in that decision, the Commission found that the proxy group of representative transmission owners "fairly brackets the range of reasonableness for all Midwest [Independent System Operator transmission owners]" and that the highest and lowest values should be included in the range of reasonableness because they likely represent other Midwest transmission owners as well. *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,302 P 9.

Customers point again to Commissioner Norris' dissent in part to Opinion No. 531, Customer Br. at 39, in which Commissioner Norris agreed that a base return on equity above the midpoint of the discounted cash flow zone of

reasonableness was warranted. *See* Commissioner Norris Dissent in Part at 2, JA 87. He questioned the need for an adjustment to the midpoint of the upper half of the zone of reasonableness, however, and stated that he would have set the issue of the magnitude of the increase above the midpoint for hearing. *Id*. at 3, JA 88. The Commission concluded there was no need to set the placement of the base return on equity within the zone for hearing "because the hearing before the [Administrative Law Judge] provided the parties a full opportunity to present evidence on all these issues, including a full opportunity to contest all of the evidence we have relied upon in our findings concerning placement in the zone." Opinion No. 531 P 155, JA 77.

Customers also object that the Commission failed to adjust the base return on equity based upon Transmission Owners' estimate of distortion in the bottom-end threshold used to eliminate low-end outliers from the proxy group. Customer Br. at 44-45. This contention likewise fails. As the Commission never accepted this theory, the Commission had no obligation to place the base return on equity within the zone of reasonableness based on that theory.

b. The Commission Reasonably Rejected Challenges To The Highest Value Proxy Company.

In the discounted cash flow analysis, the Commission determines the short-term dividend growth component of the model using security analysts' five-year forecasts for each company in the proxy group, as published by the Institutional

Brokers' Estimate System (or a comparable source). Opinion No. 531 PP 17, 39, JA 11, 21. Customers assert that the Institutional Brokers' Estimate System growth forecast for the proxy group member with the highest result -- UIL Holdings Corporation -- was "especially dubious" because it reflected the view of a single analyst rather than a consensus of multiple analyst growth forecasts. Customer Br. at 43.

The Commission, however, has never required that the growth projection for each member of the proxy group reflect a minimum number of analyst estimates. Opinion No. 531-B P 72, JA 137. The appropriate dividend growth rate for the discounted cash flow analysis is the growth rate expected by the market, and investors rely on Institutional Brokers' Estimate System growth projections in making investment decisions. *Id.* P 71, JA 136. As the Institutional Brokers' Estimate System does not publish the number of analyst estimates on which the growth rate is based, there is no reason to believe that investors' reliance varies depending on the number of analysts contributing to the projection. *Id.* P 72, JA 137. *See also* Opinion No. 531 P 91, JA 45.

While there may be more than one valid source of growth rate estimates, "to ensure that growth rate estimates are internally consistent in a [return on equity] analysis we find it inappropriate to use estimates from different sources for different proxy group companies." Opinion No. 531 P 90, JA 44. Using different

sources of growth projections for different proxy group members could produce skewed results, as different sources may take different approaches to calculating the rate, or may use different time periods. *Id*. *See also* Opinion No. 531-B P 72, JA 137. Indeed, in *Nw. Pipeline Corp*., 87 FERC ¶ 61,266 at 62,059 (1999), *on reh'g in part*, 92 FERC ¶ 61,287 (2000), *aff'd*, *Canadian Ass'n of Petroleum Producers*, 308 F.3d 11, cited in Customer Br. at 43 n.86, the Commission found it inappropriate to use multiple sources of growth rate data, rather than the Institutional Brokers' Estimate System alone, in determining the discounted cash flow analysis short-term growth projection. Opinion No. 531-B P 73, JA 137.

Customers also assert that the growth forecast of one proxy group member (UIL Holdings Corporation) was inflated by expectations based on incentive return on equity adders. Customer Br. at 43. The Commission, however, found that incentive adders granted under Federal Power Act section 219, 16 U.S.C. § 824s, would have a minimal effect, if any, on the overall range of reasonableness derived from the appropriate proxy group. Opinion No. 531-B P 74, JA 138 (quoting Incentives Rule, Order No. 679-A P 62). The discounted cash flow methodology uses proxy groups of entire companies, not individual transmission projects. *Id.* The cash flows measured in the discounted cash flow methodology are the cash flows of entire companies, which should not be significantly affected by the incentive return for any particular transmission project for one company within the

project group. *Id*. If there is any small effect on the overall range of reasonableness, it would in any event appropriately reflect the substantial risks associated with constructing new transmission. *Id*.

Even assuming that this problem exists, as the Commission found, Customers' proposed "methodology" (*see* Customer Br. at 44) for addressing this issue in their request for rehearing was simply to place the base return on equity at what they deemed to be the "true" 75th percentile of the proxy group based upon the distribution of proxy group results. *See* Opinion No. 531-B P 75, JA 138; Customers' Rehearing Request, R. 338 at 58-60, JA 1800-02.[12] The Commission reasonably found that this methodology did not determine whether or how much a company's incentive adders might impact investor expectations for a particular company, and therefore Customers had not demonstrated how this was an appropriate solution. Opinion No. 531-B P 75, JA 138. Accordingly, absent additional evidence, the Commission did not find that this potential problem warranted further adjustment to Transmission Owners' base return on equity. *Id*.

[12] While Customers on brief also cite to a different methodology discussed in their Brief on Exceptions to the Administrative Law Judge's Initial Decision, R. 320 at 77-78, JA 1350-51 (*see* Customer Br. at 44 n.88), they failed to raise this additional methodology on rehearing and therefore the Court is barred from considering it.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the petitions for review be denied, and the FERC orders on appeal be upheld in all respects.

Respectfully submitted,

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Emera Maine v. FERC,
Nos. 15-1118, 15-1119 and 15-1121 (consolidated)

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's Order of October 6, 2015, because this brief contains 17,469 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 with 14-point, Times New Roman font.

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April 26, 2016

ADDENDUM

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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) of this section 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 de-

livering 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,

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(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) of this section, in a proceeding commenced under this section involving two or more electric utility companies

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

(June 10, 1920, ch. 285, pt. II, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852; 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.)

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

Section 4 of Pub. L. 100–473 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.''

[1] See References in Text note below.

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

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

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

(k) Effect of exercising rights

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

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

FERC RULEMAKING ON LONG-TERM TRANSMISSION RIGHTS IN ORGANIZED MARKETS

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

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

(a) Definition of electric utility or person

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

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

(2) is located—

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

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

(b) Protection of transmission contracts

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

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

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

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

§ 824s. Transmission infrastructure investment

(a) Rulemaking requirement

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

(b) Contents

The rule shall—

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

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

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

(4) allow recovery of—

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

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

(c) Incentives

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

(d) Just and reasonable rates

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

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

§ 824t. Electricity market transparency rules

(a) In general

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

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

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Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

(c) Stay of Commission's order

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

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

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 26th day of April 2016, 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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