In the United States Court of Appeals for the Ninth Circuit

No. 16-70481

CALIFORNIA PUBLIC UTILITIES COMMISSION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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September 19, 2016

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Administrative Procedure Act

Federal Power Act

GLOSSARY

Br.	Brief of Petitioner California Public Utilities Commission
California	California Public Utilities Commission
California System Operator	California Independent System Operator Corporation
Commission or FERC	Federal Energy Regulatory Commission
ER	Excerpts of Record
Incentives Rule	*Promoting Transmission Investment Through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 (2006), *on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *on reh'g*, Order No. 679-B, 119 FERC ¶ 61,062 (2007)
P	Paragraph in a Commission order
R.	Item in the certified index to the record
TO16 Initial Order	*Pac. Gas & Elec. Co.*, 148 FERC ¶ 61,245 (2014), R. 20, ER 27-39
TO16 Rehearing Order	*Pac. Gas & Elec. Co.*, 154 FERC ¶ 61,119 (2016), R. 99, ER 8-14
TO17 Initial Order	*Pac. Gas & Elec. Co.*, 152 FERC ¶ 61,252 (2015), R. 80, ER 15-26
TO17 Rehearing Order	*Pac. Gas & Elec. Co.*, 154 FERC ¶ 61,118 (2016), R. 98, ER 1-7

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STATEMENT OF THE ISSUE

This appeal arises out of filings before the Federal Energy Regulatory Commission ("Commission" or "FERC") to set rates for the transmission of electricity over lines operated by a regional transmission organization and owned by Pacific Gas and Electric Company ("Pacific Gas"). Pacific Gas sought a higher rate of return under a 2006 Commission rule (which is not under review) that provides incentives to encourage widespread participation in a FERC-approved regional transmission organization. Consistent with the terms of that 2006 rule,

and prior to the orders now under review, Pacific Gas requested and received the incentive rate every year since 2007 due to its ongoing membership in California's regional transmission organization.

The California Public Utilities Commission ("California")—a participant in the FERC proceeding that led to the 2006 rule—now challenges the Commission's 2014 and 2015 grants of the incentive rate to Pacific Gas. It does so based primarily on its own interpretation of the 2006 rule, several pre-2006 Commission orders, and an argument the Commission declined to accept in 2006.

The issue presented for review is:

Whether the Commission reasonably addressed California's objections to its 2014 and 2015 grants of the incentive rate to Pacific Gas, and whether it appropriately followed its 2006 rule setting forth the criteria for grants of such incentives.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are reproduced in the Addendum.

COUNTER-STATEMENT OF JURISDICTION

This appeal concerns an "incentive" rate adder, which is a component of the overall return on equity for which a transmission owner must seek FERC approval when participating in a FERC-approved regional organization. While Pacific Gas's overall return on equity is still subject to Commission hearing and settlement

procedures, *see infra* 10, this appeal focuses on the particular incentive rate adder requested by Pacific Gas that the Commission has approved. Under this Court's precedent, "'the fact that one part of an agency order remains pending before the agency does not deprive this court of jurisdiction to review a discrete issue that has been definitively resolved by the agency.'" *Cal. ex rel. Harris v. FERC*, 809 F.3d 491, 500 (9th Cir. 2015) (quoting *Cal. Dep't of Water Res. v. FERC*, 361 F.3d 517, 520 (9th Cir. 2004)); *see also Steamboaters v. FERC*, 759 F.2d 1382, 1387-88 (9th Cir. 1985).

Section 313 of the Federal Power Act allows any party aggrieved by a final agency order to seek appellate review by filing a petition within 60 days after issuance of that order. 16 U.S.C. § 825*l*(b). To the extent California now belatedly seeks review of a 2006 Commission rule through its claim that Pacific Gas was ineligible to receive incentive rates in 2014 and 2015, this Court lacks jurisdiction to review California's untimely collateral attack, as described *infra* (Argument Section III). *See Pac. Gas & Elec. Co. v. FERC*, 464 F.3d 861, 868 (9th Cir. 2006).

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

Section 201 of the Federal Power Act gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. 16 U.S.C. §§ 824(a)-(b); *see generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction).

Under section 205 of the Federal Power Act, all rates for or in connection with FERC-jurisdictional sales and transmission services are subject to FERC review to assure that they are just and reasonable, and not unduly discriminatory or preferential. 16 U.S.C. §§ 824d(a), (b), (e); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773-74 (2016); *see also Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 254 (D.C. Cir. 2007) ("[Federal Power Act] section 205 allows utilities to file changes to their rates at any time and requires FERC to approve them as long as the new rates are 'just and reasonable.'").

Section 219(c) of the Federal Power Act, added in 2005, requires the Commission, by rule, to provide incentives to each electric utility that joins a FERC-approved regional transmission organization and to ensure that any costs associated with joining may be recovered through transmission rates. 16 U.S.C. § 824s(c).

II. DEVELOPMENT OF, AND INCENTIVE TO JOIN, REGIONAL TRANSMISSION ORGANIZATIONS

A. Pacific Gas's Membership In The California Independent System Operator

As part of its reforms of the wholesale electricity market, FERC encouraged transmission providers to establish, and transfer operational control of their facilities to, certain regional non-profit entities for, among other things, promoting competition and coordinating efficient and non-discriminatory transmission service.[1] *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-37 (2008). One of those entities is the California Independent System Operator Corporation ("California System Operator"). Established in 1997 as part of the restructuring of the California electric power industry, it provides transmission services and operates the transmission facilities owned by the three major participating electric utilities, one of which is Pacific Gas. *See, e.g.*, *Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 823 (D.C. Cir. 2008).

As a member of the California System Operator, Pacific Gas submits an annual "transmission owner" tariff filing to FERC under section 205 of the Federal Power Act. *See Pac. Gas & Elec. Co.*, 148 FERC ¶ 61,245, at P 1 n.2, R. 20, ER 27 (2014) ("TO16 Initial Order"); *Transmission Agency of N. Cal. v. FERC*,

[1] These entities are known as regional transmission organizations (or RTOs) or independent system operators (or ISOs). For ease of reference, this brief refers collectively to all such entities as "regional transmission organizations" or "regional organizations."

495 F.3d 663, 667 (D.C. Cir. 2007). That filing establishes Pacific Gas's jurisdictional transmission revenue requirement, which reflects its costs of constructing and owning its transmission system and the rate of return to which it is entitled as a participating transmission owner. *See Transmission Agency of N. Cal.*, 495 F.3d at 666 n.2; TO16 Initial Order P 1 n.2, ER 27.

B. The Commission Establishes Incentive-Based Rates For Participation In Regional Transmission Organizations

Through section 1241 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, Congress added a new section 219 to the Federal Power Act, 16 U.S.C. § 824s. Section 219(a) directed the Commission to establish by rule, no later than one year after enactment, certain incentive-based rates for electric transmission for the purpose of benefitting consumers through increased reliability and lower costs for delivering power. 16 U.S.C. § 824s(a). As relevant to this appeal, section 219(c) required the Commission to provide for incentives to each electric utility that joins a FERC-approved regional transmission organization. 16 U.S.C. § 824s(c).

To that end, the Commission issued Order No. 679 ("Incentives Rule" or "Rule"). *See Promoting Transmission Investment Through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 (2006), *on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *on reh'g*, Order No. 679-B, 119 FERC ¶ 61,062 (2007). Among other things, the Incentives Rule established upward adjustments, or "incentive

adders," to the return on equity of transmission owners that participate in a FERC-approved regional organization. *See Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 281 (D.C. Cir. 2006); Order No. 679 PP 8, 326-27. "[W]e will approve, when justified, requests for [return on equity]-based incentives for public utilities that join and/or continue to be a member of [a FERC-approved regional transmission organization]." Order No. 679 P 326.

In the rulemaking process that culminated in the Incentives Rule, several parties (including California) raised concerns about aspects of the proposed order, in particular the transmission organization incentive. Some commenters argued that any utilities legally required to join a regional organization should not be eligible for the incentive. *See* Order No. 679 P 316 ("Some of these commenters also assert that the incentive should not apply where a transmission owner is ordered to join a [regional organization] by statute . . . ."); Order No. 679-A P 83 ("TDU Systems also argue that the incentive should not be allowed for public utilities ordered to join Transmission Organizations by statute . . . because there is no nexus between the incentive rates and demonstrated customer benefits."). Others (including California) suggested that the incentive "should only apply going forward for new members, not for those who already joined," because incentives should not reward "past behavior . . . ." *See* Order No. 679 P 315; Order No. 679-A P 80 & n.127.

The Commission, however, declined to limit the incentive based on such concerns. *See* Order No. 679 PP 326-27, 331; Order No. 679-A P 86. In its Incentives Rule, the Commission stated that an entity "will be presumed to be eligible" for the incentive if it can demonstrate that it has joined a regional transmission organization and that its membership is ongoing. *See* Order No. 679 P 327. The Commission also clarified that "entities that have already joined, and that remain members of," a FERC-approved regional transmission organization are eligible to receive the incentive. *Id*. P 331.

Inducing utilities to join, and remain in, regional transmission organizations, according to the Commission, is consistent with the purpose of Federal Power Act section 219, 16 U.S.C. § 824s, to provide incentive-based rate treatments that benefit consumers by ensuring reliability and reducing the cost of delivered power. *See* Order No. 679-A P 86. As it emphasized, "the consumer benefits, including reliability and cost benefits, provided by [t]ransmission [o]rganizations are well documented," and the "best way to ensure those benefits are spread to as many consumers as possible is to provide an incentive that is widely available to member utilities . . . and is effective for the entire duration of a utility's membership in the [t]ransmission [o]rganization." *Id*. (footnote omitted).

The Commission in its Incentives Rule did not grant outright any incentives to any public utility, but rather identified specific incentives that it would allow

when justified in the context of individual rate filings by public utilities under the Federal Power Act. *See* Order No. 679 P 1. Furthermore, under the Rule, an incentive rate of return sought by an applicant must be within the zone of reasonableness before it will be approved. *Id*. P 2.

C. Pacific Gas's Transmission Owner Tariff Filings

On July 30, 2014, and July 29, 2015, Pacific Gas submitted to the Commission its sixteenth and seventeenth transmission owner ("TO") tariff filings, respectively, under section 205 of the Federal Power Act. *See* TO16 Initial Order P 2, ER 27; *Pac. Gas & Elec. Co*., 152 FERC ¶ 61,252, at P 2, R. 80, ER 15 (2015) ("TO17 Initial Order"). In these filings, it requested increases in its rate for electric transmission service to recover the costs associated with expansion and replacement of transmission infrastructure. Pacific Gas also requested a 50 basis point[2] incentive adder for its continued participation in the California System Operator. TO16 Rehearing Order P 2 & n.3, ER 8-9. California, among other parties, protested both tariff filings, and asked the Commission to deny Pacific Gas's requested incentive adder, to suspend both rate requests for the maximum statutory five-month period, *see* 16 U.S.C. § 824d(e), and to set them for hearing before an administrative law judge.

[2] Each basis point equals a 1/100% increase in a utility's return on equity, so a 50 basis point adder translates to a 0.5% increase. *See N.C. Utils. Comm'n v. FERC*, 741 F.3d 439, 443 n.1 (4th Cir. 2014).

III. THE CHALLENGED FERC ORDERS

In two separate initial orders, the Commission suspended Pacific Gas's proposed rate increases for the maximum statutory five-month period, and set them for hearing. TO16 Initial Order P 1, ER 27; TO17 Initial Order P 1, ER 15. The Commission reasoned, as a preliminary matter, that Pacific Gas's proposed rates were not shown to be just and reasonable. *See* TO16 Initial Order P 25, ER 35; TO17 Initial Order P 21, ER 22. While setting the proposed rates for hearing, it also granted the requested 50 basis point incentive adder for Pacific Gas's continued participation in the California System Operator.[3] *See* TO16 Initial Order P 30, ER 37; TO17 Initial Order P 23, ER 23 (accepting incentive adder "subject to it being applied to a base [return on equity] that has been shown to be just and reasonable . . . and subject to the resulting [return on equity] being within the zone of reasonableness . . . , as determined at hearing.").

California, in its requests for agency rehearing, raised several challenges to the Commission's findings. As relevant to its petition for review before this Court, it argued that there was no justification for granting Pacific Gas an incentive adder

[3] Pacific Gas has reached settlements with the parties that resolve all issues set for hearing, with the exception of the incentive adder. *See Pac. Gas & Elec. Co*., 152 FERC ¶ 63,014 at PP 3, 19, FERC Docket No. ER14-2529 (Aug. 6, 2015) (certification of uncontested settlement offer as to TO16 filing); *Pac. Gas & Elec. Co*., 156 FERC ¶ 63,047, at P 1, FERC Docket No. ER15-2294 (Sept. 13, 2016) (order of chief administrative law judge noting that Pacific Gas filed a settlement offer as to TO17 filing that is currently pending before the Commission).

for participation in the California System Operator because Pacific Gas does not do so voluntarily, but rather under a state mandate.[4] *See Pac. Gas & Elec. Co*., 154 FERC ¶ 61,119, at P 3, R. 99, ER 9 (2016) ("TO16 Rehearing Order"); *Pac. Gas & Elec. Co*., 154 FERC ¶ 61,118, at P 5, R. 98, ER 3 (2016) ("TO17 Rehearing Order"). California also contended that the Commission erred by granting a "generic" incentive adder to Pacific Gas, contrary to Commission policy, and that the Commission's grant of the adder was "arbitrary, capricious, and not the product of reasoned decisionmaking." *See* TO16 Rehearing Order PP 4, 7, ER 10-11; TO17 Rehearing Order P 7, ER 4.

The Commission found the requested incentive adder justified under its Incentives Rule. It concluded that it has authority, under that rule, to grant incentive adders to public utilities "that join and/or continue to remain in [a regional transmission organization]," and is not precluded from continuing to grant such adders to Pacific Gas in light of continued membership in the California System Operator. *See* TO17 Rehearing Order PP 9, 11, ER 5-6; TO16 Rehearing Order P 10, ER 12 (same); *see also* TO17 Initial Order PP 23-24, ER 23.

[4] On the question of Pacific Gas's ability to leave the System Operator, the record before the Commission indicates that California and Pacific Gas dispute each other's interpretations of both California state law and Pacific Gas's agreement with the System Operator. *See, e.g.*, Pacific Gas Answer to California Protest at 4-7, FERC Docket No. ER15-2294 (Aug. 27, 2015), R. 76, ER 93-96; California Answer to Pacific Gas Answer at 3-8, FERC Docket No. ER15-2294 (Sept. 11, 2015), R. 79, ER 79-84.

SUMMARY OF ARGUMENT

It is longstanding Commission policy (with Congress's blessing) to encourage widespread participation in regional transmission organizations. The Commission, Congress, and courts all have recognized the many, and significant, benefits that flow from such organizations to the public. *See, e.g.*, *Morgan Stanley*, 554 U.S. at 536-37; *Me. Pub. Utils. Comm'n*, 454 F.3d at 280-81; 16 U.S.C. § 824s(c).

To that laudable end, and consistent with its policy, the Commission has granted Pacific Gas's requests for an incentive rate adder each year since 2007 for its participation in the California System Operator. Now on review are the Commission's 2014 and 2015 grants of the incentive to Pacific Gas.

Disappointed with these latest grants, California labels them arbitrary and capricious. This claim, however, both misreads the governing Commission precedent and misapprehends which precedent governs. The Commission's reasoned explanation of why it granted the incentive rate adder to Pacific Gas follows both the letter and the spirit of its policy on providing incentives for participation in regional organizations. Notwithstanding California's contrary view, the Commission's reasonable interpretation of its 2006 Incentives Rule (Order No. 679) is owed deference.

California asks this Court to look to old Commission policy instead. But one source of policy it cites was expressly superseded by the Commission's Incentives Rule, as California concedes. And the remaining "longstanding policy" it flags pre-dates—and thus is implicitly superseded by—the Incentives Rule. That rule incorporated and clarified the Commission policy expressed in the older authorities cited by California.

In any event, ten years ago in its rulemaking, the Commission already considered, but did not adopt, the argument that California now resurrects—that Pacific Gas is ineligible for an incentive because it is purportedly required by law to join, and remain in, a regional transmission organization. As a party in that proceeding, California is well aware that the Commission declined to deny the incentive on that basis. California opted not to seek judicial review of the Incentives Rule. Its claim here that Pacific Gas is not free to leave the California System Operator, and is thus ineligible for the incentive, is nothing more than an untimely, impermissible collateral attack on the ten-year-old rule.

The Commission considered California's arguments and meaningfully explained why it disagreed with them. Although California disagrees with the result, that does not make the Commission's conclusion arbitrary and capricious. *Elec. Power Supply Ass'n*, 136 S. Ct. at 782-84. Nor does it amount to any violation of due process.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). Review under this standard is narrow. *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (quoting *Motor Vehicle Mfrs. Ass'n of United States, Inc. 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." *Id.* Here, courts accord great deference to the Commission's decisions because the Federal Power Act's "statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition . . . ." *Morgan Stanley*, 554 U.S. at 532; *see also Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 918 (9th Cir. 2011) (same). FERC's determinations on rate of return adders involve matters of rate design, the review of which "is highly deferential." *Me. Pub. Utils. Comm'n*, 454 F.3d at 287. Likewise, this Court gives deference to the

Commission's interpretation of its own orders. *Cal. Trout v. FERC*, 572 F.3d 1003, 1013 (9th Cir. 2009); *Cal. Dep't of Water Res. v. FERC*, 489 F.3d 1029, 1036 (9th Cir. 2007).

The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b). "Substantial evidence 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006) (quoting *Eichler v. SEC*, 757 F.2d 1066, 1069 (9th Cir. 1985)). This Court must uphold FERC's findings "'[i]f the evidence is susceptible of more than one rational interpretation . . . .'" *Id*.

As to an agency's construction of the statute it administers, if Congress has directly spoken to the precise question at issue, the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). If the statute is silent or ambiguous, the Court must defer to a reasonable interpretation made by the agency. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (citing *Chevron*, 467 U.S. at 844).

II. FERC'S APPROVAL OF PACIFIC GAS'S REQUEST FOR AN INCENTIVE ADDER WAS REASONABLE AND CONSISTENT WITH ITS INCENTIVES RULE

As described in the challenged orders, the Commission, through its 2006 Incentives Rule, sought to advance its congressionally-mandated goal of encouraging participation in regional transmission organizations through the use of incentive rates. Its grant of Pacific Gas's requests for incentives effectuated that policy goal, while providing reasons in support of its decision and responding to California's objections. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 784. The Commission's reasonable interpretation of its Incentives Rule is owed deference.

California's challenge, by contrast, is founded on its own interpretations of that rule. None of its arguments has any merit.

A. The Commission's Stated Policy Is To Encourage Widespread Participation In Regional Transmission Organizations Through Incentive Rates

It is well established that consumers reap significant benefits from regional transmission organizations. *See, e.g*, *Morgan Stanley*, 554 U.S. at 536-37 (noting that regional transmission organizations combine multiple utility power grids into a single transmission system to "reduce technical inefficiencies caused when different utilities operate different portions of the grid independently," and also "perform other functions, such as running auction markets for electricity sales and offering contracts for hedging against potential grid congestion"); *Me. Pub. Utils.*

Comm'n, 454 F.3d at 280-81 (describing anticipated public benefits from regional transmission organizations, including reduction of regional pricing disparities, creation of efficient markets for new power generators, and elimination of transmission inefficiencies and opportunities for discrimination); *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 770 (7th Cir. 2013) (noting that regional organizations "play a key role in the effort" by FERC "'to promote competition in those areas of the industry amenable to competition, such as the segment that generates electric power, while ensuring that the segment of the industry characterized by natural monopoly—namely, the transmission grid that conveys the generated electricity—cannot exert monopolistic influence over other areas'") (quoting *Morgan Stanley*, 554 U.S. at 536-37). As the Commission described in the challenged orders, those benefits include improving congestion management and grid reliability, spurring more efficient regional planning for transmission and generation investments, providing open and non-discriminatory transmission service, maintaining resource adequacy, and mitigating market power. *See* TO17 Rehearing Order P 10, ER 5; TO16 Rehearing Order P 12, ER 13.

In its Incentives Rule, the Commission approved the use of incentive rates to encourage participation in regional transmission organizations and as "a recognition of the benefits that flow from membership in such organizations and the fact [that] continuing membership is generally voluntary." *See* Order No. 679

P 331. In doing so, the Commission emphasized its goal of spreading those benefits "to as many consumers as possible" by providing an incentive "that is widely available to member utilities" and "is effective for the entire duration of a utility's membership . . . ." *See* Order No. 679-A P 86.

While recognizing the benefits of regional transmission organizations, the Commission also was cognizant of the very real dangers of electric utilities seeking to withdraw from them. Withdrawal could "risk[] reducing Transmission Organization membership and its attendant benefits to consumers." *See* Order No. 679-A P 86; *see also Ill. Commerce Comm'n*, 721 F.3d at 776 (finding that [m]embership in [a regional transmission organization] is voluntary," and that "members who think they're being mistreated by the [tariff provision at issue] can vote with their feet"); *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 354-55 (D.C. Cir. 2014) (affirming FERC's findings on the cost consequences of a utility moving from one regional organization to another).

The Commission, furthermore, took care to clarify that eligibility for the incentive extends to those entities (like Pacific Gas) that already are members of regional transmission organizations—"to do otherwise could create perverse incentives for an entity to actually leave Transmission Organizations and then join another one." Order No. 679 P 331. It also expressed concern that extending

benefits to new members, but not for existing ones, would be "unduly discriminatory." *Id.*

B. The Commission Reasonably Interpreted Its Incentives Rule To Grant Pacific Gas's Requested Incentives

Based on the goals enunciated in its Incentives Rule, and in light of Pacific Gas's ongoing membership in the California System Operator, the Commission found its requests for the incentive adder to be justified.[5] *See, e.g.*, TO17 Rehearing Order P 10, ER 5 ("As [the California System Operator] works to fulfill its duties as the transmission organization overseeing this rapidly evolving regional power market, the transmission facilities owned by participating transmission owners, such as [Pacific Gas], and operated by [the California System Operator] continue to play a critical role in supporting [the California System Operator's] efforts to efficiently manage the transmission grid and provide benefits to customers in the entire [California System Operator] footprint."); TO16 Rehearing Order P 12, ER 13 (same). Though California maintains that it "has never questioned" the Commission's authority to grant incentives that "actually serve[] as an inducement to achieve the agency's objectives," Br. 20, 22, it views the

[5] Because, as described *infra*, the Commission followed the requirements of the Incentives Rule, it appropriately rejected California's contention that it unlawfully amended or repealed that rule without the opportunity for notice and comment. *See* Br. 17, 27; TO17 Rehearing Order P 11, ER 6.

incentives here as unjustified because Pacific Gas "was not free to leave the [California System Operator] without [California's] consent," *see id*. 24.

But the Commission neither ignored nor failed to address this argument, as California claims. *See id*. 24-25. Rather, it addressed, and simply disagreed with, California's position—regardless of whether Pacific Gas's continuing participation in the California System Operator is mandatory under state law, the Commission found that it has the authority under its Incentives Rule to continue to grant incentive adders for electric utilities (like Pacific Gas) that remain members of regional transmission organizations. *See* TO17 Rehearing Order P 9, ER 5 ("We first address [California's] reliance on [Pacific Gas's] participation in [the California System Operator] now being mandatory under state requirements. The fact remains, though, that it is within the Commission's authority to grant incentive adders as described in Order No. 679. Order No. 679 is clear that the Commission may grant incentive adders for public utilities that join and/or continue to remain in [a regional transmission organization], and does not preclude the Commission from continuing to grant such adders to [Pacific Gas] in light of [Pacific Gas's] initial joining, and continued membership in, [the California System Operator]. Nor does Order No. 679 require that the Commission discontinue such adders in the face of arguments like those that [California] has made here."); TO17 Initial Order P 24, ER 23; TO16 Rehearing Order P 10, ER 12.

In other words, the Commission concluded that it was not precluded under its Incentives Rule from granting Pacific Gas an incentive adder for its continued membership in California System Operator simply because that membership may have been required under state law, as California claims. Br. 23-24. That California may find this explanation unconvincing does not make it unresponsive. *See Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 552 (D.C. Cir. 2010) (finding that the Commission's overall explanation "sufficed because it provided reasonable responses to petitioners' objections that were neither summary nor dismissive," and that "a point-by-point rebuttal is not necessarily required"); *see also Mont. Consumer Counsel*, 659 F.3d at 922 ("Our review is that of a federal appellate court, not a policy analyst.").

Not only did the Commission meaningfully respond to California's objections, it also reasonably interpreted its Incentives Rule. There, the Commission stated that an entity is presumptively eligible to receive an incentive if it can demonstrate that it has joined, or continues to be a member of, a regional transmission organization. Order No. 679 PP 326-27, 331. The incentive is not limited to new members, but applies equally to existing members. *See* TO17 Initial Order P 25 n.41, ER 24 (citing Rule); Order No. 679-A P 86 ("[T]he incentive applies to all utilities joining transmission organizations, irrespective of the date they join . . . . To limit the incentive to only utilities yet to join

Transmission Organizations offers no inducement to stay in these organizations for members with the option to withdraw, and hence risks reducing Transmission Organization membership and its attendant benefits to consumers."); Order No. 679 P 331 ("Our interpretation of the statute is that eligibility for this incentive flows to an entity that 'joins' a Transmission Organization and is not tied to when the entity joined. . . . It would also be unduly discriminatory for the Commission to consider the benefits of membership in determining the appropriate [return on equity] for new members but not for similarly situated entities that are already members.").

The Commission also conditioned its grant of the adder subject to it being applied to a just and reasonable base return on equity and subject to the overall return on equity being within the zone of reasonableness. *See* TO17 Initial Order P 23, ER 23; TO16 Initial Order P 30 & n.55, ER 37 (citing *Pac. Gas & Elec. Co*., 144 FERC ¶ 61,227, at P 20 (2013) (granting Pacific Gas's earlier request for a 50 basis point incentive adder, while noting that the justness and reasonableness of the proposed return on equity remained an issue of material fact for hearing)); TO16 Rehearing Order P 11 n.24, ER 12; *see also Me. Pub. Utils. Comm'n*, 454 F.3d at 288-89 (approving FERC's cap of 50 basis point adder to be within the zone of reasonableness); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) ("[C]ourts are without authority to set aside any rate selected by the Commission

which is within a 'zone of reasonableness.'") (quoting *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)).

California misreads the Commission's statement that it would approve incentives "when justified" as an outright prohibition on incentives for utilities that may be obligated under state law to join regional organizations. *See* Br. 23-24. But in its Incentives Rule, the Commission considered, yet did not accept, that argument. *See* Order No. 679 P 316 ("Some of these commenters also assert that the incentive should not apply where a transmission owner is ordered to join a [regional organization] by statute . . . ."); Order No. 679-A P 83 ("TDU Systems also argue that the incentive should not be allowed for public utilities ordered to join Transmission Organizations by statute . . . because there is no nexus between the incentive rates and demonstrated customer benefits."). The Commission's grants of Pacific Gas's requested incentives were thus entirely appropriate and reasonable under those orders.

C. California Fails To Establish That Pacific Gas Is Ineligible For A Rate Adder Under The Incentives Rule

In any event, even if California were correct that Pacific Gas is "not free to leave the [California System Operator] without [its] consent," *see* Br. 24, that still does not demonstrate that Pacific Gas is forbidden from *seeking* to leave the California System Operator. Rather, California acknowledges that Pacific Gas could take steps, with California's approval, to voluntarily leave the California

System Operator. *See id.*; *see also id.* 3 ("[Pacific Gas] turned its transmission assets over to the [California System Operator] pursuant to a [California] order issued in 1998, and [Pacific Gas] remains in the [California System Operator] in compliance with those orders, which require [Pacific Gas] to obtain [California] approval *should it seek to withdraw* from the [California System Operator.") (emphasis added); California Notice of Intervention and Protest at 9, ER 141-42, FERC Docket No. ER14-2529 (Aug. 20, 2014) ("None of [California's regulated] utilities can leave the [California System Operator] without [California's] authorization.") (citing California Public Utilities Code 851, "which requires [California] approval of any utility transfer of assets"); California Request for Rehearing at 9, ER 131, FERC Docket No. ER14-2529 (Oct. 30, 2014) ("[Pacific Gas] . . . cannot leave the [California System Operator] without [California's] authorization."); California Notice of Intervention and Protest at 10, ER 104, FERC Docket No. ER15-2294 (Aug. 19, 2015) ("[California] expressly provided . . . that any further transfers of control, such as from the [California System Operator] back to the three [utilities], would also require [California] authorization pursuant to state law.").

Pacific Gas's continued participation in the California System Operator cannot be labeled "involuntary," Br. 14, simply because it must, according to California, seek approval to leave. *See* TO16 Rehearing Order P 10, ER 12

("Order No. 679 is clear that the Commission may grant incentive adders for public utilities that join and/or continue to remain in [a regional transmission organization] . . . ."); Order No. 679 P 331 ("The basis for the incentive is a recognition of the benefits that flow from membership in such organizations and the fact [that] continuing membership is generally voluntary."); *see also Ill. Commerce Comm'n*, 721 F.3d at 776 (finding that [m]embership in [a regional transmission organization] is voluntary," and that "members who think they're being mistreated by the [tariff provision at issue] can vote with their feet").

D. The Commission Did Not "Act Generically," As California Claims

California also argues that the Commission improperly granted a "generic" incentive adder in violation of the Incentives Rule. Br. 25-26. Again, however, California misreads that rule.

The Commission reasonably explained that it granted the incentive adder to Pacific Gas—consistent with the requirements of the Incentives Rule—because Pacific Gas demonstrated (and California conceded) its ongoing membership in the California System Operator. *See* TO17 Rehearing Order P 11, ER 5-6; *see also Cal. Trout*, 572 F.3d at 1013 ("[W]e must give deference to the Commission's interpretation of its own orders."); *Cal. Dep't of Water Res.*, 489 F.3d at 1036 (same). It also noted that the adder is not "generic" simply because other entities have been granted the same adder. *See* TO17 Rehearing Order P 11 & n.22, ER 6

(citing *Midcontinent Indep. Sys. Operator, Inc*., 151 FERC ¶ 61,269, at P 14 (2015)); TO16 Rehearing Order P 13 & n.26, ER 13 (same).

The language of the Incentives Rule precluding "generic" adders confirms the propriety of the Commission's findings here as to Pacific Gas. There, in response to commenters who requested "a generic finding that entities that join [a regional transmission organization] automatically qualify for the incentive," the Commission concluded "we are not persuaded that we should create a generic adder for such membership, but instead will consider the appropriate [return on equity] incentive when public utilities request this incentive." Order No. 679 PP 318, 326.

As described above, the Commission's explanation of why it here granted the incentive adder, upon Pacific Gas's request, satisfies that "case-by-case" approach required by the Incentives Rule. *See* TO17 Rehearing Order P 11, ER 5-6 (granting adder because Pacific Gas demonstrated its ongoing membership in the California System Operator, consistent with the requirements of the Rule); Order No. 679 PP 326-27, 331. It did not convert the presumption of eligibility for incentives for ongoing members of regional organizations into a "right" to a generic adder, as California argues. *See* Br. 26.

California, for its part, cites no authority or evidence to support its view that Pacific Gas's ongoing membership is insufficient for an incentive under the

Incentives Rule's case-by-case approach. *See* Br. 25-26; *see also Cal. Trout*, 572 F.3d at 1013. Nor does it suggest what more the Commission should have said or done so as not to create a "generic" adder.

California also suggests that the Commission acted generically by "eschewing an inquiry into [Pacific Gas's] specific circumstances," i.e., Pacific Gas is "not free to leave" the System Operator without California's authorization. *See* Br. 26. This argument, however, fails for the same reasons as its "state law" argument: the Commission, in its Incentives Rule, did not adopt requests to disallow incentives for utilities legally mandated to join regional transmission organizations. *See* Order No. 679 PP 316, 326-27, 331; TO17 Rehearing Order P 9, ER 5; TO17 Initial Order P 24, ER 23; TO16 Rehearing Order P 10, ER 12.

III. THIS COURT LACKS JURISDICTION TO THE EXTENT CALIFORNIA NOW CLAIMS THAT PACIFIC GAS IS INELIGIBLE FOR AN INCENTIVE UNDER THE COMMISSION'S 2006 INCENTIVES RULE

This Court has held that a petition for review under the Federal Power Act is barred as an impermissible collateral attack on a prior order if the later order is a mere clarification, as opposed to a modification, of the prior order. *See Pac. Gas & Elec. Co. v. FERC*, 464 F.3d 861, 868 (9th Cir. 2006). To differentiate between a modification and a clarification, the relevant question is whether "a reasonable party in the petitioner's position would have perceived a very substantial risk that the order meant what the Commission now says it meant." *Id.* at 868-69 (quoting

Dominion Res., Inc. v. FERC, 286 F.3d 586, 589 (D.C. Cir. 2002) (alterations omitted); *see also City of Redding v. FERC*, 693 F.3d 828, 837 (9th Cir. 2012) ("The question of whether [a party] is collaterally attacking prior orders depends on whether those orders gave sufficient notice of the rule to which [the party] now objects.") (quoting *S. Co. Servs., Inc. v. FERC*, 416 F.3d 39, 44 (D.C. Cir. 2005)).

The Commission's grant of the incentive adder here merely implements the rule it enunciated in its Incentives Rule; it did not substantively alter or modify that rule. *See El Paso Elec. Co. v. FERC*, No. 14-60822, 2016 WL 4191137, at *11 (5th Cir. Aug. 8, 2016) (finding several improper collateral attacks on earlier FERC rule; "[T]he Compliance Orders merely clarified that Order No. 1000 meant to impose binding cost allocation, which Order No. 1000 clearly signaled and the D.C. Circuit has already recognized.") (citations omitted). Yet California challenged the orders here using the same argument[6] the Commission already considered and declined in its Incentives Rule—i.e., that utilities legally mandated

[6] *See, e.g.*, Br. 3 ("The core issue on appeal is whether FERC's orders granting [Pacific Gas] a Membership Incentive for remaining in the [California System Operator] arbitrarily provide [Pacific Gas] a windfall for doing something it is already required to do."); *id*. 24 ("[California] showed that the Membership Incentive was not justified under Order 679 because [Pacific Gas] was not free to leave the [System Operator] without [California's] consent."); California Request for Rehearing at 2, FERC Docket No. ER14-2529 (Oct. 30, 2014), R. 27, ER 124 ("The Commission erred in summarily granting [Pacific Gas] a 50 basis point rate incentive for participation in the [California System Operator] because [Pacific Gas's] participation . . . is not voluntary. [Pacific Gas] participates in the [System Operator] pursuant to [California] order with affirming state law directives.").

to join regional transmission organizations should not receive incentive adders. *See* Order No. 679 P 316 ("Some of these commenters also assert that the incentive should not apply where a transmission owner is ordered to join a [regional organization] by statute . . . ."); *id*. P 331; Order No. 679-A P 83 ("TDU Systems also argue that the incentive should not be allowed for public utilities ordered to join Transmission Organizations by statute . . . because there is no nexus between the incentive rates and demonstrated customer benefits."); *see also Pac. Gas & Elec.*, 464 F.3d at 870 (dismissing for lack of jurisdiction in part because petitioner raised same concerns in its petition for review that it already raised in a prior related proceeding). The Commission thus reasonably concluded that California's challenge to Pacific Gas's eligibility for an incentive was a collateral attack on its 2006 Rule. *See* TO16 Rehearing Order P 13 & n.27, ER 13 (citing *Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,049, at P 200 (2014) (rejecting arguments against grant of an incentive adder for continued participation in a regional organization as a collateral attack on the Incentives Rule)); TO17 Rehearing Order P 12 & n.27, ER 6-7 (same). California cannot show that the orders under review modified the Incentives Rule.[7] *See* Br. 30-31.

[7] Nor does California's aside that it recognized, and did not ignore, the economic and reliability benefits of membership in a regional organization, Br. 30, show that the orders are reviewable modifications of the Incentives Rule.

California also had sufficient notice that a utility that may have been legally mandated to join or remain within a regional organization is still eligible for an incentive rate adder—it was a party in the Incentives Rule proceeding, and in each of the annual proceedings since that rule in which the Commission approved Pacific Gas's requests for an incentive adder for continued participation in the California System Operator. *See* California Request for Rehearing at 6-7, FERC Docket No. ER15-2294 (Oct. 30, 2015), R. 90, ER 47-48 ("[Pacific Gas] has requested the 50 basis point incentive based on its continuing [California System Operator] membership for every one of its transmission owner rate cases filed since adoption of Order 679."); *Pac. Gas & Elec. Co.*, 120 FERC ¶ 61,296, at P 14 (2007) (first grant of incentive adder to Pacific Gas after Incentives Rule); *see also* TO17 Rehearing Order P 12, ER 6 ("If [California] disagreed with the Commission's determination in Order No. 679-A, the appropriate course of action was to seek judicial review of Order Nos. 679 and 679-A under section 313 of the [Federal Power Act]."") (footnote omitted); *City of Redding*, 693 F.3d at 837. A reasonable party in California's position thus would know, or should have known, that the Commission was not precluded, as California claims (Br. 23-24), from granting Pacific Gas an incentive simply because its continued membership in the System Operator may have been required under state law. *See Pac. Gas & Elec.*, 464 F.3d at 869 (dismissing petition for review for lack of jurisdiction because "a

reasonable party in [petitioner's] position should have known" that the Commission would apply in the current proceeding the accounting method it said it would apply in the prior related proceeding).

California disputes the collateral attack finding by contending that it raised an "as applied" challenge to the orders on review. Br. 31 (citing *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991)). But *Wind River* does not help California. It involved the question of the appropriate statute of limitations for constitutional or statutory challenges to a federal agency's classification of certain lands under the Federal Land Policy and Management Act of 1976. 946 F.2d at 711-12, 715. California has presented no such "substantive claim challenging the constitutional or statutory authority" of the Commission's application of a decision. *See* Br. 31.

IV. THE "LONGSTANDING POLICY" TO WHICH CALIFORNIA REFERS NEITHER TRUMPS THE INCENTIVES RULE NOR SUPPORTS CALIFORNIA'S POSITION

California also claims that the Commission failed to address or acknowledge its arguments that the grant of the incentive adder to Pacific Gas violated "longstanding" FERC policy prohibiting incentives for past conduct or mandatory conduct. *See* Br. 19-23. Its support for that claim, however, consists of several Commission orders—one of which California concedes was expressly reversed in the Incentives Rule—and a policy statement, all of which pre-date the Rule. *See*

id. 19-20 & n.6; *see also* Order No. 679-A P 86 n.142 ("[W]e reverse the policy adopted in our decision in *Southern California Edison*. Our decision in *Southern California Edison* failed to recognize that incentives are equally important in inducing utilities to join and remain in Transmission Organizations.").

The Commission fully explained, in the orders on review, that its Incentives Rule governs requests by public utilities for incentive rate treatment for participation in regional transmission organizations. *See* TO17 Initial Order P 24, ER 23 ("[O]ur analysis on the appropriateness of assigning [a return on equity] incentive adder is based in terms of the criteria set forth in Order No. 679 . . . . [I]t is within the Commission's authority to grant incentive adders as described in Order No. 679."); TO17 Rehearing Order P 9, ER 5 ("[I]t is within the Commission's authority to grant incentive adders as described in Order No. 679. Order No. 679 is clear that the Commission may grant incentive adders for public utilities that join and/or continue to remain in [a regional transmission organization], and does not preclude the Commission from continuing to grant such adders to [Pacific Gas] in light of [Pacific Gas's] initial joining, and continued membership in, [the California System Operator]."); TO16 Rehearing Order P 10, ER 12 (same). And, the Commission explained that its approval of Pacific Gas's request for an incentive adder here was based on its 2006 Incentives Rule. *See* TO17 Initial Order P 23, ER 23 ("[Pacific Gas] is a member of [the

California System Operator], an independent system operator, and its membership is ongoing; therefore, [Pacific Gas] is presumed to be eligible for this incentive adder in accordance with Order No. 679."); TO16 Rehearing Order P 11, ER 12 ("The Commission first granted a 50 basis point adder to [Pacific Gas] under section 205 of the Federal Power Act, and consistent with Order No. 679's requirements, [Pacific Gas] demonstrated, and [California] concedes, that it is a member of [the California System Operator] and its membership is ongoing.") (footnotes omitted). The Commission thus was not required to distinguish the older orders and policy statement California cites that plainly do not govern here.

Even accepting California's contention that prior Commission policy forbids rewards for past conduct or mandatory conduct, *see* Br. 19, the Commission in its Incentives Rule proceeding rejected arguments to limit incentives based on such concerns. There, some commenters (including California) argued that the incentive "should only apply going forward for new members, not for those who already joined," because incentives should not be provided for "past behavior"; others argued it "should not apply where a transmission owner is ordered to join a [regional transmission organization] by statute . . . ." *See* Order No. 679 PP 315-16; Order No. 679-A PP 80 & n.127, 81, 83. The Commission disagreed with these concerns, finding that entities that already joined, and remained members of, regional transmission organizations are eligible for the incentive because

"continuing membership is generally voluntary." *See* Order No. 679 P 331; *see also* Order No. 679-A P 86. It also concluded that disallowing incentives to existing members was unduly discriminatory and could create "perverse incentives" for entities to leave one organization for another. *See* Order No. 679 P 331. The Commission's approval of Pacific Gas's requests for an incentive adder is thus consistent with the governing policy set forth in its Incentives Rule.

California's attempt to distinguish *Maine Public Utilities Commission* fails. *See* Br. 21. Like the incentive there, the incentive here rewards continued membership in the regional transmission organization, not just "past action." *See* 454 F.3d at 288 (finding that FERC reasonably concluded that an incentive for participation in a regional organization rewards future participation, not just past action); *see also* TO17 Rehearing Order P 9, ER 5 ("Order No. 679 is clear that the Commission may grant incentive adders for public utilities that join and/or continue to remain in [a regional organization], and does not preclude the Commission from continuing to grant such adders to [Pacific Gas] in light of [Pacific Gas's] initial joining, and continued membership in, [the California System Operator]."). *Maine Public Utilities Commission*, 454 F.3d at 289, distinguished one of the older FERC orders cited by California (Br. 20-21), *Allegheny Power Sys. Operating Cos.*, 111 FERC ¶ 61,308 (2005), because it involved requests for incentive adders "nearly two years after" the requesting

entities had joined a regional organization. However, both *Allegheny* and the orders at issue in *Maine Public Utilities Commission* preceded the Incentives Rule, which undisputedly established that such incentives are not limited to new members, but apply equally to existing members. *See* Order No. 679-A P 86; Order No. 679 P 331; TO17 Initial Order P 25 n.41, ER 24.

Although California maintains that the incentive here was unjustified because Pacific Gas is "required to remain" in the California System Operator, *see* Br. 20-22, it acknowledges, as described *supra* 23-24, that Pacific Gas *could* seek to withdraw. *See* Br. 3, 24. California thus cannot demonstrate that Pacific Gas is prohibited from voluntarily seeking to leave the California System Operator.

In any event, the Commission did not ignore California's argument on Pacific Gas's ability to leave; it just disagreed with California that this issue mattered to the question of whether to grant an incentive rate adder under its Incentives Rule, as described *supra* 20-21. *See* TO17 Rehearing Order P 9, ER 5; TO17 Initial Order P 24, ER 23; TO16 Rehearing Order P 10, ER 12; *see also Transmission Agency of N. Cal.*, 628 F.3d at 552 (finding that the Commission's overall explanation "sufficed because it provided reasonable responses to petitioners' objections that were neither summary nor dismissive," and that "a point-by-point rebuttal is not necessarily required").

V. CALIFORNIA HAS NOT SHOWN ANY DUE PROCESS VIOLATION

Although California references "due process violations" in a section heading of its brief, Br. 28, it does not otherwise explain how the Commission's orders violated any process to which California (or anyone else) was due, or even refer to what those violations are. Nor do the two cases it cites support its assertion that the incentive was an "arbitrarily derived rate component" that was not just and reasonable. *See* Br. 28 (citing *Mobil Oil Corp. v. Fed. Power Comm'n*, 417 U.S. 283, 308-09 (1974), and *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984)). Those cases—neither of which involve due process violations—stand for the unremarkable proposition that FERC must specify the nature of any relevant non-cost factors and offer a "reasoned explanation" of how these factors justify the resulting rates. *Farmers Union*, 734 F.2d at 1502; *see also id*. at 1503 (recognizing that "'non-cost' factors may play a legitimate role in the setting of just and reasonable rates"). *Cf. Cal. ex rel. Lockyer v. FERC*, 329 F.3d 700, 712-15 (9th Cir. 2003) (holding that the Commission's "consideration of the petitioners' evidence and arguments . . . gave the petitioners all the procedural safeguards they were due under the Due Process Clause or the [Federal Power Act]," and that its decision was not arbitrary and capricious).

Here, the Commission gave a reasoned explanation of its grant of the incentive to Pacific Gas, e.g., describing the benefits to consumers from

transmission owners (such as Pacific Gas) participating in regional transmission organizations. *See, e.g.*, TO17 Rehearing Order P 10, ER 5 ("As [the California System Operator] works to fulfill its duties as the transmission organization overseeing this rapidly evolving regional power market, the transmission facilities owned by participating transmission owners, such as [Pacific Gas], and operated by [the California System Operator] continue to play a critical role in supporting [the Operator's] efforts to efficiently manage the transmission grid and provide benefits to customers in the entire [California System Operator] footprint."); TO16 Rehearing Order P 12, ER 13 (same). California does not dispute those benefits, and instead merely reiterates that it "has already addressed the issue" of why the grant of the incentive to Pacific Gas is inappropriate, i.e., Pacific Gas "must obtain [California's] consent to leave the [System Operator]." Br. 29. Again, however, this remark does not state a due process violation.

California's disappointment with the result neither renders it "arbitrar[y]" (Br. 28) nor the Commission's explanation anything less than reasoned. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 782 ("A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives. 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.'")

(quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43); *id.* at 784 (deferring to FERC on "disputed question[s] . . . [that] involve[] both technical understanding and policy judgment"; "The Commission, not this or any other court, regulates electricity rates").

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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September 19, 2016

STATEMENT OF RELATED CASES

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

Respectfully submitted,

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September 19, 2016

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 2013, in 14-point Times New Roman) and contains 8,729 words, not including the cover page, the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

/s/ Anand R. Viswanathan
Anand R. Viswanathan
Attorney

September 19, 2016

ADDENDUM

STATUTES

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STATUTES:

Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, §1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, §10(b), 60 Stat. 243.

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

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

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

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

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

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

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

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the reservation. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(b) Alternative prescriptions

(1) Whenever the Secretary of the Interior or the Secretary of Commerce prescribes a fishway under section 811 of this title, the license applicant or any other party to the license proceeding may propose an alternative to such prescription to construct, maintain, or operate a fishway.

(2) Notwithstanding section 811 of this title, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall accept and prescribe, and the Commission shall require, the proposed alternative referred to in paragraph (1), if the Secretary of the appropriate department determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative—

(A) will be no less protective than the fishway initially prescribed by the Secretary; and

(B) will either, as compared to the fishway initially prescribed by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any prescription under section 811 of this title or alternative prescription it accepts under this section, a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(June 10, 1920, ch. 285, pt. I, § 33, as added Pub. L. 109–58, title II, § 241(c), Aug. 8, 2005, 119 Stat. 675.)

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any

order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term ''sale of electric energy at wholesale'' when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term ''public utility'' when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),[1] 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms ''affiliate'', ''associate company'', ''electric utility company'', ''holding company'', ''subsidiary company'', and ''exempt wholesale generator'' shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

(June 10, 1920, ch. 285, pt. II, §201, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 847; amended Pub. L. 95–617, title II, §204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102–486, title VII, §714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109–58, title XII, §§1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985; Pub. L. 114–94, div. F, §61003(b), Dec. 4, 2015, 129 Stat. 1778.)

REFERENCES IN TEXT

The Rural Electrification Act of 1936, referred to in subsec. (f), is act May 20, 1936, ch. 432, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (§901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Public Utility Holding Company Act of 2005, referred to in subsec. (g)(5), is subtitle F of title XII of Pub. L. 109–58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (§16451 et seq.) of subchapter XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

AMENDMENTS

2015—Subsec. (b)(2). Pub. L. 114–94, §61003(b)(1), inserted ''824*o*–1,'' after ''824*o*,'' in two places.

Subsec. (e). Pub. L. 114–94, §61003(b)(2), inserted ''824*o*–1,'' after ''824*o*,''.

2005—Subsec. (b)(2). Pub. L. 109–58, §1295(a)(1), substituted ''Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title'' for ''The provisions of sections 824i, 824j, and 824k of this title'' and ''Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''Compliance with any order of the Commission under the provisions of section 824i or 824j of this title''.

Subsec. (e). Pub. L. 109–58, §1295(a)(2), substituted ''section 824e(e), 824e(f), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''section 824i, 824j, or 824k of this title''.

Subsec. (f). Pub. L. 109–58, §1291(c), which directed amendment of subsec. (f) by substituting ''political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of

[1] So in original. Section 824e of this title does not contain a subsec. (f).

1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year,'' for ''political subdivision of a state,'', was executed by making the substitution for ''political subdivision of a State,'' to reflect the probable intent of Congress.

Subsec. (g)(5). Pub. L. 109–58, § 1277(b)(1), substituted ''2005'' for ''1935''.

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

1978—Subsec. (b). Pub. L. 95–617, § 204(b)(1), designated existing provisions as par. (1), inserted ''except as provided in paragraph (2)'' after ''in interstate commerce, but'', and added par. (2).

Subsec. (e). Pub. L. 95–617, § 204(b)(2), inserted ''(other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title)'' after ''under this subchapter''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1277(b)(1) of Pub. L. 109–58 effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such date, see section 1274 of Pub. L. 109–58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Pub. L. 95–617, title II, § 214, Nov. 9, 1978, 92 Stat. 3149, provided that:

''(a) PRIOR ACTIONS.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall apply to, or affect, any action taken by the Commission [Federal Energy Regulatory Commission] before the date of the enactment of this Act [Nov. 9, 1978].

''(b) OTHER AUTHORITIES.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title.''

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

(1) During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(2) With respect to an order issued under this subsection that may result in a conflict with a

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a reg-

§ 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); or

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

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

(3) The Commission may—

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

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

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

(b) Exemption of information from disclosure

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

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

California Public Utilities Commission v. FERC **Docket No. ER14-2529, *et al.***
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 19, 2016.

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

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

9th Circuit Case Number(s): 16-70481

I, Anand R. Viswanathan , certify that this brief is identical to the version submitted electronically on [date] Sep 19, 2016 .

Date Sep 20, 2016

Signature /s/ Anand R. Viswanathan

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