ORAL ARGUMENT NOT YET SCHEDULED

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

Nos. 14-1244 and 14-1246
(consolidated)

PUBLIC CITIZEN, INC., *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

Max Minzner
General Counsel

Robert H. Solomon
Solicitor

Karin L. Larson
Attorney

For Respondent
Federal Energy Regulatory
Commission
Washington, D.C. 20426

December 23, 2015

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

A. Parties: All parties and intervenors appearing before this Court are identified in Petitioners' briefs.

B. Notices Under Review:

(1) Notice of Filing Taking Effect by Operation of Law, *ISO New England Inc.*, Docket No. ER14-1409 (Sept. 16, 2014), JA 112; and

(2) Notice of Dismissal of Pleadings, *ISO New England Inc.*, Docket No. ER14-1409 (Oct. 24, 2014), JA 154.

C. Related Cases: This case has not previously been before this Court or any other court.

/s/ Karin L. Larson
Karin L. Larson

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

---

* Cases chiefly relied upon are marked with an asterisk.

COURT CASES: **PAGE**

COURT CASES: **PAGE**

COURT CASES: **PAGE**

COURT CASES: **PAGE**

ADMINISTRATIVE CASES:

ADMINISTRATIVE CASES: **PAGE**

STATUTES:

STATUTES: **PAGE**

REGULATIONS:

GLOSSARY

Auction Rates	Rates resulting from the System Operator's eighth forward capacity auction as filed in *ISO New England Inc.*, Eighth Forward Capacity Auction Results Filing, Docket No. ER14-1409 (Feb. 28, 2014), R. 1, JA 19
Clark/Bay Statement	Joint Statement by Commissioner Tony Clark and Commissioner Norman Bay, Docket No. ER14-1409 (Sept. 16, 2014), R. 56, JA 113
Commission or FERC	Federal Energy Regulatory Commission
Connecticut	Petitioners, George Jepsen, Attorney General for the State of Connecticut, the Connecticut Public Utilities Regulatory Authority, and the Connecticut Office of Consumer Counsel
First Notice	Notice of Filing Taking Effect by Operation of Law, *ISO New England Inc.*, Docket No. ER14-1409 (Sept. 16, 2014), R. 55, JA 112
JA	Joint Appendix
LaFleur Statement	Statement of Chairman Cheryl A. LaFleur on the Forward Capacity Auction 8 Results Proceeding, Docket No. ER14-1409 (Sept. 16, 2014), R. 57, JA 116
Moeller Statement	Statement of Commissioner Philip D. Moeller on FERC's Lack of Action, Docket No. ER14-1409 (Sept. 16, 2014), R. 58, JA 120
Public Citizen	Petitioner, Public Citizen, Inc.
P	Paragraph number in a FERC order
R.	Record citation

Second Notice	*See* Notice of Dismissal of Pleadings, *ISO New England Inc.*, Docket No. ER14-1409 (Oct. 24, 2014), R. 63, JA 154
System Operator	ISO New England Inc.
Tariff	Market Rule 1, Section III.13 "Forward Capacity Market" of the System Operator's Tariff, JA 156

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

Nos. 14-1244 and 14-1246
(consolidated)

PUBLIC CITIZEN, INC., *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

The Federal Power Act governs the filing of wholesale electricity rates with, and review by, the Federal Energy Regulatory Commission ("Commission" or "FERC"). In 2014, ISO New England Inc. ("System Operator") filed for Commission review rates produced by a forward auction for electric capacity needed to meet future wholesale demand in New England. The Commission worked diligently to reach a majority decision regarding the auction rate filing within the statutorily-prescribed 60-day notice and action period. Ultimately,

however, the (then) four-member Commission was deadlocked. As announced by notices issued by the Commission Secretary, and statements by individual Commissioners, the rates went into effect by operation of law under section 205(d) of the Federal Power Act, 16 U.S.C. § 824d(d).

Several parties that had filed protests challenging the System Operator's rate filing now seek judicial review of the Commission's response to that filing. The questions presented on appeal are:

1. Whether notices announcing the absence of a majority vote, accompanied by individual Commissioner statements, demonstrate an agency action or order that is judicially reviewable under either the Federal Power Act or the Administrative Procedure Act.

2. Assuming jurisdiction, whether the Federal Power Act allows a protested rate filing to go into effect by operation of law, when the Commission cannot act, and cannot issue an order, by majority vote.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the Addendum.

COUNTER-STATEMENT OF JURISDICTION

On January 2, 2015, the Commission moved to dismiss the petitions for review in Nos. 14-1244 and 14-1246 for lack of subject matter jurisdiction. On April 7, 2015, this Court deferred action on the Commission's motion, referring the

jurisdictional issues to the merits panel. (Petitioner Public Citizen, Inc. incorrectly claims, Br. at 2, that this Court denied the Commission's motion.)

As more fully explained below in Part I of the Argument, Petitioners Public Citizen, Inc. ("Public Citizen") and George Jepsen, Attorney General for the State of Connecticut, the Connecticut Public Utilities Regulatory Authority, and the Connecticut Office of Consumer Counsel (together "Connecticut") fail to present this Court with any reviewable action or order of the Commission. Rather, they seek review of the absence of action by the Commission – the non-suspension of the System Operator's rates resulting from the eighth forward capacity auction. Although the capacity rates will not be charged until June 2017, the rate schedules took effect 60 days after they were filed with the Commission consistent with the Federal Power Act and the Commission's implementing regulations. *See* 16 U.S.C. § 824d(d); *see also* 18 C.F.R. § 35.2(f).

The Commission *may* suspend rates within 60 days of the date of a utility filing if the Commission opts to investigate whether the rates should be approved or disapproved. *See* 16 U.S.C. § 824d(e). But here, the Commission did not suspend the filed rates. Rather, the four FERC Commissioners were deadlocked on what, if any, action to take. The Commission did not reach a majority vote or make a majority decision. All that issued were notices published by the Commission Secretary announcing the absence of a decision, and individual

Commissioner statements articulating individual views on the case. *See* 42 U.S.C. § 7171(e) (FERC can act only by a majority vote of the Commissioners). As a result, the filed rates went into effect by operation of law. Whether viewed under the judicial review provisions of the Federal Power Act or the Administrative Procedure Act, there is no agency order or action for this Court to review.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Commission

The Commission is a federal agency composed of up to five members appointed by the President. *See* 42 U.S.C. § 7171(a)-(b) (statute establishing the Commission and transferring authority to it). Any "action" of the Commission requires a quorum of at least three Commissioners and "shall be determined by a majority vote by the members present." *Id.* § 7171(e).

As this Court has explained, all legal authority granted to the Commission by the Federal Power Act (and other statutes it administers) "runs to the Commission as an entity apart from its members, and it is its institutional decisions – none other – that bear legal significance." *Pub. Serv. Comm'n of N.Y. v. FPC*, 543 F.2d 757, 776 (D.C. Cir. 1974) (describing principles governing a valid Commission order and decision).

B. The Federal Power Act

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). Two Federal Power Act provisions, sections 205 and 206, 16 U.S.C. §§ 824d, 824e, govern FERC's authority and establish its obligation to regulate rates for the transmission and wholesale sale of electricity in interstate commerce. "[T]he FPA has multiple purposes in addition to preventing excessive rates, including protecting against inadequate service and promoting the orderly development of plentiful supplies of electricity." *Consol. Edison Co. of N.Y. v. FERC,* 510 F.3d 333, 342 (D.C. Cir. 2007) (citations and internal quotation marks omitted). In determining whether rates are just and reasonable, FERC is charged with balancing these competing interests. *See, e.g., New Eng. Power Generators Ass'n, v. FERC*, 757 F.3d 283, 298 (D.C. Cir. 2014).

In general, section 205 of the Act prohibits unjust and unreasonable rates, 16 U.S.C. § 824d(a), as well as rates that are unduly discriminatory or preferential. Section 206 of the Act gives the Commission the power to correct any such unlawful practices, 16 U.S.C. § 824e(a).

Particularly relevant to this case are subsections 205(d) and (e) of the Federal Power Act, governing the filing and review of proposed rates, which provide as follows:

> (d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates . . . , 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. . . .
>
> (e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint . . . , to enter upon a hearing concerning the lawfulness of such rate . . . ; and, pending such hearing and the decision thereon the Commission . . . may suspend the operation of such schedule and defer the use of such rate . . . , but not for a longer period than five months beyond the time when it would otherwise go into effect . . . .

16 U.S.C. §§ 824d(d) and (e). Accordingly, under the Federal Power Act the utility in the first instance files proposed rates with the Commission pursuant to section 205, 16 U.S.C. § 824d(c); *see also Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 531 (2008) (explaining that section 205 requires utilities to notify the Commission 60 days before a new rate is to go into effect). The Commission can investigate a newly filed rate (section 205, *id.* § 824d(e)) or an existing rate (section 206, *id.* § 824e(a)), and, if the rate is

inconsistent with the statutory just and reasonable standard, order a change in the rate to make it conform to that standard, *id.* §§ 824d(e), 824e(a)-(b).[1]

II. THE NEW ENGLAND FORWARD CAPACITY MARKET

A. New England System Operator

The System Operator is a private, non-profit entity that administers New England's energy markets, operates the region's high-voltage transmission system, and maintains system reliability. *See Blumenthal v. FERC*, 552 F.3d 875, 878 (D.C. Cir. 2009); *see also NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 169 & n.1 (2010) (explaining responsibilities of regional system operators). Having ruled on numerous appeals concerning new electricity market rate designs over the last decade, this Court is well-acquainted with the problems of maintaining system reliability and mitigating market power in regional power markets, especially in areas of high demand along the eastern seaboard (including New England) – including efforts to assure an adequate level of electric capacity to

[1] If the Commission is investigating a new rate filing under Federal Power Act section 205, the burden is on the filing utility to show that its rate is lawful. 16 U.S.C. § 824d(e). If the Commission is investigating an existing rate, the burden is on the Commission or the complaining customer to show that the rate is unlawful. *Id.* § 824e(b). The statutory test of a rate's lawfulness is the same under both section 205 and section 206 – just and reasonable. *Boston Edison Co. v. FERC*, 233 F.3d 60, 64 (1st Cir. 2000); *see also Morgan Stanley*, 554 U.S. at 545 (the "just and reasonable" standard is the only statutory standard for assessing wholesale electricity rates).

meet future demand.[2] *See, e.g.*, *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009) (capacity market in New England); *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) (same), *rev'd in part sub nom. NRG Power Marketing, LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010); *see also New Eng. Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283 (D.C. Cir. 2014) (imposition of additional mitigation measures for New England capacity market); *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364 (D.C. Cir. 2013) (standard for review of auction rates); *Blumenthal v. FERC*, 552 F.3d 875 (transition to capacity market in New England).

To attract sufficient capacity to meet wholesale demand, the System Operator conducts the bid-based "Forward Capacity Market" across six northeastern states: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. *See NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 796 (D.C. Cir. 2007). Since 2008, the System Operator has administered the Forward Capacity Market pursuant to the rules set forth in its FERC-jurisdictional tariff ("Tariff"). *See generally* Tariff at § III.13 *et seq.* (Forward Capacity Market rules),

[2] "'Capacity' is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties – generally, generators – who can either produce more or consume less when required." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 478 (D.C. Cir. 2009); *see also NRG*, 558 U.S. at 168 ("In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases an option to buy a quantity of energy, rather than purchasing the energy itself.").

JA 186-403. Under the Forward Capacity Market, electricity providers in New England purchase from generators (and other suppliers) options to buy quantities of energy (i.e., capacity) three years in advance.[3] *See Blumenthal*, 552 F.3d at 879. *See generally NRG Power Mktg.*, 558 U.S. at 168-72 (describing the System Operator's forward capacity market).

Capacity prices are set through the annual forward capacity auction. The capacity auction is a descending clock auction under which generators and other suppliers willing to provide capacity submit bids reflecting the price at which they are willing to supply capacity. Each bid reflects the lowest price the bidding resource will accept before it leaves the capacity market for that year. *See generally* Tariff at § III.13.2 *et seq.*, JA 267-298; *see also New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283, 298 (D.C. Cir. 2014) (explaining bidding process); and *ISO New England Inc.*, 148 FERC ¶ 61,201, at P 2 (2014) (describing forward capacity auction process), JA 404. Pursuant to the requirements of its Tariff, the System Operator submits the resulting auction rates

[3] A forward capacity market, such as the one administered by the System Operator, encourages the entry of new suppliers into the market with auctions that set rates three years in advance of delivery. This lag time allows competition from new suppliers that lack the installed capacity to deliver electricity now but could develop that capacity within three years of winning a bid. *See Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 (D.C. Cir. 2011) (dismissing challenge to a pricing model designed to encourage increased investment in capacity); *see also Del. Dep't of Nat. Res. and Envtl. Control v. EPA*, 785 F.3d 1, 12 (D.C. Cir. 2015) (explaining that capacity payments provide revenues to maintain operations of existing generation resources and to encourage development of new resources).

to the Commission as a Federal Power Act section 205 rate filing. Tariff at § III.13.8.2(a), JA 402.

In February 2014, the System Operator conducted the eighth annual capacity auction to procure capacity for the 12-month period from June 1, 2017 through May 31, 2018. Just prior to the eighth auction, the capacity supply shifted from an expected surplus to a deficiency of over 1,000 megawatts. *See ISO New England Inc.*, Eighth Forward Capacity Auction Results Filing, Attachment B, Testimony of Stephen J. Rourke at 6, Docket No. ER14-1409-000 (Feb. 28, 2014) R. 1, JA 34. The capacity shortage meant the anticipated amount of capacity from existing generators would be insufficient to meet system demand. *See id.*, Rourke Testimony at 17-18, JA 45-46. The capacity shortage was the result of several generators, including the Brayton Point station in Massachusetts, seeking to retire (exit the market). *See ISO New England Inc.*, 148 FERC ¶ 61,201, at P 4-8 (describing the eighth auction), JA 405-408. The eighth auction rate filing is the subject of this appeal.

B. The Challenged Proceeding

1. System Operator Filing

On February 28, 2014, the System Operator filed, pursuant to the requirements of its Tariff and section 205 of the Federal Power Act, 16 U.S.C. § 824d, the rates from the eighth auction (hereinafter the "Auction Rates"). The

System Operator requested an effective date 120 days from the date of its filing; i.e., June 28, 2014. Eighth Forward Capacity Auction Results Filing at 3, JA 21.

Certain parties filed protests challenging the eighth auction rate filing. Public Citizen's protest focused exclusively on its allegation that the owners of the Brayton Point generation units intentionally withheld the Brayton Point capacity "to manipulate the [eighth forward capacity] auction." Motion to Intervene and Protest of Public Citizen, Inc., Docket No. ER14-1409 (Apr. 14, 2014), R. 15, JA 93. Public Citizen argued that this possible "violation of the Commission's Anti-Manipulation rule" resulted in prices in the eighth auction that were significantly higher than prices expected from a competitive market. *Id.* at 1, JA 93. Like Public Citizen, Connecticut's protest centered on whether the withdrawal of the Brayton Point generating capacity reflected the "abuse of market power" by the Brayton Point owners. Motion to Intervene and Protest of George Jepsen, Attorney General for the State of Connecticut at 2-3, Docket No. ER14-1409 (Apr. 14, 2014) (urging the Commission's enforcement office to investigate the results of the eighth auction), R. 12, JA 80-81.

The Commission initially found the rate filing to be deficient and requested additional information regarding the conduct of the eighth auction. *ISO New England Inc.*, Deficiency Letter, Docket No. ER14-1409 (June 27, 2014) (noting that a new "filing" date will be the date the System Operator submits the required

information), R. 36, JA 96-98; *see also* 18 C.F.R. § 35.5 (regulation governing the rejection of a rate filing).

On July 17, 2014, the System Operator filed the requested information, completing its rate filing and triggering the statutory 60-day notice period under Federal Power Act section 205(d). *See* 18 C.F.R. § 35.2(d) (defining "filing date").

2. FERC Notices

Sixty-one days later, on September 16, 2014, the Secretary of the Commission issued a notice informing parties that, pursuant to Federal Power Act section 205, "in the absence of Commission action on or before September 15, 2014 [the 60-day statutory deadline], [the System Operator's] filing, as amended, became effective by operation of law." *See* Notice of Filing Taking Effect by Operation of Law, *ISO New England Inc.*, Docket No. ER14-1409 (Sept. 16, 2014) ("First Notice"), R. 55, JA 112. That same day, the Commission also announced that its Office of Enforcement had conducted a non-public review of Brayton Point generation station's bidding behavior and found "credible justification for the owners' retirement decision," and thus concluded that further investigation of Brayton Point was not warranted. *ISO New England Inc.*, 148 FERC ¶ 61,201, at P 11, JA 409.

The four Commissioners released separate statements expressing their individual opinions regarding the Auction Rates. *See* Statement of Chairman

Cheryl A. LaFleur on the Forward Capacity Auction 8 Results Proceeding, Docket No. ER14-1409 (Sept. 16, 2014) ("LaFleur Statement"), R. 57, JA 116; Statement of Commissioner Philip D. Moeller on FERC's Lack of Action, Docket No. ER14-1409 (Sept. 16, 2014) ("Moeller Statement"), R. 58, JA 120; Joint Statement by Commissioner Tony Clark and Commissioner Norman Bay, Docket No. ER14-1409 (Sept. 16, 2014) ("Clark/Bay Statement"), R. 56, JA 113. These statements indicated that the four Commissioners were deadlocked on what action to take if the agency were to issue an order. Chairman LaFleur and Commissioner Moeller stated that, if they had an opportunity to vote on an order, they would have voted to accept the Auction Rates. *See* LaFleur Statement at 1, JA 116, and Moeller Statement at 1, JA 120. Commissioners Clark and Bay asserted that they, unlike their colleagues, would have set the matter for hearing to evaluate the justness and reasonableness of the Auction Rates. *See* Clark/Bay Statement at 1, 3, JA 113, 115. However, all four Commissioners agreed that, in the absence of a majority Commission order, the protested capacity rates took effect by operation of law under section 205 of the Federal Power Act. LaFleur Statement at 1, JA 116; Moeller Statement at 1, JA 120; *see also* Clark/Bay Statement at 2-3, JA 114-115.

Subsequently, Public Citizen and Connecticut each filed with the Commission a pleading titled "request for rehearing" of the First Notice. *See* Request for Rehearing by George Jepsen, *et al.*, Docket No. ER14-1409 (Oct. 16,

2014), R. 62, JA 134; and Request for Rehearing and Order Setting Rates for Hearing of Public Citizen, Inc., Docket No. ER14-1409 (Oct. 15, 2014), R. 60, JA 121. The Commission Secretary issued a second notice on October 24, 2014, acknowledging the pleadings and noting that, because the First Notice was "not an order issued by the Commission," under section 313(a) of the Federal Power Act, 16 U.S.C. § 825*l*(a), "[r]ehearing therefore does not lie." *See* Notice of Dismissal of Pleadings, *ISO New England Inc.*, Docket No. ER14-1409 (Oct. 24, 2014) ("Second Notice"), R. 63, JA 154. Accordingly, because "the Commission did not issue an order in this proceeding," *id.*, the rehearing requests were dismissed. This appeal followed.

C. The Commission's Ongoing Monitoring And Enforcement Of The New England Forward Capacity Market

The Commission remains committed to ensuring that the Forward Capacity Market produces reliable energy at just and reasonable rates. To that end, concurrent with the First Notice, the Commission, by unanimous vote, initiated a new proceeding under section 206 of the Federal Power Act, 16 U.S.C. § 824e, to address concerns that participants in the Forward Capacity Market could exercise market power. *ISO New England Inc.*, 148 FERC ¶ 61,201, JA 404. The Commission directed the System Operator to ensure that the tariff provisions governing the Forward Capacity Market provide for the review and potential mitigation of importers' offers prior to each annual capacity auction. *Id.* at P 12,

JA 409. Public Citizen filed a protest asking the Commission to expand the proceeding to adjudicate the eighth auction rates.

Ultimately, the Commission approved the System Operator's proposed tariff revisions in time to ensure that the new rules, which provide for the System Operator's review and potential mitigation of importers' supply offers prior to each auction, were in place before the February 2015 start of the ninth forward capacity auction. *ISO New England Inc.*, 149 FERC ¶ 61,227 (2014) (order conditionally accepting tariff revisions, and answering Public Citizen's protest), JA 420. Public Citizen was the sole party to seek rehearing of this order, challenging the Commission's decision to not expand the tariff reform proceeding into an adjudication of the eighth Auction Rates. The Commission denied rehearing, declining "to enlarge the . . . proceeding to include an entirely different matter – the capacity prices generated by [the eighth auction] in 2014." *ISO New England Inc.*, 153 FERC ¶ 61,096, at P 15 (2015), JA 450. The Commission emphasized that Public Citizen's sole concern was that the eighth Auction Rates were the result of market manipulation by Brayton Point (*see supra* p. 11), but that the Commission previously found no evidence that Brayton Point "engaged in any inappropriate behavior" and "Public Citizen has provided no argument or evidence that causes [FERC] to reconsider this finding." *Id.*

Operating under the revised tariff rules, in February 2015, the System Operator held the ninth annual capacity auction. In Connecticut (as well as certain other areas including Rhode Island, Maine, Vermont, New Hampshire, and Southeast Massachusetts), the ninth auction resulted in higher capacity rates for existing suppliers than the eighth auction. *Compare ISO New England Inc.*, 151 FERC ¶ 61,226, at P 20 (2015) (ninth auction rate is $ 9.551 per kilowatt per month for existing resources serving the Connecticut capacity zone) *with ISO New England Inc.*, Eighth Forward Capacity Auction Results Filing at 2, JA 20 (eighth auction rate is $ 7.025 per kilowatt per month for existing resources serving the Connecticut capacity zone). Like the eighth auction rate filing, the System Operator's ninth auction rate filing was protested – but not by Public Citizen or Connecticut. (Indeed, neither Public Citizen nor Connecticut intervened in that proceeding). The Commission unanimously voted to accept the ninth auction rates and found the rates just and reasonable. *ISO New England Inc.*, 151 FERC ¶ 61,226, at P 20 (2015). (One party requested rehearing; that request is pending.)

In addition, in 2014, the Commission's Office of Enforcement initiated a non-public investigation into bidding behavior in the eighth capacity auction. *See ISO New England Inc.*, 148 FERC ¶ 61,201 at P 11 (investigation initiated based on referral from the System Operator), JA 409; *see also id.,* concurring statement of Chairman LaFleur at n.11 (noting that if the enforcement staff found market

manipulation, the Commission could employ its anti-manipulation rules and sanctions under 18 C.F.R. §§ 1c.1-1c.2), JA 416.

SUMMARY OF ARGUMENT

At all times, the Commission has acted diligently and responsibly to protect the public interest. When the Commission was able reach a majority decision, it acted to investigate market power in New England and to reform tariff provisions. When, however, the Commission was unable to reach a majority decision, the governing statute – the Federal Power Act – allowed disputed rates to go into effect.

There is nothing for this Court, on review, to review. There is no reviewable agency action, no reviewable agency order, and no reviewable record of decision-making. All that is available are individual Commissioner statements, revealing a deadlocked agency and different theories of the case. These are not actions or orders of the Commission as a collegial, multi-member body. Individual statements do not reflect the consensus views of the Commission, and are not reviewable under the judicial review provisions of either the Federal Power Act or the Administrative Procedure Act.

If there is anything to review on the "merits," it is the agency's interpretation, reflected in notices announcing the absence of majority-voted orders, that the Federal Power Act allows disputed rates to go into effect. But the rates became effective not by action of the Commission, but rather by operation of the Federal

Power Act. That Act does not require Commission action, much less action by less than majority vote, or any particular type of action. Rather, the Act leaves action to the agency's discretion; if the agency fails to act, the Act spells out the consequences. If Public Citizen or Connecticut believes the Act's processes – including complaint procedures they never invoked – or consequences are flawed or inadequate, those objections are best presented to Congress, rather than to the agency or this Court.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO REVIEW PETITIONERS' CLAIMS

A. There Is No FERC "Action" Under Its Organization Act

Public Citizen and Connecticut argue, repeatedly, that the Commission has "acted" or taken an "action" in some manner that allows for meaningful judicial review. *See, e.g.*, Pub. Cit. Br. at 10-13, 16. (They sometimes phrase the Commission's action in various affirmative ways connoting regulatory irresponsibility – *e.g.*, "rejected," "ignored," "abdicated," "terminated," Pub. Cit. Br. at 2, 4, 7, 8, 11, 17; Conn. Br. at 1, 16, 17, 28.) This argument is incorrect, both factually and legally.

There is no action here because the Commission did not make any decision on the System Operator's rate filing. Individual Commissioner statements were not put to a Commission vote, nor did any of them even informally command the

support of a majority of Commissioners. Likewise, the First and Second Notices were issued by the Secretary of the Commission and were not voted on or adopted by members of the Commission, individually or collectively. Moreover, the Notices did not "decide" anything. The First Notice notified the public that the Auction Rates had gone into effect by operation of law under Federal Power Act section 205(d), 16 U.S.C. § 824d(d), and the Second Notice merely informed the parties that rehearing of a public notice does not lie. *See* First Notice, JA 112; Second Notice, JA 154. In contrast, where the Commission did act with respect to the Forward Capacity Market, a substantive order issued reflecting the majority decision of the Commissioners. *See, e.g., ISO New England Inc.*, 151 FERC ¶ 61,226 (2015) (order approving ninth auction rates and determining the rates to be just and reasonable); *ISO New England Inc.*, 148 FERC ¶ 61,201 (order directing changes to the Forward Capacity Market rules), JA 404.

Moreover, there was no Commission action as that term is defined by statute and precedent. Congress dictated what constitutes Commission "action" when it created (and transferred authority to) FERC: "Actions of the Commission shall be determined by a majority vote of the members present." 42 U.S.C. § 7171(e). At no point during the agency proceeding here did the Commission obtain a majority vote from a quorum of Commissioners on a course of action regarding the Auction Rates. While the four Commissioners independently expressed their individual

views on this matter, the Commission, as an institution, never acted. Accordingly, there was no agency action because there was no "definitive statement [ ] of [the agency's] position" regarding the Auction Rates. *Ass'n of Int'l Auto. Mfrs., Inc. v. Comm'r, Mass. Dep't of Envtl. Prot.*, 208 F.3d 1, 5 (1st Cir. 2000) (alterations by the court) (defining final agency action) (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 241 (1980)).

B. There Is No Reviewable FERC "Order" Under The Federal Power Act

In the absence of a FERC action, there is no FERC order on review for this Court to review. *See* Second Notice ("[I]n the absence of Commission action" on the eighth auction rate filing, "the Commission did not issue an order in this proceeding . . . ."), JA 154.

"A federal court's subject-matter jurisdiction . . . extends only so far as the Congress provides by statute." *Friends of the Earth v. EPA*, 333 F.3d 184, 187 (D.C. Cir. 2003) (quoting *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 492 (D.C. Cir. 1984)); *see also NetCoalition v. SEC*, 715 F.3d 342, 348 (D.C. Cir. 2013) (appellate court's jurisdiction is "strictly limited to the agency action(s) included" in the direct review statute). The relevant statute here, section 313(b) of the Federal Power Act, limits this Court's jurisdiction to "orders" of the Commission. *See* 16 U.S.C. § 825*l*(b) ("Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a

review of such order . . . .”). Judicially-reviewable FERC orders are final orders of “definitive impact.” *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 238 (D.C. Cir. 1980). The Commission adopts “orders” when it exercises its authority under the Federal Power Act to decide questions of legal significance by a majority vote. *See Pub. Serv. Comm’n of N.Y.*, 543 F.2d at 776 (Commission orders are institutional, collective decisions made by majority vote).

There is no order here, because the Commission was unable to obtain a majority vote by the four sitting Commissioners. Rather, the Commission was unable to reach a consensus decision within the statutory 60 days mandated by Federal Power Act section 205(d), 16 U.S.C. § 824d(d), whether or not to suspend the Auction Rates. “Where is the Commission ‘order,’ and where is the ‘agency action?’” *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131 (D.C. Cir. 2007). There is none.

The Secretary’s notices and the Commissioners’ separate statements are not reviewable orders because they do not embody any collective Commission decision and they do not affect legal rights and obligations. *See id.* at 1133 (agency-issued press release is not a reviewable order); and *AT&T Corp. v. FCC*, 369 F.3d 554, 561 (D.C. Cir. 2004) (agency-issued notice is not a reviewable decision). A public notice is not among “the types of agency action suitable for review” because it is “legally insignificant,” “purely informational,” and has no

"concrete impact" or "binding effect" on any party. *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 426-427 (D.C. Cir. 2004).

The First and Second Notices were issued by FERC's Secretary and were not voted upon by the Commissioners. Moreover, unlike an "order," which is a "mandate, precept; a command or direction authoritatively given," the Notices did not authoritatively decide anything. *Black's Law Dictionary* 1270 (10th ed. 2014). The First Notice notified the public that the Auction Rates had gone into effect by operation of law under the Federal Power Act. The Second Notice informed the parties that rehearing of a public notice does not lie. The Second Notice explained that, because the Commission did not issue an order in the first instance, there was no order for which the parties may seek administrative rehearing. *See* 16 U.S.C. § 825*l*(a) (only persons aggrieved by a Commission order may seek rehearing); *see also Am. Rivers v. FERC*, 170 F.3d 896, 897 (9th Cir. 1999) (dismissing petition for review where the Commission never issued an order and the Secretary of the Commission rejected rehearing as inappropriate).

Likewise, a single Commissioner's statement is not a disposition of official agency business. *See Sprint Nextel*, 508 F.3d at 1133 (individual statements do not "represent the Commission's views" and are not reviewable). Contrary to Petitioners' claim that Chairman LaFleur's understanding of the case was the "basis" for and "critical determinant" of FERC's action (Conn. Br. at 11, Pub. Cit.

Br. at 9, 10, 28-29, 34), individual Commissioner statements do not speak for other Commissioners, much less the Commission as a whole. As this Court has observed, a regulatory commission "is an entity apart from its members, and it is its institutional decisions – none other – that bear legal significance." *Pub. Serv. Comm'n of N.Y.*, 543 F.2d at 776. "By institutional decisions," this Court means "a decision by a majority vote duly taken." *Id.* Here, individual Commissioner statements were not put to a Commission vote, nor did any of them, formally or informally, command the support of a majority of Commissioners. Thus, the Commissioner statements are not "orders" under the Federal Power Act.

Public Citizen's reliance on *City of Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982), and *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173 (D.C. Cir. 1994), to suggest that the Commission somehow engaged in a reviewable action, is misplaced. *See* Pub. Cit. Br. at 7, 13, 24, 27, 28. In both cases, the Court exercised jurisdiction to review *orders* issued by FERC. *See Batavia*, 672 F.2d at 75 (discussing petitioners' challenge to FERC's order in *Commonwealth Edison Co.*, 52 FPC ¶ 1072 (1974)); *Cajun Elec.*, 28 F.3d at 176 (review of two Commission orders approving rate schedules whose effectiveness was explicitly contingent upon the Commission's approval); *see also Entergy Servs., Inc.*, 58 FERC ¶ 61,234, at p. 61,737 (1992) (FERC order challenged in *Cajun Electric*, which explains that rate schedule language compelled FERC's review and action

on the rate filing). Public Citizen's reliance on additional cases (*see* Br. at 14-15) is similarly misplaced, as they stand only for the unremarkable proposition that an agency rule can be a reviewable order, and that justiciability of agency action generally is guided by "sensible" and "pragmatic" considerations. *See N.Y. Repub. State Comm. v. SEC*, 799 F.3d 1126, 1130-31, 1134 (D.C. Cir. 2015) (agency action must be "susceptible of review on the basis of the administrative record alone") (citing *Inv. Co. Inst. v. Bd. of Governors of the Fed. Reserve Sys.*, 551 F.2d 1270, 1278 (D.C. Cir. 1977)); *see also Kan. Power & Light Co. v. FPC*, 554 F.2d 1178, 1181 n.4 (D.C. Cir. 1977) (affirming that the challenged orders, issued by majority vote of the sitting Commissioners, had the "requisite 'definitive character' to be reviewable at [that] time").

The Court should reject Petitioners' "construction" of the Federal Power Act, which reads the word "order" out of the statute. Pub. Cit. Br. at 13, 15; *see also* Conn. Br. at 23. Essentially Petitioners demand that this Court do what only Congress can do: revise the Federal Power Act to provide for judicial review of Commission inaction, for whatever reason, on a rate filing. *See, e.g.*, Fair RATES Act, H.R. 2984, 114th Cong. (2015) (bill to amend Federal Power Act section 205, 16 U.S.C. § 824d, to provide that any inaction by the Commission that allows a rate change to go into effect shall be treated as an order by the Commission for purposes of rehearing and court review).

C. There Is No Reviewable Failure To Act Under The Administrative Procedure Act

Public Citizen and Connecticut alternatively argue that the Administrative Procedure Act provides a basis for reviewing the Commission's alleged failure to act. *See, e.g.*, Pub. Cit. Br. at 21-28; Conn. Br. at 22-29. This too is incorrect.

Under the Administrative Procedure Act, a person "adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. The Act defines "agency action" to include the "failure to act." 5 U.S.C. § 551(13). In order for an agency's inaction to qualify as a "failure to act," the agency must fail to take a "discrete" action that it is legally required to take. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62-63 (2004). But if Congress has "spelled out the legal effect" of agency inaction without articulating any limiting principle, that inaction is unreviewable. *Sprint Nextel*, 508 F.3d at 1132; *see also* 5 U.S.C. § 701(a)(2) (judicial review is inapplicable "to the extent that . . . agency action is committed to agency discretion by law").

This Court has established that there is no reviewable agency action when a statute decrees a particular outcome – such as where, as here, rates "take effect" – even if the statute gives an agency authority to alter that outcome. *See AT&T Corp.*, 369 F.3d at 561, and *Sprint Nextel*, 508 F.3d at 1131-33.

1. *AT&T* And *Sprint Nextel* Are Controlling Precedent

AT&T Corp. is the principal decision addressing whether agency inaction is judicially reviewable. *AT&T Corp. v. FCC*, 369 F.3d 554 (D.C. Cir. 2004). In *AT&T*, the telephone company Verizon was subject to certain regulatory safeguards intended to protect other telephone companies from anti-competitive behavior by Verizon. By statute the safeguards had a three-year sunset provision after which they "cease to apply" "unless the [Federal Communications] Commission extends such 3-year period by rule or order." 369 F.3d at 556 (citing 47 U.S.C. § 272(f)(1)). Prior to Verizon's sunset date, the FCC initiated a proceeding to review whether to generally extend the safeguards. *Id.* at 558. AT&T, a competitor of Verizon, urged the agency to do so, alleging the existence of market power. *Id.* At the end of the three-year period applicable to Verizon, despite AT&T's protest, the FCC did not act; rather, a public notice issued stating that the safeguards for Verizon had "sunset" by "operation of law." *Id.* at 556, 558. Two commissioners issued dissents, arguing that Congress "clearly" charged the agency with determining whether the safeguards remained necessary. *Id.*

AT&T petitioned for review, claiming, among other things, that the FCC was required to offer a reasoned explanation for its decision not to extend the safeguards, and that the sunset notice constituted a reviewable agency action. *Id.* at 559. This Court rejected both arguments. *Id.* at 560-62. The Court ruled that no

explanation of the failure to extend the safeguard was required because the period expired by operation of law, and nothing in the statute "requires the [FCC] to consider whether to allow the sunset provision to go into effect." *Id.* at 560. The Court also found the notice to be merely a public announcement, not a reviewable agency action. *Id.* at 561-62.

This Court built upon its decision in *AT&T* in *Sprint Nextel*, 508 F.3d 1129. *Sprint Nextel* involved the Communications Act provision governing "forbearance petitions." *Id.* at 1131 (citing 47 U.S.C. § 160). A forbearance petition is a request that the FCC refrain from applying regulatory requirements to a company subject to that agency's jurisdiction. *Id.* The statute requires the FCC to "forbear if it determines that a petition meets the requirements of [the statute]," but if the agency "does not deny the petition for failure to meet" the statutory requirements within a specified amount of time, the "petition shall be deemed granted." *Id.* (quoting 47 U.S.C. § 160(a), (c)).

Verizon filed a forbearance petition. The FCC, which at the time was comprised of four Commissioners, deadlocked 2-2 on whether to grant or deny Verizon's petition. *Id.* After the statutory period of time elapsed, the FCC, unable to reach a decision by majority vote, issued a press release announcing that the forbearance petition was "deemed granted by operation of law." *Id.* at 1131.

Multiple parties petitioned for review of the "deemed granted" forbearance petition, urging, among other grounds, that the "deemed granted" arising from the passage of time without an agency decision "constitute[d] agency action that should be vacated as arbitrary and capricious." *Id.* The Court dismissed the petitions for lack of jurisdiction, observing that the FCC direct review statute contemplates review only of final orders, and noting that the FCC did "not engage in any 'circumscribed, discrete' act." *Id.* at 1131 (quoting *Norton*, 542 U.S. at 62). Instead, the agency "did nothing," which was why the "deemed granted" provision kicked in. *Id.*

The Court in *Sprint Nextel* found that Congress "spelled out the legal effect" when the FCC neither grants nor denies a petition within the specified time – in that circumstance, the petition is "deemed granted." *Id.* "The grant does not result in reviewable agency action" because "Congress, not the FCC, 'granted' Verizon's forbearance petition." *Id.* (citing *AT&T*, 369 F.3d at 555-56). "When the FCC failed to deny Verizon's forbearance petition within the statutory period, Congress's decision – not the agency's – took effect." *Id.*

The conclusion that there was no judicially reviewable action was "clearer still in light of the implications of a contrary ruling" because, in performing judicial review, the Court does not just consider the agency's result, but also its reasoning, and there was no reasoning to be reviewed. *Id.* at 1132-33; *see also*

ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 283-84 (1987) (courts could not effectively review agency's refusal to act for which no reasons were given). The Court therefore determined that there was no reviewable agency action, even though it recognized that this meant that failure to act arising from a deadlocked agency – a situation that would often involve the most difficult issues – would be "unreviewable." *Sprint Nextel*, 508 F.3d at 1133.

Both *AT&T* and *Sprint Nextel* compel the conclusion that the petitions for review in this proceeding, filed by Public Citizen and Connecticut, should be dismissed for lack of jurisdiction. Like *Sprint Nextel*, here, the effectiveness of the Auction Rates by operation of law is a Congressional directive – not a FERC directive – that took effect pursuant to operation of the Federal Power Act when the Commission was unable to obtain a majority vote and therefore was unable to issue an order within the statute's 60-day timeframe.

Section 205 of the Federal Power Act provides that rate schedules "take effect" after 60 days' notice to the Commission. 16 U.S.C. § 824d(d). "[Sixty] days is the maximum a utility can be compelled to wait from the time it files its rate changes until the date the changes take effect unless the Commission properly exercises its suspension power." *Ind. & Mich. Elec. Co. v. FERC*, 502 F.2d 336, 341 (D.C. Cir. 1974); *see also Ala. Power Co. v. FERC*, 22 F.3d 270, 271 (11th Cir. 1994) ("[I]f FERC does not exercise its suspension power within the 60-day

period, the new rates take effect automatically."). While FERC "may" suspend the operation of a rate schedule and defer use of the rate pending a hearing concerning the lawfulness of the filed rate, the Federal Power Act, like the statute in *AT&T* and *Sprint Nextel*, does not require the Commission to investigate a rate filing and also does not require the Commission to explain the basis for not suspending a rate filing. *See* 16 U.S.C. § 824d(d) and (e); *Morgan Stanley*, 554 U.S. at 532 ("The Commission may, however, decline to investigate and permit the rate to go into effect . . . .") (citing 18 C.F.R. § 35.4). *See also NetCoalition*, 715 F.3d at 351-52 (holding that where a statute allows certain fees to "take effect upon filing with the [Securities and Exchange Commission]," but authorizes the SEC to suspend such rules if necessary to protect investors, the SEC's inaction – failure to suspend or issue any order – is unreviewable).

2. *Amador County* Is Distinguishable

Public Citizen and Connecticut cite *Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011), as principal support for their contention that FERC's inaction is reviewable. *See* Pub. Cit. Br. at 9, 25-27; Conn. Br. at 25-28. But, because of material differences between the Federal Power Act and the statute under review in *Amador County*, that case actually supports the conclusion that FERC's inaction is not reviewable.

The statute at issue in *Amador County*, the Indian Gaming Regulatory Act, differs in crucial ways from the statutes in *AT&T* and *Sprint Nextel*, as well as the Federal Power Act. The Gaming Act governs tribal gaming. *Amador Cty.*, 640 F.3d at 376. Tribes may engage in the type of gaming involved in *Amador County* only if they meet four conditions, one of which is that the gaming be conducted in conformance with a tribal-state compact that has been approved by the Secretary of the Interior. The Secretary has three choices when a tribal-state compact is submitted for review: (1) approve it; (2) disapprove it; or (3) do nothing, in which case, after 45 days, the compact is "considered to have been approved by the Secretary, *but only to the extent* the compact is consistent with the provisions of" the Gaming Act. *Id.* at 376-77 (emphasis added) (citing 25 U.S.C. § 2710(d)(8)(C)).

The Secretary of Interior did nothing with respect to the compact submitted in *Amador County*. When the County filed a challenge under the Administrative Procedure Act in federal district court alleging that the proposal did not satisfy the statutory requirement that the gaming occur on Indian lands, the Secretary responded that the failure to approve the compact was not agency action, and even if it were agency action, it was not subject to judicial review. *Id.* at 379-83 (reviewing district court's dismissal of case for lack of jurisdiction). On review of the district court's decision, this Court held that, in the specific context of the

Gaming Act, the Secretary's failure to act was reviewable agency action. *Id.* at 383.

The Court in *Amador County* found that *Sprint Nextel* was not dispositive on the issue of whether there was agency action because there was an "essential difference" between the relevant language of the Gaming Act and the language of the Communications Act. The Court pointed to the caveat in the Gaming Act that an unacted-upon compact was deemed approved "only to the extent the compact is consistent with" the Gaming Act. *Id.* at 382. The Communications Act contains "no parallel provision." *Id.* Because of this limiting language, the Court in *Amador County* concluded that Congress had "limited the extent to which a compact could be approved by operation of law," and "impos[ed] an obligation on the Secretary to affirmatively disapprove any compact" that did not comply with the Gaming Act's requirements. *Id.*

In contrast, the Communications Act in *Sprint Nextel* contains no such qualification, but simply provides that a forbearance petition is deemed granted by the passage of time if the FCC does not act. *See supra* at p. 27 (describing the Communications Act). Thus, the FCC's failure to disapprove was not a form of agency action. Like the Communications Act, the Federal Power Act contains no provisions parallel to the Gaming Act's qualification that a gaming compact may be deemed approved only to the extent it is consistent with certain legal

requirements. Rather, under section 205 of the Federal Power Act, 16 U.S.C. § 824d, rate schedules take effect after the notice period, with no qualification on effectiveness. *See also* 18 C.F.R. § 35.2(f) (providing that "[t]he effective date shall be 60 days after the filing date, or such other date as may be specified by the Commission"); *cf. id.* § 35.4 (the fact that a rate schedule becomes effective "shall not constitute approval by the Commission of such rate schedule"). The Federal Power Act imposes no affirmative obligation on the Commission to determine whether rates are just and reasonable before they may take effect. *See Morgan Stanley*, 554 U.S. at 532.

In contrast to *Amador County*, where the gaming compact could only be "deemed approved" if it satisfied specific legal or factual conditions, here, the decision as to whether the auction rates in this case should be suspended and investigated at the time of their filing (as opposed to later under the complaint procedures of Federal Power Act section 206, 16 U.S.C. § 824e) is entirely within the Commission's discretion. *See* 16 U.S.C. § 824d(e) ("Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative, . . . to enter upon a hearing concerning the lawfulness of such rate"). Although Federal Power Act section 205(a), 16 U.S.C. § 824d(a), dictates that all rates "shall be just and reasonable," that mandate is not a limitation or impediment to a rate schedule taking effect 60 days after filing absent

Commission action to the contrary. *See* 16 U.S.C. §§ 824d(d) and (e). This is further supported by the statutory language in section 205(e), which provides that even when a Commission investigation into the lawfulness of a rate is pending, after the five-month suspension period the rates "go into effect" regardless of the pendency of the investigation. 16 U.S.C. § 824d(e).

Thus, the Federal Power Act does not require the Commission to make a formal decision not to suspend. *See Cities of Anaheim, Riverside, Banning, Colton and Azusa v. FERC*, 723 F.2d 656 (9th Cir. 1984) (FERC's one-day suspension of a rate increase is not judicially reviewable). Here, FERC's inability to agree to investigate the Auction Rates, a decision left by Congress to the agency's discretion, is immune from judicial review under the Administrative Procedure Act. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985) (judicial review is inapplicable "to the extent that . . . agency action is committed to agency discretion by law"); *see also American Gas Ass'n v. FERC*, 912 F.2d 1496, 1505 (D.C. Cir. 1990) ("nonenforcement decisions are ordinarily unreviewable").

In short, the effectiveness of the Auction Rates "by operation of law" is a Congressional directive that took effect when the Commission took no action – because it could not reach a majority decision – on the Auction Rate filing within the 60-day statutory action period under the Federal Power Act. Because a Congressional directive is not a Commission "action" or "order" that this Court

may "affirm, modify, or set aside," 16 U.S.C. § 825*l*(b), Public Citizen and Connecticut cannot demonstrate that the Court has subject matter jurisdiction.

II. THE FEDERAL POWER ACT ALLOWS DISPUTED RATES TO GO INTO EFFECT WHEN THE AGENCY DOES NOT MAKE A DECISION

To the extent there are any "merits" left for this Court to review, review is limited to the Commission's "decision" to allow the disputed Auction Rates to go into effect when it could not reach a majority decision. The Commission worked diligently for months reviewing the System Operator's rate filing, including obtaining additional information regarding the conduct of the auction so the agency could assess the justness and reasonableness of the rates. *See ISO New England Inc.*, Deficiency Letter, Docket No. ER14-1409 (June 27, 2014), JA 96 (requiring submittal of additional information on the conduct of the eighth capacity auction). That the four-member Commission was unable to reach a consensus regarding the Auction Rates, and was unable to issue an order within the statutory time-frame imposed by Congress, does not signal that FERC "abdicated" its duties or "ignored" the rate filing. Conn. Br. at 16, 17; Pub. Cit. Br. at 7. Rather, the level of thought and consideration given to the Auction Rates is evidenced by the lengthy individual Commissioner statements, as well as the additional measures the Commission has taken regarding the forward capacity auction. *See supra* at pp. 14-17 (discussing FERC's continuing enforcement and oversight activities).

A. Standard Of Review

The Court's review of Commission orders – had an order issued here – would be governed by the "arbitrary and capricious" standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A); *see, e.g.*, *New Eng. Power Generators Ass'n*, 757 F.3d at 289 (applying arbitrary and capricious standard, Court upheld FERC's actions taken "to ensure that [capacity auction] rates are just and reasonable"). But here, there is no agency "action" or "order" that this Court can "hold unlawful and set aside" under arbitrary-and-capricious review. 5 U.S.C. § 706(2)(A).

If a "merits" issue remains in this proceeding, that issue is limited to whether the Commission may, under the Federal Power Act, not act on a protested rate filing. The only items on review are two FERC notices announcing the absence of FERC action and the absence of a FERC order. Individual Commissioner statements explain the reason – the absence of a FERC majority to act in a particular manner. Is the Commission, when it is deadlocked and cannot reach a majority decision, somehow obligated under the Federal Power Act to investigate the justness and reasonableness of a new rate filing? Petitioners argue that it is. *See, e.g.*, Conn. Br. at 15 (FERC "must examine" the rates), 17 (FERC "must therefore set for hearing" disputed rates).

Generally, the Court reviews an agency's interpretation of a statute it administers using the framework set forth in *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under *Chevron*, the Court "giv[es] effect to clear statutory text and defer[s] to an agency's reasonable interpretation of any ambiguity." *MetroPCS Cal., LLC v. FCC*, 644 F.3d 410, 412 (D.C. Cir. 2011). "*Chevron* requires a federal court to accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). "*Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1869 (2013).

Accordingly, Public Citizen and Connecticut must do more than demonstrate that a FERC judgment or policy is a bad idea. *Chevron* requires they demonstrate that the Commission has violated an unambiguous command of Congress, or adopted an impermissible interpretation of the Federal Power Act. *See Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 915-16 (9th Cir. 2011) (finding rate filing and review sections of the statute to be ambiguous and subject to the exercise of agency discretion).

B. Petitioners Incorrectly Claim That The Federal Power Act Mandates A "Just And Reasonable" Determination Prior To Filed Rates Taking Effect

Contrary to Petitioners' assertions (Pub. Cit. Br. at 28-29; Conn. Br. at 17-21), nothing in section 205 of the Federal Power Act, 16 U.S.C. § 824d, requires the Commission to suspend the effectiveness of the Auction Rate filing and to initiate a hearing regarding the rates.

1. Petitioners' Reliance On An Individual Commissioner Statement Is Misplaced

Petitioners' "merits" argument – that the Commission erroneously "abdicated" its responsibility to review the auction rates – impermissibly relies entirely on an individual Commissioner statement. *See* Pub. Cit. Br. at 34 ("FERC's action in this case was the result of Commissioner LaFleur's legally erroneous conclusion that FERC lacked the authority to review the rates under section 205 . . . ."); and Conn. Br. at 11 ("[T]he stated basis for the Commission's inaction" is Commissioner LaFleur's statement that "FERC lacked the authority to review the [auction] rates"). While the Commissioners, in individual statements, expressed their own views on the law and policy involved in the System Operator's auction rate proceeding, those statements do not reflect the collective view of a majority of the Commission. As explained *supra* at pp. 22-23, an individual Commissioner statement bears no legal significance as it is not the collective judgment of the agency. 42 U.S.C. § 7171(e) (FERC action must be taken by

majority vote). Thus, consideration of the LaFleur Statement, or any other Commissioner's statement, as the basis of the full Commission's thinking and judgment would violate the *Chenery* doctrine's fundamental requirement that an agency's order be upheld, if at all, "on the same basis articulated in the order by the agency itself." *FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). The *Chenery* doctrine "provides an assurance that the object of the court's review is the product of a body or official to whom Congress delegated authority." *Spiva v. Astrue*, 628 F.3d 346, 353 (7th Cir. 2010).

Moreover, contrary to Connecticut's claims that FERC "abdicat[ed] its responsibility" and "fail[ed] to perform [its] obligation" to adjudicate the justness and reasonableness of the Auction Rates (Br. at 17, 21, 28) and "ignore[d] credible allegations of market power" (Br. at 16), the Commission initiated an enforcement investigation and a show cause proceeding with respect to the System Operator's auction process. *ISO New England Inc.*, 148 FERC ¶ 61,201, JA 404; *see also supra* at pp. 14-17 (describing FERC's oversight actions). That the Commission did not conduct its review of the System Operator's auction process and the resulting rates in the particular docket and in the particular manner Petitioners desire does not make the Commission's choice of action arbitrary. *See Mobil Oil Expl. & Producing Se. Inc. v. United Distribution Cos.*, 498 U.S. 211, 230 (1991)

(agencies enjoy broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities) (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978), and *Heckler v. Chaney*, 470 U.S. at 831–832). This is especially the case where, as here, the Commission was unable to proceed in the docket preferred by Petitioners because of the four-member composition of the Commission at that time and the resulting 2-2 deadlock.

2. The Statutory Language In Section 205 Regarding FERC's Role Is Permissive And Discretionary

The First Notice states: "Pursuant to section 205 of the [Federal Power Act], in the absence of Commission action on or before September 15, 2014, [System Operator's] filing, as amended, became effective by operation of law." JA 112. Public Citizen and Connecticut argue that the Commission was compelled, as a matter of law, to investigate and suspend the Auction Rates before they became effective. *See* Conn. Br. at 15, 17, 19, 21; Pub. Cit. Br. at 29-30.

But the Federal Power Act is not so brittle. The rate filing and review provision at issue here, found in section 205, has consistently been interpreted by the Commission and this Court as providing for a filed rate to "take effect" automatically after 60 days "unless the Commission otherwise orders." 16 U.S.C. § 824d(d). "[U]nder the § 205 process a proposed rate becomes effective 60 days after it is filed." *Cities of Campbell and Thayer v. FERC*, 770 F.2d 1180, 1185

(D.C. Cir. 1985); *see also City of Winnfield v. FERC*, 744 F.2d 871, 874 (D.C. Cir. 1984) ("Section 205 allows utilities to charge new rates by filing them with the Commission. They take effect after a statutorily required notice period, . . . unless the Commission suspends them . . . ."); *see also Mont. Consumer Counsel*, 659 F.3d at 921 (noting that FERC's "broad discretion to construe the FPA's notice and filing requirements" is evidenced by the preface to § 824d(d): "unless the Commission otherwise orders").

If, in response to a rate filing, the Commission opts to investigate the proposed rate, the Commission "may suspend . . . such rate . . . but not for a longer period than five months beyond the time when *it would otherwise go into effect* . . . ."[4] 16 U.S.C. § 824d(e) (emphasis added). The statutory language is discretionary; nothing compels the Commission to review the justness and reasonableness of a filed rate within the 60-day notice period. *See Morgan Stanley*, 554 U.S. at 532 ("The Commission may, however, decline to investigate and permit the rate to go into effect . . . .") (citing 18 C.F.R. § 35.4); *see also Cities of Anaheim*, 723 F.2d at 661 (noting that the "discretionary phrasing of 16 U.S.C. § 824d(e) argues for judicial deference").

[4] Even when the Commission does suspend a rate filing, at the end of the maximum five-month suspension period, the challenged rate "go[es] into effect" regardless of whether the Commission has determined the lawfulness of the rates. 16 U.S.C. § 824d(e).

Accordingly, when the Commission does not act on a rate filing before the end of the statutory notice period (60 days after the filing, unless the utility requests a later effective date), the rate automatically goes into effect by operation of law.[5] *See Ind. & Mich. Elec.*, 502 F.2d at 341 ("[Sixty] days is the maximum a utility can be compelled to wait from the time it files its rate changes until the date the changes take effect unless the Commission properly exercises its suspension power."); *Ala. Power Co.*, 22 F.3d at 271 ("[I]f FERC does not exercise its suspension power within the 60-day period, the new rates take effect automatically."). This reasonable interpretation of the Federal Power Act is supported by the Supreme Court's explanation that "[a]fter a rate goes into effect, whether or not the Commission deemed it just and reasonable when filed, the Commission may conclude . . . that the rate is not just and reasonable and replace it with a lawful rate." *Morgan Stanley*, 554 U.S. at 532 (citing 16 U.S.C. § 824e(a)).

The market-based rate cases cited by Petitioners do not contradict FERC's interpretation of Federal Power Act section 205. *See* Conn. Br. at 18-21 (citing *Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 918-19 (9th Cir. 2011); *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004); *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998)); and Pub. Cit. Br. at 31 (citing

[5] If the utility seeks an effective date more than 60 days after the filing date, the Commission must act, if at all, before the utility's proposed effective date. *See National Fuel Gas Supply Corp. v. FERC*, 899 F.2d 1244, 1248-49 (D.C. Cir. 1990).

"trilogy" of Ninth Circuit decisions: *Montana Consumer Counsel*, *California ex rel. Lockyer*, and *California ex rel. Harris v. FERC*, 784 F.3d 1267 (9th Cir. 2015)). Petitioners cite these cases to argue that the "courts . . . require that the Commission review the results of the Tariff to determine that the rates are indeed just and reasonable." Conn. Br. at 18-19; *see also* Pub. Cit. Br. at 31-34 ("review of the actual rates . . . is essential").

Petitioners' argument is inconsistent with the court cases discussed above, as it ignores that the Commission recognizes and here acted upon its responsibility to ensure that the System Operator's auction process and resulting rates are just and reasonable. Consistent with that responsibility, the Commission diligently reviewed the eighth Auction Rates (although it could not reach a majority decision regarding those rates) and the forward capacity auction process, which resulted in the Commission directing the System Operator to bolster its ability to review and monitor forward capacity auctions and mitigate any anticompetitive conduct. *See supra* pp. 14-15 (noting tariff reforms).

Connecticut urges the Court to "interpret" FPA section 205 "in the context of" the System Operator's Tariff (and Settlement Agreement that gave rise to the tariff provisions governing the Forward Capacity Market (Br. at 22-23)), but it fails to point to any Tariff language that alters the applicability of Federal Power Act section 205 or imposes additional review obligations on the Commission. *See*

Conn. Br. at 5, 28 (citing snippets from the 2006 FERC orders approving the settlement in *Devon Power*); *see also* Pub. Cit. Br. at 24 (same). Rather, the Tariff merely affirms that the Auction Rates are subject to section 205 of the Federal Power Act. *See* Tariff at § III.13.8.2(a) ("[System Operator] shall file the results of that Forward Capacity Auction with the Commission pursuant to Section 205 of the Federal Power Act"), JA 402.

As this Court has explained regarding "Section 205's provision for automatic effectuation of rate increases," "[a] bare contractual reference to Section 205 signifies . . . no more than an intention to adopt at minimum the procedural requirements imposed by that section." *City of Kaukauna v. FERC*, 581 F.2d 993, 996-97 (D.C. Cir. 1978). Notably, nothing in the Tariff (or Settlement Agreement) mandates that the Commission must approve the auction rates prior to the rates taking effect. *See, e.g., Cities of Campbell*, 770 F.2d at 1186-87 (although parties may contract to require FERC's approval prior to any effective rate change, the phrase "subject to the approval of the [Commission]" is insufficient to remove the "usual automatic effectiveness associated with [Federal Power Act] § 205").

In short, Petitioners' complaint lies with the timing and format of the Commission's oversight of the eighth annual Auction Rates, but when and in what manner the Commission reviews those rates falls squarely within its discretionary authority that Congress delegated to the Commission in the Federal Power Act.

See Morgan Stanley, 554 U.S. at 532 (noting that at any time "the Commission may conclude, in response to a complaint or on its own motion, that the rate is not just and reasonable") (citing 16 U.S.C. § 824e(a)).

C. Concerns About The Adequacy Of The Complaint Process Are Premature And Speculative

Finally, Petitioners complain about a complaint process they have never invoked. *See* Pub. Cit. Br. at 17-20; *see also* Conn. Br. at 4 (arguing that the complaint standard of proof under 16 U.S.C. § 824e(b) is "practically insurmountable"). But their concerns are entirely speculative. Neither Public Citizen nor Connecticut – indeed, no one at all – has chosen to initiate the complaint process with regard to the (eighth annual) Auction Rates.

Petitioners respond that such a complaint would be futile. First, they argue that they could not overcome the burden of proving complaint allegations. *See* Pub. Cit. Br. at 17-20; Conn. Br. at 4-5. Placing this argument in context, the statutory standard of review for either newly-proposed or existing rates is "just and reasonable;" if set by certain types of contracts, typically referred to as "*Mobile-Sierra* contracts" in honor of Supreme Court decisions lending their names,[6] those rates are subject to a more rigorous "public interest" application of the just and reasonable standard. *See NRG Power Mktg.*, 558 U.S. at 174 (the *Mobile-Sierra*

[6] *See United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

"public interest standard is not . . . a standard independent of, and . . . at odds with, the 'just and reasonable' standard"); *Morgan Stanley*, 554 U.S. at 545 (disagreeing that *Mobile-Sierra* requires that FERC apply the just and reasonable standard differently depending on when a rate is challenged); *see also New England Power Generators*, 707 F.3d at 370 ("Application of public interest review is simply one method by which FERC may assure itself a rate is just and reasonable . . . .").

Moreover, the *Mobile-Sierra* standard is not, as petitioners claim (Pub. Cit. Br. at 18; Conn. Br. at 4), "practically insurmountable." Rather, that standard, as described by the Supreme Court, is whether the complainant has demonstrated "serious harm" to the public interest. *Morgan Stanley*, 554 U.S. at 530; *see also id*. at 544-48. In appropriate circumstances, the Commission has found that standard to be satisfied. *See Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 954 (D.C. Cir. 2005) (upholding FERC's public interest determination to upset settlement terms and conditions when necessary to ensure system reliability).

Second, Public Citizen asserts (Br. 19-20) that the Commission has already decided the matter. Citing *ISO New England Inc*., 149 FERC ¶ 61,227 (2014), Public Citizen asserts that the Commission already has foreclosed a Federal Power Act section 206 investigation of existing rates. But all the Commission stated in that later order is that it would not expand its investigation of necessary tariff reforms into a broader investigation of rates. *Id*. at P 67; *see also* 153 FERC

¶ 61,096 at P 15 (rejecting on rehearing Public Citizen's request to "enlarge" the proceeding to include an "entirely different matter"), JA 450. Public Citizen, if it remains aggrieved, can seek judicial review of those orders as appropriate. *See, e.g., Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005) (court will not "reach out to examine a decision made after the one actually under review").

CONCLUSION

For the foregoing reasons, the petitions for review should be dismissed for lack of jurisdiction; if not, they should be denied.

Respectfully submitted,

Max Minzner
General Counsel

Robert H. Solomon
Solicitor

/s/ Karin L. Larson
Karin L. Larson
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel: (202) 502-8236
Fax: (202) 273-0901

FINAL BRIEF: December 23, 2015

Public Citizen, Inc. v. FERC,
Nos. 14-1244 and 14-1246 (consolidated)

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,214 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

/s/ Karin L. Larson
Karin L. Larson
Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-8236
Fax: 202-273-0901
karin.larson@ferc.gov

December 23, 2015

ADDENDUM
STATUTES AND REGULATIONS

TABLE OF CONTENTS

PAGE

expenses in the same manner as the payment of final judgments as provided in this Act [probably should be ''this title'', see Short Title note above] would be effective only to the extent and in such amounts as are provided in advance in appropriation Acts, was repealed by Pub. L. 99–80, § 4, Aug. 5, 1985, 99 Stat. 186.

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

SHORT TITLE

The provisions of this subchapter and chapter 7 of this title were originally enacted by act June 11, 1946, ch. 324, 60 Stat. 237, popularly known as the ''Administrative Procedure Act''. That Act was repealed as part of the general revision of this title by Pub. L. 89–554 and its provisions incorporated into this subchapter and chapter 7 hereof.

§ 551. Definitions

For the purpose of this subchapter—

(1) ''agency'' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) ''person'' includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) ''party'' includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) ''rule'' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) ''rule making'' means agency process for formulating, amending, or repealing a rule;

(6) ''order'' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) ''adjudication'' means agency process for the formulation of an order;

(8) ''license'' includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) ''licensing'' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) ''sanction'' includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) ''relief'' includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) ''agency proceeding'' means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) ''agency action'' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) ''ex parte communication'' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 381; Pub. L. 94–409, § 4(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 103–272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub. L. 111–350, § 5(a)(2), Jan. 4, 2011, 124 Stat. 3841.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
(1)	5 U.S.C. 1001(a).	June 11, 1946, ch. 324, § 2(a), 60 Stat. 237. Aug. 8, 1946, ch. 870, § 302, 60 Stat. 918. Aug. 10, 1946, ch. 951, § 601, 60 Stat. 993. Mar. 31, 1947, ch. 30, § 6(a), 61 Stat. 37. June 30, 1947, ch. 163, § 210, 61 Stat. 201.

(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law.

(Added Pub. L. 96–354, §3(a), Sept. 19, 1980, 94 Stat. 1169; amended Pub. L. 104–121, title II, §242, Mar. 29, 1996, 110 Stat. 865.)

AMENDMENTS

1996—Pub. L. 104–121 amended section generally. Prior to amendment, section read as follows:

''(a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provisions of this chapter to any action of the agency shall not be subject to judicial review.

''(b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of the whole record of agency action in connection with the review.

''(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.''

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–121 effective on expiration of 90 days after Mar. 29, 1996, but inapplicable to interpretative rules for which a notice of proposed rulemaking was published prior to Mar. 29, 1996, see section 245 of Pub. L. 104–121, set out as a note under section 601 of this title.

§ 612. Reports and intervention rights

(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.

(c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).

(Added Pub. L. 96–354, §3(a), Sept. 19, 1980, 94 Stat. 1170; amended Pub. L. 104–121, title II, §243(b), Mar. 29, 1996, 110 Stat. 866.)

AMENDMENTS

1996—Subsec. (a). Pub. L. 104–121, §243(b)(1), which directed substitution of ''the Committees on the Judiciary and Small Business of the Senate and House of Representatives'' for ''the committees on the Judiciary of the Senate and the House of Representatives, the Select Committee on Small Business of the Senate, and the Committee on Small Business of the House of Representatives'', was executed by making the substitution for ''the Committees on the Judiciary of the Senate and House of Representatives, the Select Committee on Small Business of the Senate, and the Committee on Small Business of the House of Representatives'' to reflect the probable intent of Congress.

Subsec. (b). Pub. L. 104–121, §243(b)(2), substituted ''his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the'' for ''his views with respect to the''.

CHANGE OF NAME

Committee on Small Business of Senate changed to Committee on Small Business and Entrepreneurship of Senate. See Senate Resolution No. 123, One Hundred Seventh Congress, June 29, 2001.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–121 effective on expiration of 90 days after Mar. 29, 1996, but inapplicable to interpretative rules for which a notice of proposed rulemaking was published prior to Mar. 29, 1996, see section 245 of Pub. L. 104–121, set out as a note under section 601 of this title.

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of reporting provisions in subsec. (a) of this section, see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 191 of House Document No. 103–7.

CHAPTER 7—JUDICIAL REVIEW

SHORT TITLE

The provisions of sections 551 to 559 of this title and this chapter were originally enacted by act June 11, 1946, ch. 423, 60 Stat. 237, popularly known as the ''Administrative Procedure Act''. That Act was repealed as part of the general revision of this title by Pub. L. 89–554 and its provisions incorporated into sections 551 to 559 of this title and this chapter.

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) ''agency'' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; and

(2) ''person'', ''rule'', ''order'', ''license'', ''sanction'', ''relief'', and ''agency action'' have the meanings given them by section 551 of this title.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 103–272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub. L. 111–350, § 5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

HISTORICAL AND REVISION NOTES

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

In subsection (a), the words ''This chapter applies, according to the provisions thereof,'' are added to avoid the necessity of repeating the introductory clause of former section 1009 in sections 702–706.

Subsection (b) is added on authority of section 2 of the Act of June 11, 1946, ch. 324, 60 Stat. 237, as amended, which is carried into section 551 of this title.

In subsection (b)(1)(G), the words ''or naval'' are omitted as included in ''military''.

In subsection (b)(1)(H), the words ''functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947'' are omitted as executed. Reference to the ''Selective Training and Service Act of 1940'' is omitted as that Act expired on Mar. 31, 1947. Reference to the ''Sugar Control Extension Act of 1947'' is omitted as that Act expired on Mar. 31, 1948. References to the ''Housing and Rent Act of 1947, as amended'' and the ''Veterans' Emergency Housing Act of 1946'' have been consolidated as they are related. The reference to former section 1641(b)(2) of title 50, appendix, is retained notwithstanding its repeal by § 111(a)(1) of the Act of Sept. 21, 1961, Pub. L. 87–256, 75 Stat. 538, since § 111(c) of the Act provides that a reference in other Acts to a provision of law repealed by § 111(a) shall be considered to be a reference to the appropriate provisions of Pub. L. 87–256.

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

REFERENCES IN TEXT

Sections 1891–1902 of title 50, appendix, referred to in subsec. (b)(1)(H), were omitted from the Code as executed.

AMENDMENTS

2011—Subsec. (b)(1)(H). Pub. L. 111–350 struck out ''chapter 2 of title 41;'' after ''title 12;''.

1994—Subsec. (b)(1)(H). Pub. L. 103–272 substituted ''subchapter II of chapter 471 of title 49; or sections'' for ''or sections 1622,''.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(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(a).	June 11, 1946, ch. 324, § 10(a), 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 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. 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. 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 ju-

dicial 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

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

cers and components of that Department, as relate to or are utilized by the Office of Energy Programs, but limited to industrial energy conservation programs.

(Pub. L. 95–91, title III, § 308, Aug. 4, 1977, 91 Stat. 581.)

§ 7158. Naval reactor and military application programs

The Division of Naval Reactors established pursuant to section 2035 of this title, and responsible for research, design, development, health, and safety matters pertaining to naval nuclear propulsion plants and assigned civilian power reactor programs is transferred to the Department under the Under Secretary for Nuclear Security, and such organizational unit shall be deemed to be an organizational unit established by this chapter.

(Pub. L. 95–91, title III, § 309, Aug. 4, 1977, 91 Stat. 581; Pub. L. 106–65, div. C, title XXXII, § 3294(c), Oct. 5, 1999, 113 Stat. 970.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 95–91, Aug. 4, 1977, 91 Stat. 565, as amended, known as the Department of Energy Organization Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of this title and Tables.

AMENDMENTS

1999—Pub. L. 106–65 struck out subsec. (a) designation before ''The Division of Naval Reactors'', substituted ''Under Secretary for Nuclear Security'' for ''Assistant Secretary to whom the Secretary has assigned the function listed in section 7133(a)(2)(E) of this title'', and struck out subsec. (b) which read as follows: ''The Division of Military Application, established by section 2035 of this title, and the functions of the Energy Research and Development Administration with respect to the Military Liaison Committee, established by section 2037 of this title, are transferred to the Department under the Assistant Secretary to whom the Secretary has assigned those functions listed in section 7133(a)(5) of this title, and such organizational units shall be deemed to be organizational units established by this chapter.''

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by Pub. L. 106–65 effective Mar. 1, 2000, see section 3299 of Pub. L. 106–65, set out as an Effective Date note under section 2401 of Title 50, War and National Defense.

TRANSFER OF FUNCTIONS

All national security functions and activities performed immediately before Oct. 5, 1999, by the Office of Naval Reactors transferred to the Administrator for Nuclear Security of the National Nuclear Security Administration of the Department of Energy, and the Deputy Administrator for Naval Reactors of the Administration to be assigned the responsibilities, authorities, and accountability for all functions of the Office of Naval Reactors under Executive Order No. 12344, set out as a note under section 2511 of Title 50, War and National Defense, see sections 2406 and 2481 of Title 50.

Pub. L. 98–525, title XVI, § 1634, Oct. 19, 1984, 98 Stat. 2649, which was formerly set out as a note under this section, was renumbered section 4101 of Pub. L. 107–314, the Bob Stump National Defense Authorization Act for Fiscal Year 2003, by Pub. L 108–136, div. C, title XXXI, § 3141(d)(2), Nov. 24, 2003, 117 Stat. 1757, and is set out as a note under section 2511 of Title 50, War and National Defense.

§ 7159. Transfer to Department of Transportation

Notwithstanding section 7151(a) of this title, there are transferred to, and vested in, the Secretary of Transportation all of the functions vested in the Administrator of the Federal Energy Administration by section 6361(b)(1)(B) of this title.

(Pub. L. 95–91, title III, § 310, Aug. 4, 1977, 91 Stat. 582.)

SUBCHAPTER IV—FEDERAL ENERGY REGULATORY COMMISSION

§ 7171. Appointment and administration

(a) Federal Energy Regulatory Commission; establishment

There is established within the Department an independent regulatory commission to be known as the Federal Energy Regulatory Commission.

(b) Composition; term of office; conflict of interest; expiration of terms

(1) The Commission shall be composed of five members appointed by the President, by and with the advice and consent of the Senate. One of the members shall be designated by the President as Chairman. Members shall hold office for a term of 5 years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. Not more than three members of the Commission shall be members of the same political party. Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A Commissioner may continue to serve after the expiration of his term until his successor is appointed and has been confirmed and taken the oath of Office, except that such Commissioner shall not serve beyond the end of the session of the Congress in which such term expires. Members of the Commission shall not engage in any other business, vocation, or employment while serving on the Commission.

(2) Notwithstanding the third sentence of paragraph (1), the terms of members first taking office after April 11, 1990, shall expire as follows:

(A) In the case of members appointed to succeed members whose terms expire in 1991, one such member's term shall expire on June 30, 1994, and one such member's term shall expire on June 30, 1995, as designated by the President at the time of appointment.

(B) In the case of members appointed to succeed members whose terms expire in 1992, one such member's term shall expire on June 30, 1996, and one such member's term shall expire on June 30, 1997, as designated by the President at the time of appointment.

(C) In the case of the member appointed to succeed the member whose term expires in 1993, such member's term shall expire on June 30, 1998.

(c) Duties and responsibilities of Chairman

The Chairman shall be responsible on behalf of the Commission for the executive and administrative operation of the Commission, including functions of the Commission with respect to (1)

the appointment and employment of hearing examiners in accordance with the provisions of title 5, (2) the selection, appointment, and fixing of the compensation of such personnel as he deems necessary, including an executive director, (3) the supervision of personnel employed by or assigned to the Commission, except that each member of the Commission may select and supervise personnel for his personal staff, (4) the distribution of business among personnel and among administrative units of the Commission, and (5) the procurement of services of experts and consultants in accordance with section 3109 of title 5. The Secretary shall provide to the Commission such support and facilities as the Commission determines it needs to carry out its functions.

(d) Supervision and direction of members, employees, or other personnel of Commission

In the performance of their functions, the members, employees, or other personnel of the Commission shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department.

(e) Designation of Acting Chairman; quorum; seal

The Chairman of the Commission may designate any other member of the Commission as Acting Chairman to act in the place and stead of the Chairman during his absence. The Chairman (or the Acting Chairman in the absence of the Chairman) shall preside at all sessions of the Commission and a quorum for the transaction of business shall consist of at least three members present. Each member of the Commission, including the Chairman, shall have one vote. Actions of the Commission shall be determined by a majority vote of the members present. The Commission shall have an official seal which shall be judicially noticed.

(f) Rules

The Commission is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions. Until changed by the Commission, any procedural and administrative rules applicable to particular functions over which the Commission has jurisdiction shall continue in effect with respect to such particular functions.

(g) Powers of Commission

In carrying out any of its functions, the Commission shall have the powers authorized by the law under which such function is exercised to hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States it may designate. The Commission may, by one or more of its members or by such agents as it may designate, conduct any hearing or other inquiry necessary or appropriate to its functions, except that nothing in this subsection shall be deemed to supersede the provisions of section 556 of title 5 relating to hearing examiners.

(h) Principal office of Commission

The principal office of the Commission shall be in or near the District of Columbia, where its general sessions shall be held, but the Commission may sit anywhere in the United States.

(i) Commission deemed agency; attorney for Commission

For the purpose of section 552b of title 5, the Commission shall be deemed to be an agency. Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Commission may appear for, and represent the Commission in, any civil action brought in connection with any function carried out by the Commission pursuant to this chapter or as otherwise authorized by law.

(j) Annual authorization and appropriation request

In each annual authorization and appropriation request under this chapter, the Secretary shall identify the portion thereof intended for the support of the Commission and include a statement by the Commission (1) showing the amount requested by the Commission in its budgetary presentation to the Secretary and the Office of Management and Budget and (2) an assessment of the budgetary needs of the Commission. Whenever the Commission submits to the Secretary, the President, or the Office of Management and Budget, any legislative recommendation or testimony, or comments on legislation, prepared for submission to Congress, the Commission shall concurrently transmit a copy thereof to the appropriate committees of Congress.

(Pub. L. 95–91, title IV, § 401, Aug. 4, 1977, 91 Stat. 582; Pub. L. 101–271, § 2(a), (b), Apr. 11, 1990, 104 Stat. 135.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (i) and (j), was in the original ''this Act'', meaning Pub. L. 95–91, Aug. 4, 1977, 91 Stat. 565, as amended, known as the Department of Energy Organization Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of this title and Tables.

AMENDMENTS

1990—Subsec. (b). Pub. L. 101–271 designated existing provisions as par. (1), substituted ''5 years'' for ''four years'', struck out after third sentence ''The terms of the members first taking office shall expire (as designated by the President at the time of appointment), two at the end of two years, two at the end of three years, and one at the end of four years.'', substituted ''A Commissioner may continue to serve after the expiration of his term until his successor is appointed and has been confirmed and taken the oath of Office, except that such Commissioner shall not serve beyond the end of the session of the Congress in which such term expires.'' for ''A Commissioner may continue to serve after the expiration of his term until his successor has taken office, except that he may not so continue to serve for more than one year after the date on which his term would otherwise expire under this subsection.'', and added par. (2).

EFFECTIVE DATE OF 1990 AMENDMENT

Pub. L. 101–271, § 2(c), Apr. 11, 1990, 104 Stat. 136, provided that: ''The amendments made by this section [amending this section] apply only to persons appointed or reappointed as members of the Federal Energy Regulatory Commission after the date of enactment of this Act [Apr. 11, 1990].''

previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) Compliance with order of Commission

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

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon

complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and 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 classi-

fication is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

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

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

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

[1] See References in Text note below.

to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

LIMITATION ON AUTHORITY PROVIDED

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

STUDY

Pub. L. 100–473, § 5, Oct. 6, 1988, 102 Stat. 2301, directed that, no earlier than three years and no later than four years after Oct. 6, 1988, Federal Energy Regulatory Commission perform a study of effect of amendments to this section, analyzing (1) impact, if any, of such amendments on cost of capital paid by public utilities, (2) any change in average time taken to resolve proceedings under this section, and (3) such other matters as Commission may deem appropriate in public interest, with study to be sent to Committee on Energy and Natural Resources of Senate and Committee on Energy and Commerce of House of Representatives.

§ 824f. Ordering furnishing of adequate service

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

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

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

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

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

Power Act absent the agreement of all parties thereto.

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

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

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

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

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

§ 35.2 Definitions.

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

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

(c)(1) *Tariff.* The term *tariff* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section offered on a generally applicable basis, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in

any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A tariff is designated with a Tariff Volume number.

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

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

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

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

(ii) Serving each purchaser under a rate schedule, service agreement, or tariff either electronically or by mail in accordance with the service regulations in Part 385 of this chapter with a copy of the rate schedule, service agreement, or tariff. Posting shall include, in the event of the filing of increased rates or charges, serving either electronically or by mail in accordance with the service regulations in Part 385 of this chapter each purchaser under a rate schedule, service agreement or tariff proposed to be changed and to each State Commission within whose jurisdiction such purchaser or purchasers distribute and sell electric energy at retail, a copy of the rate schedule, service agreement or tariff showing such increased rates or charges, comparative billing data as required under this part, and, if requested by a purchaser or State Commission, a copy of the supporting data required to be submitted to this Commission under this part. Upon direction of the Secretary, the public utility shall serve copies of rate schedules, service agreements, or tariffs, and supplementary data, upon designated parties other than those specified herein.

(2) Unless it seeks a waiver of electronic service, each customer, State Commission, or other party entitled to service under this paragraph (e) must notify the public utility of the e-mail address to which service should be directed. A customer, State Commission, or other party may seek a waiver of electronic service by filing a waiver request under Part 390 of this chapter providing good cause for its inability to accept electronic service.

(f) *Effective date*. As used herein the *effective date* of a rate schedule, tariff or service agreement shall mean the date on which a rate schedule filed and posted pursuant to the requirements of this part is permitted by the Commission to become effective as a filed rate schedule. The effective date shall be 60 days after the filing date, or such other date as may be specified by the Commission.

(g) *Frequency regulation*. The term *frequency regulation* as used in this part will mean the capability to inject or withdraw real power by resources capable of responding appropriately to a system operator's automatic generation control signal in order to correct

may not be filed at the time of execution thereof by reason of the aforementioned sixty to one hundred-twenty day prior filing requirements. The proposed effective date of any rate schedule filing having a *filing date* in accordance with § 35.2(c) may be deferred at the written request of the filing public utility submitted to the Secretary prior to its acceptance by the Commission.

(b) *Construction of facilities.* Rate schedules predicated on the construction of facilities may be tendered for filing and posted no more than one hundred-twenty days prior to the date set by the parties for the contract to go into effect. The Commission, upon request, may permit a rate schedule or part thereof to be tendered for filing and posted more than one hundred-twenty days before it is to become effective.

(16 U.S.C. 284(d); Pub. L. 95–617; Pub. L. 95–91; E.O. 12009, 42 FR 46267)

[44 FR 16372, Mar. 19, 1979; 44 FR 20077, Apr. 4, 1979]

§ 35.4 Permission to become effective is not approval.

The fact that the Commission permits a rate schedule or any part thereof or any notice of cancellation to become effective shall not constitute approval by the Commission of such rate schedule or part thereof or notice of cancellation.

§ 35.5 Rejection of material submitted for filing.

(a) The Secretary, pursuant to the Commission's rules of practice and procedure and delegation of Commission authority, shall reject any material submitted for filing with the Commission which patently fails to substantially comply with the applicable requirements set forth in this part, or the Commission's rules of practice and procedure.

(b) A rate filing that fails to comply with this Part may be rejected by the Director of the Office of Markets, Tariffs, and Rates pursuant to the authority delegated to the Director in § 375.307(k)(3) of this chapter.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 614, 65 FR 18227, Apr. 7, 2000]

§ 35.6 Submission for staff suggestions.

Any public utility may submit a rate schedule or any part thereof or any material relating thereto for the purpose of receiving staff suggestions and comments thereon prior to filing with the Commission.

§ 35.7 Number of copies to be supplied.

All tariffs, rate schedules and contracts, or parts thereof, and material related thereto including any change in rates, certificates of concurrence, notices of cancellation or termination, and notices of succession, shall be supplied to the Commission for filing in six copies. All copies are to be included in one package, together with six copies of the letter of transmittal and all other materials and information required by these regulations, and addressed to the Federal Energy Regulatory Commission, Washington, DC 20426.

[Order 525, 40 FR 8947, Mar. 4, 1975, as amended by Order 541, 57 FR 21734, May 22, 1992]

§ 35.8 Protests and interventions by interested parties and form for Federal Register notice.

(a) *Protests or interventions.* Unless the notice issued by the Commission provides otherwise, any protest or intervention to a rate filing made pursuant to this part must be filed in accordance with §§ 385.211 and 385.214 of this chapter, on or before 21 days after the subject rate filing. A protest must state the basis for the objection. A protest will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestant a party to the proceeding. A person wishing to become a party to the proceeding must file a motion to intervene.

(b) *Form of notice.* The applicant must include a form of notice of the application suitable for publication in the FEDERAL REGISTER in accordance with the specifications in § 385.203(d) of this chapter. The form of notice shall be on electronic media as specified by the Secretary.

[Order 612, 64 FR 72537, Dec. 28, 1999; 65 FR 18229, Apr. 7, 2000, as amended by Order 647, 69 FR 32438, June 10, 2004]

Public Citizen, Inc. v. FERC **Docket No. ER14-1409**
D.C. Cir. Nos. 14-1244 and 14-1246

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 23rd day of December 2015, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

Bruce Folker Anderson New England Power Generators Ass. Inc. 141 Tremont Street Boston, MA 02111	Email
Joseph H. Fagan Day Pitney LLP Suite 300 Washington, DC 20005	Email
Lynn Norton Hargis Public Citizens, Inc. 215 Pennsylvania Avenue Washington, DC 20003	US Mail
Clare E. Kindall Office of the Attorney General, State of Connecticut 10 Franklin Square New Britain, CT 06051	Email

Neil Lawrence Levy King & Spalding LLP 1700 Pennsylvania Ave. NW Suite 200 Washington, DC 20006	US Mail
Cortney Madea NRG Energy, Inc. 211 Carnegie Center Drive Princeton, NJ 08540	Email
Robert Louis Marconi Office of the Attorney General, State of Connecticut 10 Franklin Square New Britain, CT 06051	Email
Scott Lawrence Nelson Public Citizen Litigation Group 1600 20th Street, NW Washington, DC 20009	Email
Ashley Charles Parrish King & Spalding LLP 1700 Pennsylvania Ave. NW Suite 200 Washington, DC 20006	Email
Joseph Arnold Rosenthal Office of Consumer Counsel 10 Franklin Square New Britain, CT 06051	Email
John L Shepherd Jr. Skadden, Arps, Slate, Meagher & Flom LLP 1440 New York Ave. NW Washington, DC 20005	Email

Abraham Silverman — Email
NRG Energy, Inc.
211 Carnegie Center Drive
Princeton, NJ 0840

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

Michael C. Wertheimer — Email
Office of the Attorney General, State
Of Connecticut
10 Franklin Square
New Britain, CT 06051

Paul Franklin Wight — Email
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave. NW
Washington, DC 20005

John Story Wright — Email
Office of the Attorney General, State
Of Connecticut
10 Franklin Square
New Britain, CT 06051

/s/Karin L. Larson
Karin L. Larson
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel: (202) 502-8236
Fax: (202) 273-0901
Email: Karin.Larson@ferc.gov