ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 14-1282

XCEL ENERGY SERVICES, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

Max Minzner
General Counsel

Robert H. Solomon
Solicitor

Lisa B. Luftig
Attorney

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

Corrected Final Brief: September 30, 2015

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

To counsel's knowledge, the parties before this Court and before the Federal Energy Regulatory Commission in the underlying agency proceeding are as listed in the brief of Petitioner.

B. Rulings Under Review:

1. Order Accepting Formula Rate Proposal and Establishing Hearing and Settlement Judge Procedures, *Sw. Power Pool, Inc.*, FERC Docket No. ER12-959-000, 138 FERC ¶ 61,231 (Mar. 30, 2012) ("2012 Order"), R.12, JA 205;

2. Order On Rehearing, *Sw. Power Pool, Inc.*, FERC Docket No. ER12-959-001, 142 FERC ¶ 61,135 (Feb. 21, 2013) ("2013 Order"), R.145, JA 283; and

3. Order Denying Rehearing and Accepting Compliance Filing, Subject to Further Compliance Filing, *Sw. Power Pool, Inc.*, FERC Docket Nos. ER12-959-000 & -005, 149 FERC ¶ 61,050 (Oct. 16, 2014) ("2014 Order"), R.189, JA 524.

C. Related Cases:

The orders under review in this proceeding have not previously been before this Court or any other court. However, as noted by Petitioner (Br. at ii-iii), there is a pending Texas state court proceeding wherein Petitioner has sought recovery of amounts paid to Tri-County Electric Cooperative, Inc. under Texas state law.

/s/ *Lisa B. Luftig*
Lisa B. Luftig
Attorney

September 30, 2015

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2012 Order	*Sw. Power Pool, Inc.*, Order Accepting Formula Rate Proposal and Establishing Hearing and Settlement Judges Procedures, 138 FERC ¶ 61,231 (Mar. 30, 2012), R.12, JA 205
2013 Order	*Sw. Power Pool, Inc.*, Order On Rehearing, 142 FERC ¶ 61,135 (Feb. 21, 2013), R.145, JA 283
2014 Order	*Sw. Power Pool, Inc.*, Order Denying Rehearing and Accepting Compliance Filing, Subject to Further Compliance Filing, 149 FERC ¶ 61,050 (Oct. 16, 2014), R.189, JA 524
Br.	Opening Brief of Petitioner Xcel Energy Services, Inc.
Commission or FERC	Federal Energy Regulatory Commission
Complaint Order	*Sw. Pub. Serv. Co. v. Sw. Power Pool, Inc.*, 142 FERC ¶ 61,136 (Feb. 21, 2013)
Int. Br.	Opening Brief of Intervenor for Petitioner Occidental Permian Ltd.
JA	Joint Appendix
Occidental	Intervenor for Petitioner Occidental Permian Ltd.
P	Denotes a paragraph number in a Commission order
R.	Indicates an item in the certified index to the record
Southwest Pool	Intervenor for Respondent Southwest Power Pool, Inc.
Tri-County	Intervenor for Respondent Tri-County Electric Cooperative, Inc.
Xcel	Petitioner Xcel Energy Services, Inc.

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BRIEF FOR RESPONDENT
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STATEMENT OF THE ISSUES

The Federal Energy Regulatory Commission made, acknowledged, and remedied an error in its processing of a difficult rate filing – dealing with a complicated mix of FERC-jurisdictional and non-jurisdictional services and entities. The Commission provided as much of a remedy (refund relief back to 2013) as it could, under the circumstances, consistent with legal limitations. Petitioner continues to argue that the Commission, as a matter of law, was compelled to provide more of a remedy (refund relief back to 2012).

The issues presented on appeal are:

1. Whether the Commission acted appropriately in limiting its remedy based on its consistent, decades-long interpretation of the Federal Power Act and Commission regulations; and

2. Whether, by virtue of its error, the Commission was compelled to treat this case differently than similar cases, to achieve a result that would benefit Petitioner to the detriment of others.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

INTRODUCTION

Tri-County Electric Cooperative, Inc. (Tri-County) is a not-for-profit electricity cooperative serving approximately 23,000 customers in Oklahoma, Kansas, Texas, Colorado, and New Mexico. Tri-County is not subject to the Commission's rate jurisdiction under sections 205 and 206 of the Federal Power Act ("FPA"), 16 U.S.C. §§ 824d-824e, *see also* 16 U.S.C. § 824(f) (exemption for cooperatives). Tri-County is, however, a member of the Southwest Power Pool, Inc. (Southwest Pool), a FERC-regulated regional transmission organization that operates a multi-state transmission grid consisting of facilities owned by both FERC-jurisdictional public utilities and non-jurisdictional utilities.

Here, Southwest Pool made a rate filing with the Commission to incorporate the rate of its participating member, Tri-County, that is not otherwise subject to

FERC rate review (or FERC-ordered refunds). The Commission typically allows such a rate filing to become effective only following a Commission order finding the rates just and reasonable, unless the non-jurisdictional utility has provided a voluntary commitment to provide refunds in the event they are owed. Unfortunately, here, the Commission accepted Southwest Pool's 2012 filing to include Tri-County's rate into its tariff, to be effective on the requested 2012 effective date, without obtaining this voluntary commitment. *See Sw. Power Pool, Inc.*, 138 FERC ¶ 61,231 (2012) ("2012 Order"), R.12, JA 205.

On rehearing, the Commission acknowledged its error. *See Sw. Power Pool, Inc.*, 142 FERC ¶ 61,135 (2013) ("2013 Order"), R.145, JA 283. Unable to compel Tri-County to give a voluntary refund commitment, the Commission used its prospective power under section 206 of the Federal Power Act, 16 U.S.C. § 824e, to fashion a remedy. The Commission directed Southwest Pool either to: 1) remove Tri-County's rate from its tariff until the Commission issues an order following hearing proceedings; or 2) submit a compliance filing providing, prospective from the day after its order, the voluntary commitment by Tri-County to refund any difference between the proposed rate and the rate ultimately found to be just and reasonable. 2013 Order P 16, JA 288-89.

Petitioner Xcel Energy Services Inc. ("Xcel") is a Southwest Pool transmission customer. It pays a portion of the Southwest Pool rate that recovers

the Tri-County rate. Xcel was not satisfied with the Commission's prospective-only remedy. It argued that, notwithstanding Tri-County's non-jurisdictional status, Southwest Pool is a jurisdictional utility and that the Commission should, on rehearing, accept and suspend Southwest Pool's filing subject to refund by Southwest Pool.

The Commission denied Xcel's request for retroactive relief. *See Sw. Power Pool, Inc.*, 149 FERC ¶ 61,050 (2014) ("2014 Order"), R.189, JA 524. The Commission explained that decades of Commission and court precedent, and a Commission regulation, establish that the Commission cannot suspend a rate filing after its effective date, even on rehearing. Further, the Commission noted that, even if it had the power to suspend on rehearing, holding Southwest Pool accountable for refunds associated with Tri-County's rates would be inconsistent with the structure of the Federal Power Act and the Commission's policy regarding filings to implement the rates of non-jurisdictional utilities, as well as inequitable under the circumstances. 2014 Order P 28, JA 535-36.

STATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Power Act

Section 201(b) of the Federal Power Act confers upon the Commission jurisdiction over all rates, terms, and conditions of electric transmission service and

sales at wholesale by public utilities in interstate commerce. 16 U.S.C. § 824(b); *see generally New York v. FERC*, 535 U.S. 1 (2002). Under section 205 of the Act, 16 U.S.C. § 824d(a)-(b), the Commission must ensure that jurisdictional rates and services are "just and reasonable." "Public utilities," as defined in the Act, *see* 16 U.S.C. § 824(e), are required to file tariff schedules with the Commission providing for their jurisdictional rates, terms, and conditions of service, and related contracts for service. 16 U.S.C. § 824d(c); *see also* 18 C.F.R. § 35.1 (obligation to file rates and tariffs).

Section 205(e) of the Federal Power Act, 16 U.S.C. § 824d(e), provides that the Commission may suspend tariff schedules, and defer the use of any rates proposed therein, for up to five months while the Commission investigates the justness and reasonableness of the proposal. At the end of the suspension period, the proposed change becomes effective, subject to refund if the Commission later determines the change to be unjust and unreasonable. *Id*.

Section 206 of the Act, 16 U.S.C. § 824e, authorizes FERC to investigate, on its own motion or upon complaint, existing rates and terms of service. If the Commission finds that an existing rate is "unjust, unreasonable, unduly discriminatory, or preferential," it must determine and set the just and reasonable rate. 16 U.S.C. § 824e(a); *see generally Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011) (discussing FPA § 206 burden).

The Commission's authority to remedy an unlawful rate under FPA section 206, 16 U.S.C. § 824e(a), is prospective. Upon making necessary findings, the Commission can determine a revised rate "to be thereafter observed and in force." 16 U.S.C. § 824e(a). Section 206(b) provides that the Commission shall establish a refund effective date no "earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date." 16 U.S.C. § 824e(b).

B. The Southwest Pool

Southwest Pool is a regional transmission organization with members in multiple states. *See Sw. Power Pool, Inc.*, 106 FERC ¶ 61,110, at PP 1, 52 (2004). This Court is familiar with the history and policy supporting the formation of regional transmission organizations. *See generally Pub. Util. Dist. No. 1 of Snohomish Cnty. v. FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001) (describing developments in the energy industry leading up to the voluntary formation of regional transmission organizations); *see also Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 535-37 (2008) (discussing technological, regulatory, and legislative advances, including the development of regional transmission organizations). The Southwest Pool is a "public utility" as defined in the Federal Power Act. *See Sw. Power Pool, Inc.*, 119 FERC ¶ 61,307, P 11 (2007); *see also Sw. Power Pool, Inc. v. FERC*, 736 F.3d 994 (D.C. Cir. 2013)

(concerning contract dispute between Southwest Pool and adjacent regional transmission organization).

C. Tri-County Electric Cooperative, Inc.

Tri-County is a not-for-profit distribution cooperative headquartered in Hooker, Oklahoma. Filing of Southwest Power Pool, at 3, R.2 (Feb. 1, 2012), JA 3. The Commission has previously determined that Tri-County is not a public utility under the Federal Power Act and, therefore, Tri-County is exempt from most aspects of Commission jurisdiction, including the Commission's rate jurisdiction. *Id*. (citing *Tri-County Elec. Coop., Inc.*, Order Disclaiming Jurisdiction, Docket No. EL06-92-000 (Dec. 8, 2006)); *see also* 16 U.S.C. §§ 824(b)(2), 824(f) (exemption from federal regulation under most sections of the Federal Power Act for certain electric cooperatives).

Nevertheless, this Court's precedent establishes that the Commission may review Tri-County's non-jurisdictional rates to ensure that the Southwest Pool's jurisdictional rates are just and reasonable. *See Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 667 (D.C. Cir. 2007) (explaining how entities that are otherwise exempt from the Federal Power Act can participate in regional transmission organizations and be subject to rate scrutiny); *see also Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1116 (D.C. Cir. 2002) (same).

Notwithstanding Tri-County's willing participation in the Southwest Pool, the Commission cannot order Tri-County to pay refunds. *See Transmission Agency of N. Cal.*, 495 F.3d at 673-74 (finding that the Federal Power Act expressly limits FERC refund authority to public utilities and exempts non-public utilities); *see also Bonneville Power Admin. v. FERC*, 422 F.3d 908, 911 (9th Cir. 2005) (same). As the Commission explained in *City of Riverside, California*, 128 FERC ¶ 61,207 (2009), the structure of the Federal Power Act reflects Congress's intent to exempt governmental entities and non-public utilities from the Commission's refund authority. *Id.* P 24 (citing *Transmission Agency of N. Cal.*, 495 F.3d at 673-74).

D. Xcel Energy Services, Inc.

Petitioner Xcel has a public utility affiliate, Southwestern Public Service Company. Br. at iv. Xcel, through its wholly-owned subsidiary Southwestern Public Service, is both a transmission-owning member and a transmission customer of the Southwest Pool. Br. at 3.

Southwest Pool's tariff has zonal rates which are based on the combined annual transmission revenue requirement (an annualized cost for transmission service) for each of the transmission owners located in that zone. Each transmission owner is responsible for filing rate changes for its zone, and the Southwest Pool is responsible for filings necessary to incorporate such rate

changes into the Southwest Pool's tariff. *See* 2012 Order P 2, JA 205; *see also* Southwest Pool Filing at 2, JA 2 (citing *Westar Energy, Inc.*, 122 FERC ¶ 61,268, at P 105 (2008) (requiring Southwest Pool to include each transmission owner's rate formula in its tariff)). Southwest Pool proposed to include Tri-County's annual transmission revenue requirement in the combined revenue requirement of the Southwestern Public Service Company zone. Southwest Pool Filing at 4, JA 4.

Xcel, and its supporting intervenor Occidental Permian Ltd. ("Occidental"), purchase transmission service from Southwest Pool and pay the rate for the Southwestern Public Service Company zone, which includes Tri-County's revenue requirement. *See* Br. at 3; *see also* Int. Br. at 1.

II. The Commission Proceedings And Orders

A. 2012 Order

On February 2, 2012, the Southwest Pool filed, on behalf of Tri-County, revisions to the Southwest Pool's tariff necessary to include Tri-County's formula rate for transmission service into the Southwestern Public Service Company (an Xcel company) zone. 2012 Order P 1, JA 205; *see also* Southwest Pool Filing at 1-2, JA 1-2. Several parties filed protests challenging whether Tri-County submitted sufficient evidence that its facilities meet the requirements of "Transmission Facilities" as defined in the Southwest Pool's tariff. 2012 Order P 5, JA 206-07. Parties, including Xcel and Occidental, requested that the

Commission either reject the filing, issue a deficiency letter, or suspend the filing for the maximum five-month period and set it for hearing and settlement procedures. 2012 Order P 9, JA 208.

The Commission found that the record was not sufficient to make a determination on whether the rates were just and reasonable. 2012 Order P 14, JA 209-10 ("the record before us does not provide enough information for us to determine the appropriate classification of the facilities that form the basis for the annual revenue requirements proposed by Tri-County"); *id*. ("Tri-County's proposed formula rate template and protocols raise issues of material fact that cannot be resolved based on the record before us"). Because the filing had not been shown to be just and reasonable, the Commission accepted the tariff revisions, to be effective April 1, 2012, as requested, and established hearing and settlement judge procedures to resolve the factual issues raised by the filing. 2012 Order P 15, JA 210.

B. 2013 Order And Complaint Proceeding

Parties sought rehearing of the 2012 Order. 2013 Order P 6, JA 284; *see also* Xcel Apr. 25, 2012 Rehearing Request, Docket No. ER12-959-000 at 1, R.16, JA 213. Xcel also filed a letter on August 24, 2012 requesting immediate action on its rehearing request (Br. at 13; *see also* R.42, JA 269).

Xcel argued that the Commission should grant rehearing to either suspend the filing, and make it subject to refund and the outcome of a hearing, or rescind its acceptance of the rates and conduct a full review prior to the rates going into effect. Xcel 2012 Rehearing Request at 4, JA 216. Xcel explained that Commission precedent had been to accept revenue requirement filings by or on behalf of non-public utilities (such as Tri-County) in contested proceedings only where the non-public utilities made a voluntary commitment to refund the difference between the as-filed rates and the rates ultimately found to be just and reasonable by the Commission. *Id*. at 7-8, JA 219-18; *see also* 2013 Order P 8, JA 285 (Xcel's arguments and supporting cases). Xcel also sought a stay of the 2012 Order based on its belief that it would have no recourse from Tri-County if the rates were ultimately found to be unjust and unreasonable. 2013 Order P 11, JA 286-87 (citing Xcel 2012 Rehearing Request at 10-12, JA 222-24).

Five months after the Commission's 2012 Order, on October 26, 2012, Xcel filed a complaint challenging the inclusion of Tri-County's costs in the Southwest Pool tariff without a refund commitment. In that complaint, Xcel sought a refund effective date of April 1, 2012 (the effective date of Southwest Pool's filing). *See Sw. Pub. Serv. Co. v. Sw. Power Pool, Inc.*, Complaint, Docket No. EL13-15-000, Oct. 26, 2012. Xcel asserted that section 206 of the Federal Power Act, 16 U.S.C. § 824e, provides the statutory recourse to correct the rate. *See* Xcel Complaint at

19-20 (citing *Pub. Utils. Comm'n of the State of Cal. v. FERC*, 254 F.3d 250 (D.C. Cir. 2001)).

On February 21, 2013, the Commission issued two orders. First, and not subject to this appeal, the Commission granted Xcel's complaint and set the issues for hearing and settlement judge procedures. *Sw. Pub. Serv. Co. v. Sw. Power Pool, Inc.*, 142 FERC ¶ 61,136 (Feb. 21, 2013) ("Complaint Order"). The Commission set a refund effective date of February 22, 2013, and directed the hearing and settlement judge to consider Xcel's request to consolidate the complaint with the hearing set in the 2012 Order. *Id*. PP 16, 18. The Commission also cross-referenced the rehearing order issued concurrently with the order on complaint. *See id*. PP 19, 20.

In its separate rehearing order, the subject of this appeal, the Commission determined that it had erred in allowing Southwest Pool's rate for Tri-County to go into effect in 2012 without a commitment from Tri-County to refund the difference between the filed rate and the rate ultimately found to be just and reasonable. 2013 Order P 13, JA 287-88. Although the Commission denied Xcel's request to make the rates fully refundable, based on Tri-County's non-jurisdictional status (*Id*. PP 14-15, JA 288 (citing cases)), the Commission found that it would not be just and reasonable to allow Southwest Pool to continue to pass through Tri-County's proposed rate without some refund protection in place. *Id*. P 16, JA 288-89.

Pursuant to section 206 of the Federal Power Act, 16 U.S.C. § 824e, the Commission directed the Southwest Pool to either remove Tri-County's rate until the conclusion of hearing and settlement judge proceedings, or submit a compliance filing providing a voluntary commitment by Tri-County to refund the difference between the filed rate and the rate ultimately found to be just and reasonable, with such voluntary commitment to be effective as of the day after the date (February 21, 2013) of the Rehearing Order. 2013 Order P 16, JA 288-89. The Commission also noted that Tri-County was not precluded from making a further voluntary commitment to provide refunds for the period from April 1, 2012 to the date of the 2013 Order. *Id*. n.18, JA 289; *see also* Complaint Order P 20, n.36. The Commission dismissed Xcel's motion for stay as moot. 2013 Order P 18, JA 289.

C. 2014 Order

Xcel sought rehearing of the 2013 Order and the Complaint Order, arguing that the rates at issue were the Southwest Pool's rates, not Tri-County's, and that refund protection should have been provided back to 2012. *See* Xcel March 25, 2013 Rehearing Request, R.162, JA 316; *see also* Xcel March 25, 2013 Rehearing Request, Docket No. EL13-15-000 (complaint proceeding).[1] Xcel argued that the

[1] While rehearing was pending, the parties settled the complaint, with Xcel retaining its right to pursue issues raised in the original Southwest Pool filing proceeding. *See* Jan. 10, 2014 Settlement, Docket No. EL13-15-000, at 8-9.

Southwest Pool is a FERC-jurisdictional public utility so the Commission is not constrained in its refund authority. *See* 2014 Order P 10, JA 528. Xcel also argued that the Commission did not craft a proper remedy because "[w]hen the Commission commits legal error, the proper remedy is one that puts the parties in the position they would have been in had the error not been made." *Id*. P 11, JA 528-29 (citing *Exxon Co. v. FERC*, 182 F.3d 30, 40 (D.C. Cir. 1999) (other citations omitted)). Xcel argued that the remedy for error can include retroactive surcharges. *Id*. (citing *Se. Mich. Gas Co. v. FERC*, 133 F.3d 34, 42 (D.C. Cir. 1998); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073-74 (D.C. Cir. 1992)). Xcel also argued that section 309 of the Federal Power Act, 16 U.S.C. § 825h, gives the Commission "the authority in fashioning remedies to consider equitable principles, one of which is to do what should have been done." 2014 Order P 12, JA 529 (citing Xcel March 25, 2013 Rehearing Request at 16, JA 331).

The Commission denied rehearing. As it explained, "the parties' emphasis on the affected rate being [a Southwest Pool] rate rather than a Tri-County rate does not change our view that the Commission cannot grant the relief that the rehearing parties seek; i.e., it cannot establish refunds against [Southwest Pool] back to April 1, 2012[.]" 2014 Order P 23, JA 533. The Commission "remedied its error as best it could within the limitations on its authority to do so." *Id*. P 24,

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Having settled the complaint, Xcel does not (and cannot) seek review of the Complaint Order or the refund effective date established therein.

JA 534. Because the Commission accepted Southwest Pool's filing and made it effective April 1, 2012, Commission precedent, policy, and regulations provide for a prospective remedy only: "[O]nce a rate goes into effect without suspension, the Commission must act pursuant to Section 206 of the Federal Power Act in order to change that rate." *Id*. P 25, JA 534 (citing *FirstEnergy Operating Cos*., 86 FERC ¶ 61,152, at 61,544, n.12 (1999) (other citations omitted)); *see also id*. P 28, JA 535-36 (citing, e.g., 18 C.F.R. § 2.4(a)). Further, acknowledging the inability to obtain refunds from Tri-County, a non-jurisdictional entity, the Commission observed the practical limitations on imposing refunds on the Southwest Pool, a non-profit entity. 2014 Order P 28, n.43, JA 535-36.

D. Related Orders

Although not the subject of this (or any) appeal, two months after the 2013 Order issued, the Administrative Law Judge determined that Tri-County's facilities are not "Transmission Facilities" under the Southwest Pool tariff, nor do they satisfy the Commission's general test for whether facilities are properly classified as transmission. *See Sw. Power Pool, Inc.*, 143 FERC ¶ 63,003, PP 248-49 (Apr. 22, 2013), R.168, JA 352, 440. On the same day as the 2014 Order, the Commission affirmed the Administrative Law Judge's findings that Tri-County's assets do not satisfy the requirements to be classified as transmission. *See Sw. Power Pool, Inc.*, 149 FERC ¶ 61,051 (2014), R.188, JA 443. As a result, none of

Tri-County's facilities are eligible to be rolled into Southwest Pool's tariff rate. *Id*. P 16, JA 447; *see also* 2014 Order P 38, JA 540 (directing Southwest Pool to stop collecting Tri-County's revenue requirement and to pass through refunds received from Tri-County under its refund commitment).

Xcel claims that, for the period between the 2012 Order and the 2013 Order, when refunds are unavailable, it paid $1.4 million in increased charges associated with Tri-County's revenue requirement. Br. at 5.

SUMMARY OF ARGUMENT

The Commission's remedial decision here respects two jurisdictional limitations on its authority – first, as between jurisdictional and non-jurisdictional entities based on statutory definitions and distinctions in the Federal Power Act, and second, as to refunds available under the ratemaking sections of the Act. Decades of court precedent, interpreting and applying governing statutory provisions and implementing regulations, establishes that the Commission is unable to order the remedy preferred by Xcel – to direct Southwest Pool to pay refunds for money it collected between the 2012 Order and the 2013 Order.

Xcel argues that, because this case involves a Commission error, the Commission was compelled to abandon its precedent and use its equitable powers to grant Xcel's requested relief. But the Commission explained that doing so would be inconsistent with how the Commission treats similar filings to

incorporate non-jurisdictional utilities' rates. Also, holding Southwest Pool, a non-profit entity, responsible for refunds owed by a non-jurisdictional member could lead to an under-recovery inconsistent with Commission refund policy and would be inequitable to Southwest Pool's other members. The Commission weighed these additional findings against granting Xcel's request. That balance is owed deference.

Contrary to Xcel's assertions, it is not without a remedy. Xcel was aware of the correct mode of obtaining relief and availed itself of the opportunity to file a complaint as contemplated by the Federal Power Act. That Xcel subsequently settled its complaint does not compel the Commission to make an exception to the decades of precedent affirming its understanding of the structure of the statute and the meaning of its regulations, to achieve a result inconsistent with Commission policy. Finally, granting Xcel's petition would interfere with the possibility of Xcel's recovering amounts claimed against Tri-County in Texas state court.

ARGUMENT

I. THE COMMISSION'S REMEDY IS CONSISTENT WITH THE FEDERAL POWER ACT, COMMISSION REGULATIONS, AND PRECEDENT

A. Standard Of Review

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

Power Partners v. FERC, 165 F.3d 944, 948 (D.C. Cir. 1999) (applying arbitrary and capricious standard to Commission orders). The relevant inquiry is whether the agency has "examine[d] the relevant data and articulate[d] a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

This appeal concerns FERC's interpretation of the Federal Power Act, as well as application of its own precedents and regulations. Generally, to review FERC's interpretation of a statute it administers, the Court applies the framework set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), under which 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). *See also City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) ("Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.").

FERC's interpretation of its own regulations is entitled to "'controlling weight' unless it be 'plainly erroneous or inconsistent with the regulation.'" *St. Luke's Hosp. v. Sebelius*, 611 F.3d 900, 904-05 (D.C. Cir. 2010) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); *see also Cent. Vt. Pub. Serv. Corp. v. FERC*, 214 F.3d 1366, 1369 (D.C. Cir. 2000) (same); *N. Border Pipeline*

Co. v. FERC, 129 F.3d 1315, 1318 (D.C. Cir. 1997) (same). Likewise, the Court must give deference to the Commission's interpretation of its own precedent. *See Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 703-704 (D.C. Cir. 2010); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007).

B. The Commission's Remedy Is Consistent With The Federal Power Act, Commission Precedent, And Commission Regulations

The Commission Orders reflect the Commission's balance of providing a remedy to parties while at the same time respecting limitations on its authority under the Federal Power Act and expectations stemming from Commission precedent and regulations. This balance should be affirmed.

First, there is no question that the Federal Power Act limits the Commission's ability to obtain refunds from Tri-County, a non-jurisdictional electric cooperative. *See* 2013 Order PP 14-15, JA 288 (holding that Tri-County is not itself subject to rate review under the statute, including Commission-imposed rate suspension and refund obligations) (citing 16 U.S.C. §§ 824(f), 824d and *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,131, at P 72 (2011)); *see also* Br. at 27 ("[Xcel] never claimed that FERC has the authority under the [Federal Power Act] to require *Tri-County* to pay refunds." (emphasis in original)). Instead, Xcel offers that the Commission should have granted Xcel's proposed alternative remedy of, on agency rehearing, retroactively suspending Southwest Pool's filing and directing Southwest Pool to provide refunds. Yet

Xcel's alternative remedy is inconsistent with the Commission's authority under the Federal Power Act, a specific Commission regulation on rate suspension, and decades of Commission precedent.

1. For 70 Years, The Commission Has Consistently Interpreted The Federal Power Act And Its Regulations To Bar Suspension And Refunds After A Rate Goes Into Effect

The Federal Power Act grants the Commission power to order refunds, but only where the rate is "upon reasonable notice" suspended before going into effect. 16 U.S.C. § 824d(e); *see also Ind. & Mich. Elec. Co. v. FPC*, 502 F.2d 336, 344-45 (D.C. Cir. 1974) ("*Indiana & Michigan*") ("The Commission's power to order refunds arises from section 205(e) of the Federal Power Act and is directly tied to the exercise of the Commission's suspension power.") (citations omitted)). Suspending the rate means preventing it from going into effect. The Commission may suspend a rate for up to five months while a hearing is pending. 16 U.S.C. § 824d(e). If the hearing has not concluded at the end of the suspension period, the changed rate goes into effect, but the Commission may "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." *Id*.

The Commission and reviewing courts have long held that FPA section 205(e) limits the Commission to providing refunds only where the changed rate

goes into effect at the end of a suspension period. *See generally Phillips Petroleum Co. v. FPC*, 227 F.2d 470 (10th Cir. 1955) (holding notice by telegram was sufficient to suspend the filing prior to its effective date). As this Court explained, "once proposed rates have become effective [the] Commission is powerless to suspend the effectiveness of, or otherwise modify, those rates under 205 of the Federal Power Act [. . . and the] only recourse is to institute a proceeding under § 206(a) of the Act and after hearing determine just and reasonable rates to be thereafter observed and in force." *Indiana & Michigan*, 502 F.2d at 343 (vacating a Commission order suspending a rate after its effective date).

In addition to the language in section 205(e) of the Act, a Commission regulation prohibits suspension of a rate after its effective date. *See* 2014 Order P 28, JA 535-36 (citing 18 C.F.R. § 2.4(a) "Suspension of rate schedules")). That regulation, adopted in 1945 as a formal interpretation of the agency's powers of suspension of rate schedules under section 205 of the Federal Power Act, provides "[t]he Commission cannot suspend a rate schedule after its effective date." 18 C.F.R. § 2.4(a).

The Commission has consistently recognized the statute (FPA section 205(e)) and its regulation (section 2.4(a)) as a bar to suspending a rate schedule after its effective date. *See* 2014 Order P 25, JA 534 (citing *Dynegy Midwest*

Generation, Inc., 110 FERC ¶ 61,358 (2005) (rejecting request to suspend an effective rate on rehearing); *FirstEnergy Operating Cos.*, 86 FERC ¶ 61,152 (1999) (same); *Consumers Energy Co.*, 80 FERC ¶ 61,316, at ¶ 62,077 (1997) (same)); *see also* 2014 Order P 28, JA 535-36 (citing *Ill. Power Co.*, 73 FERC ¶ 61,348 (1995) (finding Commission powerless, on rehearing, to suspend an effective rate)); *Ky. Power Co.*, 64 FERC ¶ 61,112 (1993) (same).

Notwithstanding this long line of precedent, Xcel argues that this case is distinguishable because the Commission recognized on rehearing, before its decision became final, its error in processing Southwest Pool's 2012 filing. In essence, Xcel suggests that there is some distinction between a rate that is "effective" and one that is "final." Br. at 32 (distinguishing effective rates from rates that have been put in effect by an initial order that has not become final). Xcel offers no statutory support in the ratemaking sections of the Federal Power Act for such a distinction. Rather, Xcel points to the Commission's remedial powers under section 309 of the Federal Power Act, 16 U.S.C. § 825h (Commission has "any and all" authority to "carry out" other sections of the statute), and section 313 of the Act, 16 U.S.C. § 825*l* (rehearing and judicial review). *See* Br. at 39 (arguing that the Commission can modify its orders at any time).

As recognized by the Commission (*see* 2014 Order, P 28, JA 535-36), however, Xcel's arguments were addressed and rejected by the Eighth Circuit in *Cooperative Power Ass'n v. FERC*, 733 F.2d 577, *reh'g denied*, 739 F.2d 390 (8th Cir. 1984). In that case, the Cooperative Power Association requested, on rehearing, that the Commission reject a filing, or suspend it subject to the outcome of a hearing. 733 F.2d at 579. The Commission denied that request, citing its inability, even on rehearing, to suspend a rate after its effective date, but initiated an investigation under section 206 of the Federal Power Act. *Id*. at 579. The court deferred to the Commission's interpretation, finding "no compelling circumstances justifying an interpretation of § 2.4(a) contrary to that to which the Commission adhered for the last forty years." *Id*. at 580. "Nor do we find," the court confirmed, "that the Commission must suspend otherwise effective rates under a vague theory of 'remedial' powers. The Commission does not contend that it has such a suspension power and we do not find such power a necessary incident of the Commission's authority." *Id*.

Cooperative Power Association sought panel rehearing. It argued that, in the case of *Indiana & Michigan Elec. Co.*, 50 F.P.C. 1451 (1973), the Commission allowed the suspension of an effective rate. The Eighth Circuit denied rehearing, finding that *Indiana & Michigan Elec. Co.* was distinguishable because the Commission only suspended the part of the rate that was amended five days before

it was to go into effect – thereby extending the effective date. 739 F.2d at 391; *accord Ida. Power Co.*, 41 FERC ¶ 61,196 (1987) (post-*Cooperative Power Ass'n*, the Commission explained that its *Ind. & Mich. Elec. Co.* decision is consistent with section 205(e) and § 2.4(a), because the filing of the amendment triggered a new effective date and suspension was, therefore, prior to effective date). Contrary to Xcel's assertion (Br. at 33), the Eighth Circuit did not "express doubt" as to whether the Commission was correct in finding it did not have the power to suspend a rate on rehearing. Rather, the Court accepted the Commission's additional reasons why it would not suspend, even if it had the power to do so. 739 F.2d at 392; *see also infra* Section II of Argument (discussing the additional reasons FERC gave not to suspend Southwest Pool's filing on rehearing). On that basis, the court held that "[a]ssuming that it had the power to do so, the Commission's decision not to suspend the effective rates will not be reversed absent a finding of abuse of discretion." *Id*. (citing *Pub. Serv. Comm'n of the State of N.Y. v. FPC*, 329 F.2d 242 (D.C. Cir. 1964)).

Since *Cooperative Power Ass'n*, the Commission has consistently held that pursuant to the statute (FPA section 205(e)) and its regulations (section 2.4(a)), it is powerless, even on rehearing, to suspend a rate after its effective date. *See* 2014 Order P 28, JA 535-36 (citing *Coop. Power Ass'n*); *see also Ky. Power Co.*, 64 FERC ¶ 61,112 (discussing and applying the reasoning in *Coop. Power Ass'n*). In

Ida. Power Co., 37 FERC ¶ 61,013 (1986), the Commission once again rejected a request to suspend a rate on rehearing, explaining that "section 313(a) of the Federal Power Act does not operate as a stay of any date specified in this [order] except as specifically provided by the Commission." 37 FERC ¶ 61,013 at ¶ 61,027. Although Occidental argues (Int. Br. at 17-18) that FERC's regulation § 2.4(a) is a mere policy and is not binding, this argument ignores the Federal Power Act and decades of Commission precedent applying the Commission's interpretation of it. This consistent interpretation is owed deference. *See Alcoa Inc. v. FERC*, 564 F.3d 1342, 1348 (D.C. Cir. 2009) (FERC "may not depart from precedent solely because a petitioner failed to show why that precedent should apply"); *see also Ala. Power Co. v. FERC*, 22 F.3d 280 (11th Cir. 1994) (deferring to FERC interpretation of when rate filing becomes final for the purpose of commencing 60-day rate review period).

2. Once A Rate Is Effective Without Suspension, It Can Only Be Changed Under FPA Section 206

Xcel argues that the Commission's inability to suspend a rate on rehearing leaves it without a remedy. *See* Br. at 39 ("Under such a view, any clear FERC error in accepting rates without suspension and refund protection, no matter how egregious, would be irremediable."). This is belied by the statute, Commission

precedent, and even Xcel's own actions in this proceeding.[2] The Commission has consistently held, as it has here, that "[o]nce a rate goes into effect without suspension, the Commission must act pursuant to section 206 of the Federal Power Act in order to change that rate." *See* 2014 Order P 25 n.36, JA 534 (quoting *FirstEnergy Operating Cos.*, 86 FERC ¶ 61,152 (rejecting a request that the Commission grant rehearing to suspend a rate, and offering section 206 complaint filing as an available remedy)); *see also Consumers Energy Co.*, 80 FERC ¶ 61,316, at ¶ 62,077 ("[o]nce a rate is accepted and goes into effect, we cannot suspend [it]", but a party may file a complaint under FPA section 206 to seek to change the rate at issue). This is entirely consistent with this Court's warning against blurring the line between FPA ratemaking sections 205 and 206, 16 U.S.C. §§ 824d, 824e. *See, e.g.*, *W. Res., Inc. v. FERC*, 9 F.3d 1568 (D.C. Cir. 1993) (rejecting FERC attempt to use section 4 of the Natural Gas Act (analogous to FPA section 205) to change an effective rate where it was required to use section 5 of the Natural Gas Act (analogous to FPA section 206)).[3]

[2] Xcel availed itself of this prospective remedy by filing its own complaint, but chose to settle the matter rather than pursue judicial review of the Commission's treatment of that complaint. *See supra* pp. 11-13 (discussing related complaint proceeding).

[3] Because the relevant provisions of the Federal Power Act and the Natural Gas Act, including their ratemaking sections, *see* 15 U.S.C. §§ 717c-717d and 16 U.S.C. §§ 824d-824e, "are in all material respects substantially identical," courts

Xcel cites no case where the Commission has done what it asks this Court to do – suspend a rate that is already in effect. (Nor does intervenor Occidental in its brief supporting Xcel.) But this Court has acknowledged that FPA section 206 – allowing for prospective relief upon the filing of a complaint – provides a proper remedy in this circumstance. *See, e.g.*, *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 542 (D.C. Cir. 2010) (noting the availability of petitions to the Commission under section 206 as an effective remedy); *see also Nat'l Fuel Gas Supply Corp. v. FERC*, 899 F.2d 1244, 1247 n.5 (D.C. Cir. 1990) (observing that, under the similar framework in the Natural Gas Act, after the effective date the Commission must proceed under section 5 of the Natural Gas Act (akin to FPA section 206) to change the rate prospectively). Although this interpretation may limit refund protection in certain circumstances, that result is a balance struck by Congress. *Cf. Middle S. Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984) (holding that Congress barred FERC from suspending initial rate filings, notwithstanding FERC's argument that the only remedy would be prospective under FPA section 206).

In *Cooperative Power Ass'n*, the Eighth Circuit observed that, by enacting section 206 without suspension and refund protection, "Congress anticipated cases

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"cite interchangeably decisions interpreting the pertinent sections of the two statutes." *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981) (citation omitted).

in which rates would be found unreasonable, and subject to future adjustment, but would not be subject to refunds or suspension." 733 F.2d at 580. If courts were able to order "suspension of rates in every case where the rates might be subject to future adjustments, [they] would be substantially eliminating § 206 from the Act." *Id*.

Cases cited by Xcel do not refute this statutory interpretation. Xcel suggests that *Cities of Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982), is an instance where the Court remanded to FERC to determine whether to use its power under section 205 to review a previously-approved rate. *See* Br. at 46. Yet this Court subsequently clarified its holding and explained that FERC does not have the authority under section 205 to review previously approved rates, and must do so under section 206 of the Federal Power Act. *See Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182 (D.C. Cir. 1986) (clarifying that "neither section 4 [of the Natural Gas Act (analogous to section 205 of the Federal Power Act)] nor the *Cities of Batavia* opinion gives the Commission the authority to reject, post hoc, a previously accepted provision or to specify what should replace it"); *see also TC Ravenswood, LLC v. FERC*, 331 Fed. Appx. 8, 10 (D.C. Cir. 2009) (unpublished opinion) (citing *E. Tenn. Natural Gas Co. v. FERC*, 863 F.2d 932, 942-44 (D.C. Cir. 1988) (same)). All *Cities of Batavia* stands for is the proposition that the Commission, in reviewing a filing, may look outside the four corners of the filing

at how the proposal interacts with the existing rate structure. If the interaction creates an unjust and unreasonable result, the Commission can reject or amend the proposal under FPA section 205, or may use its authority to amend the existing tariff prospectively under section 206. *See TC Ravenswood*, 331 Fed. Appx. at 10.

Xcel also cites *Indiana & Michigan*, 502 F.2d 336, as a case where this Court used its powers of equity to impose suspension and refund obligations after the rate's effective date. *See* Br. at 47-48. Yet the facts of *Indiana & Michigan* are readily distinguishable. There, after finding the Commission's suspension and refund order unlawful, the Court used its powers of equity to maintain the status quo based on reliance by all parties and the fact that the passage of time eliminated the parties' ability to pursue other remedies. *See Indiana & Michigan*, 502 F.2d at 345 (observing that the Commission's ability to order refunds would be prospective only under section 206 of the Federal Power Act and that the utility's equitable interest was not significant because the modified order grants no greater relief than it requested); *see also id*. n.55 (explaining that the court's order gives effect to the Commission's decision that suspension was appropriate). Xcel is not similarly prejudiced by the Commission's 2012 Order, because it was aware of the Commission's general policy not to suspend a rate after its effective date (*see* Xcel 2012 Rehearing Request, at p.9, n.29, JA 221), and availed itself of the prospective remedy under section 206 of the Federal Power Act by filing a complaint. *See*

2013 Order, n.6, JA 285; *id*. P 12, JA 287 (describing Tri-County's May 10, 2012 Answer, citing 18 C.F.R. § 2.4 and Commission orders); *see also Sw. Pub. Serv. Co. v. Sw. Power Pool, Inc.*, Complaint, Docket No. EL13-15-000, Oct. 26, 2012.

II. THE COMMISSION WAS NOT COMPELLED TO PROVIDE A GREATER REMEDY

Xcel faults the Commission with not considering whether there were other reasons, beyond statutory constraints, to overturn its acceptance of the Southwest Pool filing and suspend subject to refund. *See* Br. at 36. To the contrary, as a direct result of the jurisdictional limitations here (lack of refund authority over non-jurisdictional Tri-County), the Commission identified two other factors that weighed against granting Xcel's request. Namely, granting Xcel's request would be inconsistent with how the Commission has treated similar filings and allowing refunds in this circumstance could result in an under-recovery in violation of general Commission refund policies.

A. Standard Of Review

The Court "owe[s] FERC great deference in reviewing its selection of a remedy, for the breadth of agency discretion is, if anything, at its zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions." *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008) (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)). *See also, e.g., Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 956 (D.C. Cir.

2005) (similarly noting that FERC "wields maximum discretion" when choosing a remedy). Although the Commission has broad remedial authority, such remedial authority cannot conflict with an express limitation in the statute. *See, e.g., Pub. Utils. Comm'n of the State of Cal. v. FERC*, 988 F.2d 154, 168 n.12 (D.C. Cir. 1993) ("[T]he Commission does not have the authority to ignore the law to achieve an equitable result.") (citing *Pub. Utils. Comm'n of the State of Cal. v. FERC*, 894 F.2d 1372, 1383 (D.C. Cir. 1990)).

B. Xcel's Preferred Remedy Would Be Inconsistent With Commission Treatment Of Similar Filings

First, the Commission's error here was not simply failing to suspend the rate filing. As the Commission explained, and as Xcel acknowledged (*see* Xcel 2012 Rehearing Request at 7, JA 219), the Commission's "error was in allowing [Southwest Pool's] filing to take effect in the [2012 Order] on April 1, 2012 without a voluntary refund commitment from Tri-County." 2014 Order P 25, JA 534; *see also* 2013 Order P 13, JA 287 (the 2012 Order "erred in allowing [Southwest Pool's] rate proposal for Tri-County's [transmission rate] to go into effect April 1, 2012, without a commitment from Tri-County to refund the difference between the as-filed rate and the rate ultimately found to be just and reasonable"). Neither Xcel nor Occidental cites any precedent where the Commission, acting upon the filing of a regional transmission organization to incorporate the rate of a non-jurisdictional member, has suspended the filing,

subject to refund provided by the regional transmission organization, as Xcel seeks here.

In fact, suspension of the filing, subject to refund, would be inconsistent with how the Commission has treated similar filings. As the Commission explained, "Xcel's suggested approach would have been inconsistent with the Commission's policy regarding filings to implement formula rates of non-jurisdictional entities." 2014 Order P 28, JA 535 (citing 2013 Order P 15, JA 288; *Midwest Indep. Sys. Operator, Inc.*, 135 FERC ¶ 61,131, P 72 (2011) (denying Xcel's request to suspend the rates filed by a regional transmission operator on behalf of a non-jurisdictional utility)); *see also* 2013 Order P 13, JA 288 (observing that without a refund commitment, Commission policy makes the filing effective after the conclusion of a hearing) (citing *Lively Grove Energy Partners, LLC*, 140 FERC ¶ 61,252, P 47 & n.59 (2012)). In fact, the Commission has rejected several requests to suspend, subject to refund, filings of regional transmission organizations (such as Southwest Pool) to reflect in their tariff the rates of non-jurisdictional utilities (such as Tri-County). *See, e.g., N.Y. Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,240, P 31 (2012) (rejecting requests to suspend the filing subject to refund because the New York Power Authority is not subject to Commission-imposed rate suspension and refund obligations); *see also Sw. Power Pool, Inc.*, 151 FERC ¶ 61,211, PP 41, 44 (2015) (declining to suspend filing to

incorporate non-jurisdictional rate into Southwest Pool tariff, but noting voluntary commitment to provide refunds).

C. Xcel's Preferred Remedy Would Be Inconsistent With Commission Refund Policy

Holding Southwest Pool responsible for refund liability for a non-jurisdictional utility member not only would be inconsistent with how the Commission has treated similar cases, but would violate the Commission's refund policy more broadly. The Commission does not favor refunds where there would be an under-recovery, as there could be in this case. *See Towns of Concord v. FERC*, 955 F.2d 67, 75-76 (D.C. Cir. 1992) (affirming FERC's exercise of discretion not to require refunds despite violation of the filed rate; noting that "the general rule is that agencies should order restitution only when 'money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it'") (quoting *Atl. Coast Line R.R. v. Florida*, 295 U.S. 301, 309 (1935)). Here, Xcel seeks to hold Southwest Pool, a non-profit regional entity, liable for payment of refunds associated with Tri-County's rates. *See* Br. at 42. As Xcel explains, Southwest Pool could only obtain funds to pay out a refund by charging market participants to cover them. *Id*.

As the Commission suggested, such an approach could be inequitable. In its 2014 Order, the Commission observed that "as a practical matter, Xcel does not suggest the means by which [Southwest Pool], a non-profit entity, would provide

refunds." 2014 Order P 28 n.43, JA 535-36. Xcel's insistence that Southwest Pool pay the refunds could result in other transmission customers or transmission-owning members of the Southwest Pool paying for the refunds at issue. *See Black Oak Energy, LLC*, 725 F.3d 230, 242-244 (D.C. Cir. 2013) (acknowledging FERC policy of denying refunds where regional transmission organization, with no funds of its own to pay refunds, would have to acquire funds through surcharges); *see also Black Oak Energy, LLC*, 136 FERC ¶ 61,040, at P 28 (2011) (denying refunds where PJM, a regional transmission organization in the Mid-Atlantic, would suffer a loss of revenues and under-recovery of legitimate costs); *see also* Southwest Pool April 9, 2013 Motion For Leave To Answer And Answer, at 8, Docket No. ER12-959-001, R.165, JA 345 (explaining that Southwest Pool would need to collect from its members any amount it must refund). The Commission has declined to impose refunds under similar circumstances. *See, e.g.*, *Mid-Continent Area Power Pool*, 91 FERC ¶ 61,353 (2000) (declining to impose refund liability associated with non-jurisdictional utility on members of power pool or power pool itself), *reh'g denied*, 92 FERC ¶ 61,229 (2000).

D. Xcel's Preferred Remedy Would Be Inequitable

Although Xcel asserts that the Commission's error entitled it to a remedy that would "undo what is wrongfully done by virtue of its order" (Br. at 36, quoting *United Gas Improvement Co. v. Callery Prop., Inc.*, 382 U.S. 223, 229

(1965)), Xcel's preferred remedy would not achieve this result. Xcel conflates the remedy it seeks with one that would "put the parties in the position they would have been in had the error not been made." Br. at 44 (quoting *Tenn. Valley Mun. Gas Ass'n v. FPC*, 470 F.2d 446, 452 (D.C. Cir. 1972)). The Commission is unable to order refunds from Tri-County, a non-jurisdictional electric cooperative (*see supra* pp. 8, 19) – and it failed to extract a voluntary commitment from Tri-County to make refunds back to 2012 – so it cannot put the parties in the position they would have been in but for the error. *See, e.g., Transmission Agency of N. California*, 495 F.3d at 674 (Commission has no authority to order refunds from non-jurisdictional governmental entities). Xcel's remedy, imposing suspension and refund obligations on the Southwest Pool (and, therefore, its members), only benefits Xcel to the detriment of others.

Unlike other cases where the Commission can equitably reallocate an over- or under- recovery, the strict jurisdictional boundaries here prevent the Commission from achieving that result. *See* 2014 Order P 28, JA 535-36 (citing statutory constraints); *see also* 2013 Order P 14, JA 288 ("the structure of the [Federal Power Act] reflects Congress' intent to exempt non-public utilities, including governmental entities, from the Commission's refund authority") (citing cases). Unfortunately, unlike other cases, the Commission is unable to provide complete retroactive relief. *Cf. Exxon Co., USA*, 182 F.3d at 50 (remanding FERC

decision to deny refunds where some parties would receive a windfall at the expense of others); *cf. Pub. Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1490-92 (D.C. Cir. 1990) (requiring refunds where natural gas producers would otherwise keep some unlawful overcharges, but declining to hold pipelines accountable if the responsible producer defaults on its refund obligation).

Additionally, Xcel may succeed in its legal action against Tri-County in Texas state court. *See* Br. at ii-iii (discussing Texas action) and 43-44 (raising concern about the filed-rate doctrine barring Xcel's claims, but acknowledging contrary authority that may allow Xcel's recovery); *see also Bonneville Power Admin.*, 422 F.3d at 925-26 (Federal Power Act does not provide for FERC refund action against non-jurisdictional entity, but other remedies – such as a contract claim filed in court – may be available). An order from this Court directing the Commission to suspend Southwest Pool's filing, subject to Southwest Pool's members providing refunds, could eliminate Xcel's standing and injury to pursue claims against Tri-County or otherwise insulate Tri-County from liability.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

Max Minzner
General Counsel

Robert H. Solomon
Solicitor

/s/ Lisa B. Luftig
Lisa B. Luftig
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, D.C. 20426
Phone: (202) 502-6791
Fax: (202) 273-0901
Email: Lisa.Luftig@ferc.gov

September 30, 2015

Xcel Energy Services, Inc. v. FERC **Docket Nos. ER12-959-000 & -001**
D.C. Cir. No. 14-1282

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 8,404 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum.

/s/ Lisa B. Luftig
Lisa B. Luftig
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, D.C. 20426
Phone: (202) 502-6791
Fax: (202) 273-0901
Email: lisa.luftig@ferc.gov

September 30, 2015

ADDENDUM

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REGULATIONS:

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

wherever located, if such examination is required for the effective discharge of the State

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

[1] See References in Text note below.

LIMITATION ON AUTHORITY PROVIDED

Section 3 of Pub. L. 100–473 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

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

§ 824f. Ordering furnishing of adequate service

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

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

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

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

(b) Request for inventory and cost statements

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

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

§ 824h. References to State boards by Commission

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

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

(b) Cooperation with State commissions

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

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

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

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

shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Testimony by deposition

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(e) Deposition of witness in a foreign country

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(f) Deposition fees

Witnesses whose depositions are taken as authorized in this chapter, and the person or officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(June 10, 1920, ch. 285, pt. III, § 307, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 856; amended Pub. L. 91–452, title II, § 221, Oct. 15, 1970, 84 Stat. 929; Pub. L. 109–58, title XII, § 1284(b), Aug. 8, 2005, 119 Stat. 980.)

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ", electric utility, transmitting utility, or other entity" after "person" in two places and inserted ", or in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce" before period at end of first sentence.

1970—Subsec. (g). Pub. L. 91–452 struck out subsec. (g) which related to the immunity from prosecution of any individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–452 effective on 60th day following Oct. 15, 1970, and not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before 60th day following Oct. 15, 1970, see section 260 of Pub. L. 91–452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

§ 825g. Hearings; rules of procedure

(a) Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 10, 1920, ch. 285, pt. III, § 308, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

§ 825h. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 10, 1920, ch. 285, pt. III, § 309, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

COMMISSION REVIEW

Pub. L. 99–495, § 4(c), Oct. 16, 1986, 100 Stat. 1248, provided that: ''In order to ensure that the provisions of Part I of the Federal Power Act [16 U.S.C. 791a et seq.], as amended by this Act, are fully, fairly, and efficiently implemented, that other governmental agencies identified in such Part I are able to carry out their responsibilities, and that the increased workload of the Federal Energy Regulatory Commission and other agencies is facilitated, the Commission shall, consistent with the provisions of section 309 of the Federal Power Act [16 U.S.C. 825h], review all provisions of that Act [16 U.S.C. 791a et seq.] requiring an action within a 30-day period and, as the Commission deems appropriate, amend its regulations to interpret such period as meaning 'working days', rather than 'calendar days' unless calendar days is specified in such Act for such action.''

§ 825i. Appointment of officers and employees; compensation

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 10, 1920, ch. 285, pt. III, § 310, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amended Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States'' have been omitted as obsolete and superseded.

Such appointments are subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order No. 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed Pub. L. 89–554, Sept. 6, 1966, § 8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

§ 825j. Investigations relating to electric energy; reports to Congress

In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, § 311, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Public Printer under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Printing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without ad-

vertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 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 chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

(June 10, 1920, ch. 285, pt. III, § 314, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 109–58, title XII, § 1288, Aug. 8, 2005, 119 Stat. 982.)

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of Title 28 which states that ''the District of Columbia constitutes one judicial district''.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

§ 825n. Forfeiture for violations; recovery; applicability

(a) Forfeiture

Any licensee or public utility which willfully fails, within the time prescribed by the Commission, to comply with any order of the Commission, to file any report required under this chapter or any rule or regulation of the Commission thereunder, to submit any information or document required by the Commission in the course of an investigation conducted under this chapter, or to appear by an officer or agent at any hearing or investigation in response to a subpena issued under this chapter, shall forfeit to the United States an amount not exceeding $1,000 to be fixed by the Commission after notice and opportunity for hearing. The imposition or payment of any such forfeiture shall not bar or affect any penalty prescribed in this chapter but such forfeiture shall be in addition to any such penalty.

(b) Recovery

The forfeitures provided for in this chapter shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States, brought in the district where the person is an inhabitant or has his principal place of business, or if a licensee or public utility, in any district in which such licensee or public utility transacts business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this chapter. The costs and expenses of such prosecution shall be paid from the appropriations for the expenses of the courts of the United States.

(c) Applicability

This section shall not apply in the case of any provision of section 824j, 824k, 824*l*, or 824m of this title or any rule or order issued under any such provision.

(June 10, 1920, ch. 285, pt. III, § 315, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amend-

the issuance of the permit and to the exercise of the rights granted thereunder such conditions as the public interest may in its judgment require.

(b) In any case wherein the Secretary of Energy, the Secretary of State, and the Secretary of Defense cannot agree as to whether or not a permit should be issued, the Secretary of Energy shall submit to the President for approval or disapproval the application for a permit with the respective views of the Secretary of Energy, the Secretary of State and the Secretary of Defense.

SEC. 2. [Deleted.]

SEC. 3. The Secretary of Energy is authorized to issue such rules and regulations, and to prescribe such procedures, as it may from time to time deem necessary or desirable for the exercise of the authority delegated to it by this order.

SEC. 4. All Presidential Permits heretofore issued pursuant to Executive Order No. 8202 of July 13, 1939, and in force at the time of the issuance of this order, and all permits issued hereunder, shall remain in full force and effect until modified or revoked by the President or by the Secretary of Energy.

SEC. 5. Executive Order No. 8202 of July 13, 1939, is hereby revoked.

§ 717b–1. State and local safety considerations

(a) Promulgation of regulations

The Commission shall promulgate regulations on the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) pre-filing process within 60 days after August 8, 2005. An applicant shall comply with pre-filing process required under the National Environmental Policy Act of 1969 prior to filing an application with the Commission. The regulations shall require that the pre-filing process commence at least 6 months prior to the filing of an application for authorization to construct an LNG terminal and encourage applicants to cooperate with State and local officials.

(b) State consultation

The Governor of a State in which an LNG terminal is proposed to be located shall designate the appropriate State agency for the purposes of consulting with the Commission regarding an application under section 717b of this title. The Commission shall consult with such State agency regarding State and local safety considerations prior to issuing an order pursuant to section 717b of this title. For the purposes of this section, State and local safety considerations include—

(1) the kind and use of the facility;

(2) the existing and projected population and demographic characteristics of the location;

(3) the existing and proposed land use near the location;

(4) the natural and physical aspects of the location;

(5) the emergency response capabilities near the facility location; and

(6) the need to encourage remote siting.

(c) Advisory report

The State agency may furnish an advisory report on State and local safety considerations to the Commission with respect to an application no later than 30 days after the application was filed with the Commission. Before issuing an order authorizing an applicant to site, construct, expand, or operate an LNG terminal, the Commission shall review and respond specifically to the issues raised by the State agency described in subsection (b) of this section in the advisory report. This subsection shall apply to any application filed after August 8, 2005. A State agency has 30 days after August 8, 2005 to file an advisory report related to any applications pending at the Commission as of August 8, 2005.

(d) Inspections

The State commission of the State in which an LNG terminal is located may, after the terminal is operational, conduct safety inspections in conformance with Federal regulations and guidelines with respect to the LNG terminal upon written notice to the Commission. The State commission may notify the Commission of any alleged safety violations. The Commission shall transmit information regarding such allegations to the appropriate Federal agency, which shall take appropriate action and notify the State commission.

(e) Emergency Response Plan

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

(2) A cost-sharing plan developed under paragraph (1) shall include a description of any direct cost reimbursements that the applicant agrees to provide to any State and local agencies with responsibility for security and safety—

(A) at the LNG terminal; and

(B) in proximity to vessels that serve the facility.

(June 21, 1938, ch. 556, § 3A, as added Pub. L. 109–58, title III, § 311(d), Aug. 8, 2005, 119 Stat. 687.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (a), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas 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 declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas 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) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) 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 transportation 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) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty 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 thirty 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) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, 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 natural-gas company 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 the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision 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 natural-gas company, 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) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

(June 21, 1938, ch. 556, § 4, 52 Stat. 822; Pub. L. 87–454, May 21, 1962, 76 Stat. 72; Pub. L. 109–58, title III, § 312, Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsec. (f)(1), is Pub. L. 95–621, Nov. 9, 1978, 92 Stat. 3350, as amended, which is classified generally to chapter 60 (§ 3301 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of this title and Tables.

AMENDMENTS

2005—Subsec. (f). Pub. L. 109–58 added subsec. (f).

1962—Subsec. (e). Pub. L. 87–454 inserted ''or gas distributing company'' after ''State commission'', and struck out proviso which denied authority to the Commission to suspend the rate, charge, classification, or

service for the sale of natural gas for resale for industrial use only.

ADVANCE RECOVERY OF EXPENSES INCURRED BY NATURAL GAS COMPANIES FOR NATURAL GAS RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROJECTS

Pub. L. 102–104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, development and demonstration activities by Gas Research Institute for projects on use of natural gas in motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102–486, title IV, § 408(c), Oct. 24, 1992, 106 Stat. 2882.

§ 717c–1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, § 4A, as added Pub. L. 109–58, title III, § 315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

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 transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

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

(b) Inventory of property; statements of costs

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

(June 21, 1938, ch. 556, § 6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

service for the sale of natural gas for resale for industrial use only.

ADVANCE RECOVERY OF EXPENSES INCURRED BY NATURAL GAS COMPANIES FOR NATURAL GAS RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROJECTS

Pub. L. 102–104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, development and demonstration activities by Gas Research Institute for projects on use of natural gas in motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102–486, title IV, § 408(c), Oct. 24, 1992, 106 Stat. 2882.

§ 717c–1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, § 4A, as added Pub. L. 109–58, title III, § 315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided*, *however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

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 transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

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

(b) Inventory of property; statements of costs

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

(June 21, 1938, ch. 556, § 6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

§ 2.4 Suspension of rate schedules.

The Commission approved and adopted on May 29, 1945, the following conclusions as to its powers of suspension of rate schedules under section 205 of the act:

(a) The Commission cannot suspend a rate schedule after its effective date.

(b) The Commission can suspend any new schedule making any change in an existing filed rate schedule, including any rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, contained in the filed schedule.

(c) Included in such changes which may be suspended are:

(1) Increases.

(2) Reductions.

(3) Discriminatory changes.

(4) Cancellation or notice of termination.

(5) Changes in classification, service, rule, regulation or contract.

(d) Immaterial, unimportant or routine changes will not be suspended.

(e) During suspension, the prior existing rate schedule continues in effect and should not be changed during suspension.

(f) Changes under escalator clauses may be suspended as changes in existing filed schedules.

(g) Suspension of a rate schedule, within the ambit of the Commission's statutory authority is a matter within the discretion of the Commission.

(Natural Gas Act, 15 U.S.C. 717–717w (1976 & Supp. IV 1980); Federal Power Act, 16 U.S.C. 791a–828c (1976 & Supp. IV 1980); Dept. of Energy Organization Act, 42 U.S.C. 7101–7352 (Supp. IV 1980); E.O. 12009, 3 CFR part 142 (1978); 5 U.S.C. 553 (1976))

[Order 141, 12 FR 8471, Dec. 19, 1947. Redesignated by Order 147, 13 FR 8259, Dec. 23, 1948, and amended by Order 303, 48 FR 24361, June 1, 1983; Order 575, 60 FR 4852, Jan. 25, 1995]

§ 2.7 Recreational development at licensed projects.

The Commission will evaluate the recreational resources of all projects under Federal license or applications therefor and seek, within its authority, the ultimate development of these resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project. Reasonable expenditures by a licensee for public recreational development pursuant to an approved plan, including the purchase of land, will be included as part of the project cost. The Commission will not object to licensees and operators of recreational facilities within the boundaries of a project charging reasonable fees to users of such facilities in order to help defray the cost of constructing, operating, and maintaining such facilities. The Commission expects the licensee to assume the following responsibilities:

(a) To acquire in fee and include within the project boundary enough land to assure optimum development of the recreational resources afforded by the project. To the extent consistent with the other objectives of the license, such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other project lands specified in any approved recreational use plan for the project.

(b) To develop suitable public recreational facilities upon project lands and waters and to make provisions for adequate public access to such project facilities and waters and to include therein consideration of the needs of persons with disabilities in the design and construction of such project facilities and access.

(c) To encourage and cooperate with appropriate local, State, and Federal agencies and other interested entities in the determination of public recreation needs and to cooperate in the preparation of plans to meet these needs, including those for sport fishing and hunting.

(d) To encourage governmental agencies and private interests, such as operators of user-fee facilities, to assist in carrying out plans for recreation, including operation and adequate maintenance of recreational areas and facilities.

(e) To cooperate with local, State, and Federal Government agencies in planning, providing, operating, and maintaining facilities for recreational use of public lands administered by those agencies adjacent to the project area.

AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

SOURCE: Order 271, 28 FR 10573, Oct. 2, 1963, unless otherwise noted.

Subpart A—Application

§ 35.1 Application; obligation to file rate schedules, tariffs and certain service agreements.

(a) Every public utility shall file with the Commission and post, in conformity with the requirements of this part, full and complete rate schedules and tariffs and those service agreements not meeting the requirements of §35.1(g), clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy subject to the jurisdiction of this Commission, the classifications, practices, rules and regulations affecting such rates, charges, classifications, services, rules, regulations or practices, as required by section 205(c) of the Federal Power Act (49 Stat. 851; 16 U.S.C. 824d(c)). Where two or more public utilities are parties to the same rate schedule or tariff, each public utility transmitting or selling electric energy subject to the jurisdiction of this Commission shall post and file such rate schedule, or the rate schedule may be filed by one such public utility and all other parties having an obligation to file may post and file a certificate of concurrence on the form indicated in §131.52 of this chapter: *Provided, however,* In cases where two or more public utilities are required to file rate schedules or certificates of concurrence such public utilities may authorize a designated representative to file upon behalf of all parties if upon written request such parties have been granted Commission authorization therefor.

(b) A rate schedule, tariff, or service agreement applicable to a transmission or sale of electric energy, other than that which proposes to supersede, cancel or otherwise change the provisions of a rate schedule, tariff, or service agreement required to be on file with this Commission, shall be filed as an initial rate in accordance with §35.12.

(c) A rate schedule, tariff, or service agreement applicable to a transmission or sale of electric energy which proposes to supersede, cancel or otherwise

change any of the provisions of a rate schedule, tariff, or service agreement required to be on file with this Commission (such as providing for other or additional rates, charges, classifications or services, or rules, regulations, practices or contracts for a particular customer or customers) shall be filed as a change in rate in accordance with § 35.13, except cancellation or termination which shall be filed as a change in accordance with § 35.15.

(d)(1) The provisions of this paragraph (d) shall apply to rate schedules, tariffs or service agreements tendered for filing on or after August 1, 1976, which are applicable to the transmission or sale of firm power for resale to an all-requirements customer, whether tendered pursuant to § 35.12 as an initial rate schedule or tendered pursuant to § 35.13 as a change in an existing rate schedule whose term has expired or whose term is to be extended.

(2) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to give the party furnishing service the unrestricted right to file unilateral rate changes under section 205 of the Federal Power Act:

> Nothing contained herein shall be construed as affecting in any way the right of the party furnishing service under this rate schedule to unilaterally make application to the Federal Energy Regulatory Commission for a change in rates under section 205 of the Federal Power Act and pursuant to the Commission's Rules and Regulations promulgated thereunder.

(3) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to withhold from the party furnishing service the right to file any unilateral rate changes under section 205 of the Federal Power Act:

> The rates for service specified herein shall remain in effect for the term of _____ or until _____, and shall not be subject to change through application to the Federal Energy Regulatory Commission pursuant to the provisions of Section 205 of the Federal 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 greement 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

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, today the 30th day of September 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:

Stephen Matthew Spina — Email
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2541
Email: sspina@morganlewis.com

Matthew Joseph Binette — Email
Wright & Talisman, PC
1200 G Street, NW
Suite 600
Washington, DC 20005-1200
Email: binette@wrightlaw.com

Marvin T. Griff — Email
Husch Blackwell LLP
750 17th Street, NW
Suite 900
Washington, DC 20006
Email: marvin.griff@huschblackwell.com

Earle Hugh O'Donnell — Email
White & Case LLP
701 13th Street, NW
Washington, DC 20005
Email: eodonnell@whitecase.com

Jennifer Lynn Mersing — Email
White & Case LLP
701 13th Street, NW
Washington, DC 20005
Email: jmersing@whitecase.com

Andrew Todd Swers — Email
Wright & Talisman, PC
1200 G Street, NW
Suite 600
Washington, DC 20005-1200
Email: swers@wrightlaw.com

/s/ Lisa Luftig
Lisa Luftig
Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426
Tel: (202) 502-6791
Fax: (202) 273-0901

Date: September 30, 2015