ORAL ARGUMENT NOT YET SCHEDULED

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

Nos. 15-1057 and 15-1241 (consolidated)

TRANSMISSION AGENCY OF NORTHERN CALIFORNIA, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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June 14, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent submits:

A. Parties and Amici

The parties and intervenors appearing before this Court are identified in Petitioners' brief.

B. Rulings Under Review

1. *Transmission Agency of Northern California v. Pacific Gas & Electric Co.*, 148 FERC ¶ 61,150 (2014), FERC Dkt. EL14-44, (15-1057) R. 50, JA 1326 ("Complaint Order");

2. *Transmission Agency of Northern California v. Pacific Gas & Electric Co.*, 150 FERC ¶ 61,133 (2015), FERC Dkt. EL14-44, (15-1057) R. 62, JA 1431 ("Complaint Rehearing Order");

3. *Pacific Gas & Electric Co.*, 149 FERC ¶ 61,276 (2014), FERC Dkts. ER15-223, ER15-227, ER15-231, ER15-322, (15-1241) R. 58, JA 2245 ("Termination Order"); and

4. *Pacific Gas & Electric Co.*, 151 FERC ¶ 61,252 (2015), FERC Dkts. ER15-223, ER15-227, ER15-322, (15-1241) R. 73, JA 2328 ("Termination Rehearing Order").

C. Related Cases

A related case, *Turlock Irrigation District and Modesto Irrigation District v. FERC*, No. 16-71380 (petition for review filed May 6, 2016), is currently pending in the Ninth Circuit. In that case, Turlock Irrigation District and Modesto Irrigation District (the "Districts") challenge orders of the Federal Energy Regulatory Commission addressing the Districts' allegation that Pacific Gas &

Electric Co. (“PG&E”) breached certain interconnection agreements between those parties. The alleged breach relates to the termination of a transmission contract between PG&E and the California Department of Water Resources that is also at issue in this proceeding.

/s/ Susanna Y. Chu
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June 14, 2016

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(15-1241) R. ___	Record item number in Amended Certified Index to the Record filed in D.C. Cir. No. 15-1241 on September 22, 2015.
Commission or FERC	Respondent Federal Energy Regulatory Commission.
Complaint Order	Order Denying Complaint, *Transmission Agency of Northern California v. Pacific Gas & Electric Co.*, 148 FERC ¶ 61,150 (2014), (15-1057) R. 50, JA 1326.
Complaint Rehearing Order	Order Denying Rehearing, *Transmission Agency of Northern California v. Pacific Gas & Electric Co.*, 150 FERC ¶ 61,133 (2015), (15-1057) R. 62, JA 1431.
PG&E	Intervenor Pacific Gas & Electric Co.
Termination Order	Order on Notice of Termination, Proposed Replacement Agreements, and Related Filings, *Pacific Gas & Electric Co.*, 149 FERC ¶ 61,276 (2014), (15-1241) R. 58, JA 2245.
Termination Rehearing Order	Order Denying Rehearing, *Pacific Gas & Electric Co.*, 151 FERC ¶ 61,252 (2015), (15-1241) R. 73, JA 2328.
Transmission Agency	Petitioner Transmission Agency of Northern California.

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BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF ISSUES

Petitioner Transmission Agency of Northern California ("Transmission Agency") and Intervenor Pacific Gas & Electric Co. ("PG&E") are parties to an Operation Agreement governing the operation of the California-Oregon Intertie, a high-voltage transmission system that delivers electric power from the Pacific Northwest to California markets. The Operation Agreement contemplates the expiration of a separate transmission contract between PG&E and one of its customers, and provides that PG&E "shall not be required" to replace certain system protection measures established in the transmission contract upon that contract's termination in December 2014.

The issues presented for review are:

1. Whether the petitions should be dismissed for lack of standing and/or lack of a ripe controversy, where Transmission Agency fails to demonstrate that it has suffered a concrete and particularized injury as a result of the challenged orders, and the petitions do not present a concrete legal dispute ripe for judicial review at this time; and

2. Assuming jurisdiction, whether the Federal Energy Regulatory Commission reasonably rejected Transmission Agency's request to order PG&E to replace the benefits of the system protection measures set forth in the expired transmission contract, or compensate Transmission Agency for potential adverse impacts that may result from discontinuance of the measures.

STATUTORY PROVISIONS

Pertinent statutes are contained in the Addendum to this brief.

COUNTER-STATEMENT OF JURISDICTION

Transmission Agency seeks review of orders issued by the Federal Energy Regulatory Commission ("FERC" or the "Commission") in two related proceedings.[1] Case no. 15-1057 concerns Commission orders denying

[1] Petitioners Modesto Irrigation District, City of Redding, California, and City of Santa Clara, California are members of Transmission Agency and also members of petitioner M-S-R Public Power Agency. For ease of reference, this brief refers to all petitioners as "Transmission Agency."

Transmission Agency's complaint against PG&E for alleged anticipatory breach of the Operation Agreement. *Transmission Agency of Northern California v. Pacific Gas & Electric Co.*, 148 FERC ¶ 61,150 (2014), (15-1057) R. 50, JA 1326 ("Complaint Order"), *on rehearing*, 150 FERC ¶ 61,133 (2015), (15-1057) R. 62, JA 1431 ("Complaint Rehearing Order").

Case no. 15-1241 concerns Commission orders that (1) accept PG&E's notice of termination of a transmission contract between PG&E and one of its customers, Intervenor California Department of Water Resources ("State Water"), and (2) approve replacement interconnection agreements between PG&E and State Water. *Pacific Gas & Electric Co.*, 149 FERC ¶ 61,276 (2014), (15-1241) R. 58, JA 2245 ("Termination Order"), *on rehearing*, 151 FERC ¶ 61,252 (2015), (15-1241) R. 73, JA 2328 ("Termination Rehearing Order"). Transmission Agency intervened in the agency proceeding and protested PG&E's filings.

As discussed in Argument section I.A, Transmission Agency has not established standing to challenge the orders presented for review. In particular, Transmission Agency fails to demonstrate that it has suffered a concrete and particularized injury sufficient to satisfy constitutional standing requirements.

In the alternative, as discussed in Argument section I.B, the petitions should be dismissed as unripe. The factual circumstances underlying the petitions do not

present a concrete legal dispute susceptible to judicial review, and Transmission Agency will suffer no hardship if review is withheld at this time.

INTRODUCTION

The three transmission lines that comprise the California-Oregon Intertie run roughly parallel to each other, extending from substations in Oregon to substations in California. Transmission Agency is the majority owner of the California-Oregon Transmission Project, the westernmost line. PG&E, a California public utility, owns the largest portion of the Pacific AC Intertie, the two easterly lines.[2] Pursuant to the Operation Agreement and various predecessor agreements, Transmission Agency, PG&E, and other parties with ownership interests have operated the California-Oregon Intertie on a coordinated basis for over twenty years.

Under a transmission contract originally executed in 1983, PG&E provided interconnection and firm transmission service over its transmission system to State Water (the "State Water contract"). Of relevance here, the State Water contract also provided that, during certain system contingencies, PG&E may interrupt power flows to and from State Water. These system protection measures—a "remedial action scheme" in industry parlance—supported PG&E's provision of

[2] A map depicting the California-Oregon Transmission Project and Pacific AC Intertie lines appears at JA 88.

firm transmission service to State Water and also provided benefits to the California-Oregon Intertie as a whole. The State Water contract was set to expire by its own terms in December 2014.

In advance of the expiration of the State Water contract, Transmission Agency filed a complaint with the Commission alleging anticipatory breach by PG&E of the Operation Agreement. According to Transmission Agency, in the absence of action by PG&E, the discontinuance of the State Water remedial action scheme would adversely affect the California-Oregon Intertie's ability to transfer electric power in certain conditions.

The Commission denied Transmission Agency's complaint. Analyzing relevant provisions of the Operation Agreement, the Commission determined that PG&E was not required to replace the remedial action scheme contained in the State Water contract—whether by obtaining new remedial action rights, building new transmission facilities, or otherwise—at its sole expense. Complaint Order PP 62-67, JA 1349-50; Complaint Rehearing Order PP 20-27, JA 1438-42. In addition, the Commission recommended that the parties should discuss potential impacts of the discontinuance of the State Water remedial action, and work collaboratively, if necessary, to address any adverse impacts on the California-Oregon Intertie. Complaint Order PP 69-70, JA 1351; Complaint Rehearing Order P 58, JA 1452.

In the agency proceedings giving rise to the Termination Order and Termination Rehearing Order, the Commission accepted (1) PG&E's notice of termination of the State Water contract in accordance with its December 2014 expiration date, and (2) new interconnection agreements between PG&E and State Water that do not contain the remedial action scheme previously contained in the expired State Water contract. Termination Order PP 67, 69, JA 2268, 2269; Termination Rehearing Order P 7, JA 2331.

Transmission Agency's petitions challenge the Commission's orders with respect to the legal effect of the Operation Agreement, in particular, the Commission's interpretation of certain provisions of the Operation Agreement. Transmission Agency also challenges the Commission's acceptance of the termination of the State Water contract and approval of replacement interconnection agreements between PG&E and State Water. However, the interpretation of substantive provisions in the contracts between PG&E and State Water is not at issue in these appeals.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

This Court has addressed the California-Oregon Intertie and aspects of the Operation Agreement in *Transmission Agency of Northern California v. FERC*, 628 F.3d 538 (D.C. Cir. 2010). This Court has also considered issues relating to

the expiration of long-term firm transmission contracts (such as the State Water contract at issue here) against the backdrop of California energy market restructuring and the move to open-access transmission. *See Sacramento Mun. Util. Dist. v. FERC*, 474 F.3d 797 (D.C. Cir. 2007), and *Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294 (D.C. Cir. 2005).

A. The State Water Remedial Action Scheme

In 1983, PG&E and State Water entered into an agreement that provided for, among other things, interconnection of all State Water plants and facilities in PG&E's service territory and firm physical transmission service over PG&E's transmission system.[3] Complaint Order P 13, JA 1330; Complaint Rehearing Order P 3, JA 1432. Relevant portions of the State Water contract appear at Joint Appendix pages 151-302.

In 1991, to support State Water's significant transmission needs, PG&E and State Water agreed to implement a remedial action scheme under which PG&E could interrupt the operation of State Water's pumps and generation facilities during certain system contingencies. Specifically, in the event of unplanned simultaneous or near simultaneous outages of the Pacific AC Intertie lines, or

[3] "Firm service permits customers to demand transmission at any time, while non-firm service permits the utility to cut service when there is not enough excess capacity." *Sacramento Mun. Util. Dist.*, 474 F.3d at 798 (citation and internal quotations omitted).

unplanned outages at a PG&E nuclear power plant, PG&E could automatically cut off power flows to and from State Water pumps and generation facilities. Complaint Order P 14, JA 1330-31; Complaint Rehearing Order P 3, JA 1432-33. *See also* Complaint of the Transmission Agency of Northern California PP 20-25, (15-1057) R. 1, JA 35-38; Answer of PG&E to Complaint of Transmission Agency, June 17, 2014, at 10-11, (15-1057) R. 33, JA 970-71. The remedial action scheme is set forth in Amendment 4 to the State Water contract, JA 222-32.

B. The Operation Agreement and the Contemplated Expiration of the State Water Remedial Action Program

Since the completion of the California-Oregon Transmission Project line in the early 1990s, its operations have been coordinated with that of the Pacific AC Intertie lines by contractual arrangement. The Operation Agreement, which appears at Joint Appendix pages 90-149, "provides for shared use, coordinated operation, maintenance, and planning of the California-Oregon Intertie." *Transmission Agency*, 628 F.3d at 548. By coordinating operations, the parties to the Operation Agreement maintain reliability and maximize the system's transfer capability—i.e., the amount of electric power capable of being transferred over the system—to a greater extent than if the three lines were operated independently. Complaint Order P 11, JA 1330.[4]

[4] The California-Oregon Intertie's *rated* system transfer capability or "path rating"—i.e., the maximum amount of electric power capable of being

In 1996, FERC directed public utilities to "unbundle" their electricity generation and transmission services and to file new "open access" tariffs guaranteeing non-discriminatory access to their transmission facilities by competing generators. *Sacramento Mun. Util. Dist.*, 428 F.3d at 295-96. At the same time, California "restructure[ed] California's energy markets." *Id.* at 296. The State created the California Independent System Operator, an independent, non-profit entity that took over operational control of many transmission facilities, including the portions of the Pacific AC Intertie owned by PG&E. *Sacramento Mun. Util. Dist.*, 474 F.3d at 798-99; Complaint Order P 6 n.15, JA 1328-29. The PG&E-owned portions of the Pacific AC Intertie are now part of the grid controlled by the California System Operator.

Under a FERC-approved tariff, the California System Operator does not offer long-term firm transmission service, but instead requires customers to request transmission capacity in "real time," i.e., on either an hour-ahead or day-ahead basis. *Sacramento Mun. Util. Dist.*, 474 F.3d at 799. To manage the transition to a new, open-access transmission regime, the Commission permitted existing

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transferred—is up to 4,800 megawatts north-to-south, and up to 3,675 megawatts south-to-north. Complaint Order P 10, JA 1329-30; Operation Agreement § 10.1, JA 127. Because day-to-day operating conditions may adversely affect the system's physical capability to transmit power, *available* system transfer capability is monitored on a real-time basis and may differ from the system's rated capability. *See* Operation Agreement §§ 8.1.6.1, 11.1.1, JA 116, 128.

transmission contracts—such as the State Water contract—to continue until their expiration. *See id.* Accordingly, for the duration of the State Water contract, the California System Operator was required to honor State Water's firm transmission rights by setting aside a portion of the transmission system capacity under its control to satisfy State Water's needs. *See* Complaint Order PP 43-44, JA 1341-42. Since the State Water contract has expired, the California System Operator is no longer required to set aside State Water's share of transmission capacity. *See id*.

In 2004, the California-Oregon Intertie owners amended the then-existing Operation Agreement to address, among other things, the anticipated expiration of the State Water contract in 2014. *See* Complaint PP 14-15, JA 34. In particular, the parties added section 8.6.3, Duties and Rights Retained by the Parties. That provision states:

> Each Party shall operate, maintain and replace its Remedial Action Facilities, and shall provide and maintain such control and communication access to its switchable equipment and facilities, as is necessary to maintain the capability to support [rated system transfer capability] and [available system transfer capability] of its [remedial action schemes] existing as of the Effective Date, ***provided that PG&E shall not be required to replace any Remedial Action or element thereof provided under [the State Water contract], upon cancellation or termination of that agreement.*** The capital and operating costs and responsibility for Remedial Actions of additional [remedial action schemes] agreed upon by the Parties after the Effective Date shall be shared by the Parties pro rata in relation to [rated system transfer capability shares] unless otherwise agreed in writing.

Operation Agreement § 8.6.3, JA 123-24 (emphasis added).

II. PROCEDURAL BACKGROUND

A. The Complaint Proceeding (15-1057)

On April 30, 2014, Transmission Agency filed a complaint with the Commission against PG&E pursuant to sections 206 and 306 of the Federal Power Act, 16 U.S.C. §§ 824e and 825e. According to Transmission Agency, "PG&E has committed an anticipatory breach of its obligations under the [Operation Agreement] by electing to allow [the State Water remedial action scheme] to expire without timely upgrading its transmission system or implementing other measures to avoid transmission overloads during certain seasons and hydropower conditions." Complaint P 33, JA 41-42. Transmission Agency asserted that, in the absence of action by PG&E, the loss of the State Water remedial action scheme would adversely affect available system transfer capability on the California-Oregon Intertie, to the detriment of Transmission Agency and its members. *Id.*; *see also id.* PP 114-15, JA 78-79.

In particular, Transmission Agency alleged that PG&E's failure to act constituted anticipatory breach of two provisions of the Operation Agreement (1) section 8.7.2.2 of the Operation Agreement, JA 126, which requires parties to "[a]void imposing undue burdens on the interconnected Electric Systems of other Parties," and (2) section 12.1, JA 131, which requires parties, when making system

"modifications," to "avoid adverse impacts" that would, as relevant here, "reduce [rated system transfer capability]" or "materially reduce [available system transfer capability]." Complaint PP 89-115, JA 67-79. Transmission Agency further asserted that section 8.6.3's provision that "PG&E shall not be required to replace" the State Water remedial action scheme upon expiration of the State Water contract did not override the obligations set forth in sections 8.7.2.2 and 12.1. Complaint PP 64-77, 116-17, JA 55-62, 79.

Accordingly, Transmission Agency requested, among other things, that the Commission order PG&E to take certain steps to address the potential loss of transfer capability (such as accelerating the completion of planned transmission upgrades or obtaining additional remedial action rights), or to provide monetary compensation to Transmission Agency "for the period [a]vailable [s]ystem [t]ransfer [c]apability is reduced." *Id.* § X (Conclusion), JA 84-86.

The Commission denied Transmission Agency's complaint, finding that Transmission Agency "has not met its burden of establishing that PG&E has breached the Operation Agreement." Complaint Rehearing Order P 61, JA 1453. Interpreting the exclusion set forth in section 8.6.3 of the Operation Agreement under standard principles of contract interpretation, the Commission determined that PG&E is not obligated to replace the State Water remedial action with other remedial action, or to substitute other measures for the expired remedial action

program. Complaint Order PP 60-67, JA 1348-50; Complaint Rehearing Order PP 20-24, JA 1438-40. The Commission also found that section 12.1 of the Operation Agreement was not applicable because the loss of the State Water remedial action program did not constitute a "modification" as defined by the Operation Agreement. Complaint Order P 67, JA 1350; Complaint Rehearing Order P 39, JA 1446.

As the Commission explained, it is reasonable to assume that the California-Oregon Intertie parties understood that the State Water contract—an existing transmission contract that pre-dated open-access transmission and organized wholesale energy markets—would not be extended or amended upon its expiration. Complaint Rehearing Order P 25, JA 1440-41. Transmission Agency, a signatory to the 2004 revision of the Operation Agreement that added section 8.6.3, "knew that the [State Water contract] would terminate, and with this knowledge . . . specifically excused PG&E from the sole responsibility of mitigating the effect of the loss of [State Water]'s participation in remedial action." *Id.* P 35, JA 1445.

Finally, the Commission observed that termination of the State Water remedial action scheme would not adversely affect grid reliability, and noted that no party disputed this conclusion. Complaint Order P 68, JA 1350-51. The Commission acknowledged, however, Transmission Agency's "concerns regarding a potential reduction in [transfer] capability" as a result of the loss of the State

Water remedial action program. *Id.* P 69, JA 1351. Noting that the parties had previously attempted to resolve their differences prior to the filing of Transmission Agency's complaint, the Commission "strongly encourage[d] the [o]wners to continue to discuss all of the possible resolutions to the termination" of the State Water contract, and offered the assistance of the Commission's Dispute Resolution Division. *Id.* P 70, JA 1351.

B. The State Water Contract Termination Proceeding (15-1241)

In advance of the State Water contract's December 2014 termination, PG&E filed a notice of termination of the State Water contract with the Commission, along with replacement agreements to provide for the continued interconnection of State Water's pumping loads and generation facilities to PG&E's transmission system. Transmission Agency protested both aspects of the filing, arguing again that discontinuance of the State Water remedial action would adversely affect the California-Oregon Intertie's transfer capability. *See* Termination Order PP 27-34, JA 2254-57.

The Commission accepted PG&E's notice of termination of the State Water contract and approved the new interconnection agreements as just and reasonable. In so doing, the Commission held that Transmission Agency's arguments constituted an impermissible collateral attack on its decisions in the complaint proceeding. *Id.* PP 62-66, JA 2266-68. The Commission explained that it was

appropriate for the State Water contract—an existing transmission contract intended to expire pursuant to its express terms in the transition to competitive electricity markets—to terminate. *Id.* PP 67-68, JA 2268-69. The Commission also approved as just and reasonable the new interconnection agreements between State Water and PG&E. *Id.* P 69, JA 2269. Moreover, the Commission found that Transmission Agency failed to demonstrate irreparable harm as a result of the discontinuance of the State Water remedial action: "[Transmission Agency]'s allegations of harm were, and remain, speculative." Termination Rehearing Order P 42, JA 2345.

SUMMARY OF ARGUMENT

As explained in Argument section I.A below, the petitions in these consolidated appeals should be dismissed for lack of jurisdiction because Transmission Agency's opening brief fails to demonstrate that it has suffered any actual or imminent harm as a result of the challenged orders. Transmission Agency has not shown that transfer capability on the California-Oregon Intertie actually has been or necessarily will be reduced, or that system reliability will be impaired, as a result of the Commission's orders. Nor has Transmission Agency established that it has incurred any particular costs, or unavoidably will incur such costs, or that it will need to take any particular action, as a result of the Commission's orders.

In the alternative, as discussed in Argument section I.B, dismissal of both petitions is appropriate because they present highly abstract issues that are not ripe for judicial review. Moreover, Transmission Agency will suffer no hardship as a result of withholding review. The orders on review encouraged the parties to discuss potential impacts from the expiration of the State Water contract, and to work toward a mutually agreeable resolution. In the event another party seeks to impose particular costs on Transmission Agency in connection with the State Water remedial action discontinuance, or in the event some other concrete, actual or imminent harm materializes, Transmission Agency may seek relief from FERC and/or this Court, as appropriate.

Should the Court reach the merits, Argument section II sets forth the relevant standard of review. Next, Argument section III explains that the Commission reasonably interpreted the Operation Agreement and found that Transmission Agency is not entitled to the relief requested. The parties anticipated the expiration of the State Water contract, and amended the Operation Agreement to excuse PG&E from sole responsibility for mitigating any impacts that might arise from discontinuance of the State Water remedial action. The orders presented for review reflect the Commission's application of its technical expertise and informed judgment to claims arising from complex, FERC-jurisdictional contracts and contractual relationships in the context of FERC-regulated markets, and should

be upheld.

Finally, as explained in Argument section IV, in the termination proceeding, the Commission reasonably determined that it was appropriate for the State Water contract to expire pursuant to its express terms. The Commission also reasonably approved new interconnection agreements between PG&E and State Water. In so doing, the Commission appropriately applied its interpretation of the Operation Agreement, which excuses PG&E from sole responsibility for mitigating any impacts that might arise from discontinuance of the State Water remedial action.

ARGUMENT

I. THE PETITIONS SHOULD BE DISMISSED FOR LACK OF STANDING AND/OR LACK OF A RIPE CONTROVERSY

A. Transmission Agency Fails to Demonstrate That It Has Suffered a Concrete Injury Sufficient to Support Standing in 15-1057 and 15-1241

The "irreducible constitutional minimum" for standing requires petitioner to show that it has suffered (1) an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that likely "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted); *see also, e.g.*, *New England Power Generators Ass'n v. FERC*, 707 F.3d 364, 368-70 (D.C. Cir. 2013) (applying *Lujan* standard and

dismissing petition because "asserted injuries are overly speculative"). "The petitioner bears the burden of averring facts in its opening brief establishing the[] elements" of standing. *Texas v. EPA*, 726 F.3d 180, 198 (D.C. Cir. 2013); *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 174 (D.C. Cir. 2012) (same).

Transmission Agency's opening brief fails to establish a concrete injury sufficient to satisfy constitutional standing requirements. Transmission Agency asserts that the Commission orders on appeal "permit PG&E to shift the costs associated with maintaining the capability of PG&E's portion of the California-Oregon Intertie to other transmission owners, including Petitioners." Br. 28; *see also id.* at 5 ("PG&E's actions will add millions of dollars annually to Petitioners' costs of serving their customers").

Transmission Agency fails to show, however, that either it or any of its members has actually incurred, or will unavoidably incur, any costs or obligations as a result of the agency orders on review. This is insufficient for purposes of Article III standing. *See, e.g., Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 670 (D.C. Cir. 2007) (dismissing for lack of standing Transmission Agency petition challenging FERC order requiring another party to pay refunds, where Transmission Agency had not been ordered to pay refunds, and its "alleged injury is speculative at best"; finding, by contrast, that party ordered to pay refunds had standing because "it was ordered to make payments out of its

treasury, the injury was caused by FERC's orders, and this Court can redress [the] injury if FERC's order is contrary to law"); *PNGTS Shippers' Grp. v. FERC*, 592 F.3d 132, 136-37 (D.C. Cir. 2010) (petitioners not aggrieved where there is no evidence that they have suffered, or will unavoidably suffer, an economic injury as a result of FERC's order).

Transmission Agency's theory of harm rests on several premises. First, PG&E allegedly failed to take adequate steps to replace the benefits of the now-discontinued State Water remedial action. *See* Complaint P 33, JA 41-42. As a result, Transmission Agency projected that, under certain conditions involving high northern California hydropower levels during spring and summer months, available transfer capability on the California-Oregon Intertie may decline. *See id.* PP 45-47, JA 46-48. Next, as a result of such alleged reductions of transfer capability, Transmission Agency and/or its members may be required to obtain replacement generation or transmission capacity at significant cost. *See id.* PP 48-51, JA 48-50, PP 114-15, JA 78-79. Such a theory "stacks speculation upon hypothetical upon speculation," and fails to "establish an 'actual or imminent' injury." *New York Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011); *see also Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1025-28 (D.C. Cir. 2012) (dismissing petition claiming that FERC's authorization of transmission project would increase rates for petitioners' subsidiaries, where petitioners'

claimed injury was based on a "parade of horribles . . . far too speculative to represent a concrete injury"); *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1202 (D.C. Cir. 1995) (rejecting party's attempt to establish standing based on a conceivable yet "hypothetical" scenario involving future business relations).

Since the expiration of the State Water contract 16 months ago in December 2014, the California-Oregon Intertie has continued in operation, including during peak summer months. However, there has been no claim or showing of actual material reductions in available transfer capability, and no showing of any resulting costs incurred by Transmission Agency or its members. This is consistent with the Commission's determinations, based on studies by the California System Operator, that termination of the State Water remedial action scheme (1) will not affect grid reliability, (2) will not reduce the 4,800 megawatt path rating of the California-Oregon Intertie, and (3) will have "*de minimis* economic impacts." Termination Rehearing Order P 19 & nn.32-33, JA 2335-36. *See also* Termination Order PP 53-58, JA 2263-65 (summarizing California System Operator studies); Answer of the California System Operator to Protests and Motions for Consolidation of Transmission Agency, Dec. 5, 2014, (15-1241) R. 52, Attachment 2 (Declaration of Dede Subakti) at P 10, JA 2231 (studies show

that "under some limited conditions that do not occur frequently there could be a reduction in the available system transfer capability").[5]

Indeed, shortly after the Commission's issuance of the Complaint Order, Transmission Agency, PG&E, the California System Operator and other parties entered into an agreement "(1) to evaluate the effect of the termination of the [State Water contract] and the [State Water remedial action] on the California-Oregon Intertie after 2014; (2) to enable the parties to identify and evaluate potential measures they should take in response; and (3) to assist the parties in developing and/or negotiating potential alternative arrangements." Termination Order P 59, JA 2265. *See also* Complaint Order P 70, JA 1351 (offering the assistance of FERC's Dispute Resolution Division). The Commission is not privy to the substance of any confidential communications between the relevant parties, but understands that the parties routinely engage in discussions regarding operations and transfer capability on the California-Oregon Intertie. Thus, it is possible that, at some point in the future, such discussions will produce events that cause actual or imminent harm to Transmission Agency.

[5] The California System Operator serves as "path operator" for the California-Oregon Intertie and, in that capacity, is responsible for determining available system transfer capability. *See* California System Operator Answer at 3, JA 2179; Operation Agreement §§ 8.1.2.1 and 8.1.6.1, JA 115, 116.

At present, however, Transmission Agency's claimed injuries are speculative at best. *See PNGTS Shippers' Grp.*, 592 F.3d at 137 ("The potential for future economic injury, even assuming it is readily quantifiable into a possible rate increase in the future, is not enough to show the requisite injury for Article III standing.") (internal quotations and citation omitted). Moreover, although the Commission has interpreted the Operation Agreement to mean that PG&E is not required to bear the full cost of any future measures taken by the parties to replace the effect of the State Water remedial action scheme, "neither a FERC decision's legal reasoning nor the precedential effect of such reasoning confers standing unless the substance of the decision itself gives rise to an injury in fact." *New England Power Generators Ass'n*, 707 F.3d at 369 (citing *Wisconsin Pub. Power Inc. v. FERC*, 493 F.3d 239, 268 (D.C. Cir. 2007)); *see also Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998) ("[M]ere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation.").

The cases cited by Transmission Agency in support of its alleged standing are unhelpful. *See* Br. 28-29 (citing *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1315-16 (D.C. Cir. 1995), and *Telephone & Data Sys. v. FCC*, 19 F.3d 42, 46 (D.C. Cir. 1994)). Both cases involve agency determinations that resulted in actual, immediate economic harm to petitioners. In *Committee for*

Effective Cellular Rules, 53 F.3d at 1315-16, the Court found that petitioners demonstrated an "actual economic injury" for standing purposes where an FCC rulemaking eliminated their ability to compete to provide cellular service in certain areas. In *Telephone and Data Systems*, 19 F.3d at 46, the Court determined that petitioner had standing to challenge an FCC determination that abrogated petitioner's contractual right to purchase an interest in a cellular network. By contrast, Transmission Agency does not demonstrate that it has suffered an actual or imminent injury as a result of the Commission orders presented for review.

B. In the Alternative, the Petitions Should Be Dismissed as Unripe

Related to the standing issue, but representing an alternative ground for dismissal, the petitions should be dismissed for lack of a ripe controversy. A claim is unripe "when it rests 'upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *New York State Elec. & Gas Corp. v. FERC*, 177 F.3d 1037, 1040 (D.C. Cir. 1999) (citing *Texas v. United States*, 523 U.S. 296, 300-301 (1998)). "To evaluate ripeness, a court must . . . consider 'both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *New York State Elec. & Gas Corp.*, 177 F.3d at 1040 (citing *Texas*, 523 U.S. at 300-301). *See also Northern Indiana Pub. Serv. Co. v. FERC*, 954 F.2d 736, 738 (D.C. Cir. 1992) ("Settled principles of ripeness require that [a court] postpone review of administrative decisions where (1) delay

would permit better review of the issues while (2) causing no significant hardship to the parties.").

Under the first prong of the ripeness inquiry, the petitions should be dismissed because Transmission Agency's challenges to the agency orders at issue are highly abstract and not fit for judicial review at this time. The Commission orders on review do not impose any costs on Transmission Agency; nor do they require Transmission Agency to take any particular action or deprive Transmission Agency of any concrete right. At bottom, Transmission Agency challenges the Commission's decision declining to order PG&E to take certain actions upon the planned expiration of the State Water contract. These factual circumstances do not rise to the level of a concrete legal dispute ripe for judicial review.

Indeed, as noted above, California-Oregon Intertie parties, including Transmission Agency, PG&E, and the California System Operator, appear to routinely engage in discussions relating to the transfer capability of the system. In the event that the parties determine that specific steps need to be taken to address potential or actual reductions in transfer capability on the California-Oregon Intertie, and in the event that PG&E or other parties seek to impose particular costs on Transmission Agency, Transmission Agency may challenge any proposed cost sharing agreement submitted for FERC's approval, or file a complaint, as appropriate. *See, e.g.*, *Mississippi Valley Gas Co. v. FERC*, 68 F.3d 503, 509

(D.C. Cir. 1995) (finding issues not fit for review where "the future impact of the FERC orders is uncertain at present, and will likely be more clear once [pipeline]'s actual rates for the period in question have been finalized," and where "[t]he possible benefit to both FERC and this court counsels in favor of a delay in review of the FERC orders").

Under the second prong of the ripeness inquiry, dismissal is also appropriate because Transmission Agency will suffer no hardship as a result of the Court withholding consideration at this time. *See Tenneco Gas v. FERC,* 969 F.2d 1187, 1211 (D.C. Cir. 1992) (dismissing as unripe petitioners' challenge to provision in rulemaking permitting FERC to assess civil penalties for violations of certain rules, where FERC had not imposed such penalties on any party; petitioners would suffer no hardship as a result of withholding review because, "if FERC ever assesses a penalty, the pipelines will at that time enjoy a full opportunity to challenge FERC's authority"). *See also Mississippi Valley Gas Co.*, 68 F.3d at 509 (petitioner failed to meet hardship prong of ripeness inquiry where the orders at issue "do not currently impact" petitioner and petitioner "will be able to obtain relief from [the orders] in its eventual challenge to [pipeline]'s final rates, should it decide to bring one").

As in *Tenneco Gas* and *Mississippi Valley Gas*, the petitions should be dismissed for lack of ripeness because the orders do not currently adversely affect

Transmission Agency, and Transmission Agency will suffer no hardship as a result of withholding review at this time. In the event that Transmission Agency incurs actual costs or suffers actual, definitive harm relating to the discontinuance of the State Water remedial action, Transmission Agency will be able to seek review and judicial redress, as appropriate.

II. STANDARD OF REVIEW

This Court reviews Commission actions under the Administrative Procedure Act's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow," and the Court "may not substitute [its] own judgment for that of the Commission." *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Commission decisions will be upheld so long as the Commission "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation omitted). The Commission's factual findings are conclusive, if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b); *see also, e.g., Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 407 (D.C. Cir. 2000) (citations omitted) (same).

The Court accords deference to the Commission's contract interpretations

where the agency's interpretation is "influenced by [its] expertise in the technical language of that field and by its greater knowledge of industry conditions and practices." *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1568-71 (D.C. Cir. 1987). *See also Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1198 (D.C. Cir. 2000) (upholding Commission's interpretation of settlement agreement under a deferential standard "[b]ecause Congress explicitly delegated to FERC broad powers over ratemaking, including the power to analyze relevant contracts, and because the Commission has greater technical expertise in this field than does the Court") (citation omitted); *Kansas Cities v. FERC*, 723 F.2d 82, 87 (D.C. Cir. 1983) (whether a contract interpretation raises "an issue of law" or "an issue of fact," the Court "accord[s] great weight to the judgment of the expert agency that deals with agreements of this sort on a daily basis").

III. ASSUMING JURISDICTION, THE COMMISSION REASONABLY INTERPRETED THE OPERATION AGREEMENT AND FOUND THAT TRANSMISSION AGENCY IS NOT ENTITLED TO THE RELIEF REQUESTED

Applying its expertise and judgment, FERC interpreted relevant provisions of the Operation Agreement and reasonably concluded that Transmission Agency was not entitled to the relief requested. The parties, sophisticated entities and industry participants, understood that the State Water contract would expire by its own terms in December 2014, and expressly added section 8.6.3 to the Operation Agreement governing the coordinated operation of the California-Oregon Intertie.

Section 8.6.3 reflects the parties' intent to excuse PG&E from taking any specific action to replace the benefits of the State Water remedial action upon expiration of the State Water contract. Sections 8.7.2.2 and 12.1 do not compel a different conclusion. The Commission's orders in the complaint proceeding (15-1057) and the termination proceeding (15-1241) represent a manifestly reasonable exercise of the agency's authority and expertise, and should be upheld.

A. The Commission Reasonably Interpreted Section 8.6.3

Consistent with this Court's and the Commission's own precedents, the Commission found that the State Water contract was an "existing transmission contract"—a firm transmission service contract pre-dating the advent of competitive electricity markets and open-access transmission—that was intended to expire pursuant to its own terms. *See* Termination Rehearing Order P 41, JA 2344-45; Complaint Rehearing Order P 25, JA 1440-41 (citing Commission orders and *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002)). *See also Sacramento Mun. Util. Dist.*, 428 F.3d at 297 (in approving California System Operator tariff, "the Commission . . . declined to abrogate existing [transmission] contracts and ordered customers to take service under the California [System Operator] tariff upon contract expiration"). The Commission also found that the parties, sophisticated entities and industry participants who have operated the

California-Oregon Intertie and interconnected electrical systems for decades, understood that the State Water contract would terminate at the end of 2014 and "would not be extended or amended." Complaint Rehearing Order P 25, JA 1440-41.

With this understanding, "[t]he parties placed no obligation on PG&E to replace [State Water]'s participation upon termination of the [State Water contract] remedial action . . . . " *Id.* P 21, JA 1439; *see also id.* P 25, JA 1440-41. Rather, the parties agreed in 2004 to add section 8.6.3 to the Operation Agreement. *Id.* P 35, JA 1445. Section 8.6.3 appears in section 8.6, which sets forth certain "rights and duties related to the operation of the [California-Oregon Intertie]." Operation Agreement § 8.6, JA 123. In particular, section 8.6.3 states that each party is responsible for maintaining its own remedial action facilities:[6]

> as is necessary to maintain the capability to support [rated system transfer capability] and [available system transfer capability] of its [remedial action schemes] existing as of the Effective Date, ***provided that PG&E shall not be required to replace any Remedial Action or element thereof provided under its [contract] with [State Water], upon cancellation or termination of that agreement***. The capital and operating costs and responsibility for Remedial Actions of additional [remedial action schemes] agreed upon by the Parties after the Effective Date shall be shared by the Parties pro rata in relation to [rated system transfer capability shares] unless otherwise agreed in writing.

[6] "The equipment and facilities installed to enable the implementation of [remedial action schemes]." Operation Agreement § 4.47, JA 106.

Id. § 8.6.3, JA 123-24 (emphasis added).

The Commission found that section 8.6.3 reflects the parties' recognition of the anticipated expiration of the State Water contract, and their intention to excuse PG&E "from the sole responsibility of mitigating the effect of the loss of [State Water]'s participation in remedial action." *See* Complaint Rehearing Order P 35, JA 1445; *id.* P 25, JA 1440-41. The Commission explained that "replace" means to "substitute or use one thing instead of another." Complaint Order P 64, JA 1350. Accordingly, the Commission concluded that the "use of the word 'replace' and the dependent phrase 'any Remedial Action or element thereof'" excuses PG&E from replacing the discontinued State Water remedial action with other remedial action or any other substitute. *Id.*

Transmission Agency claims that while section 8.6.3 may not obligate PG&E to replace State Water remedial action with more remedial action, it does obligate PG&E to replace it with something. *See, e.g.*, Br. 24-25. The Commission reasonably held otherwise. While the exclusion of State Water remedial action from the general obligations in section 8.6.3 is an exception, it is "not a narrow one." Complaint Rehearing Order P 25, JA 1440-41. Replace, as explained above, means substitute. *Id*. PP 23-24, JA 1439-40. And substitute does not just mean new remedial action for State Water remedial action; it means any other mitigation for the loss of State Water remedial action. *See id*.

Thus, as the Commission explained, if the parties agree to replace the State Water remedial action with other remedial action, the cost would be shared on a pro rata basis in light of the final sentence of section 8.6.3. Complaint Order P 66, JA 1350; Complaint Rehearing Order PP 44-45, JA 1448. However, the Operation Agreement also spells out the consequences if the parties choose not to replace the State Water remedial action with another substitute: "If the loss of the [State Water] participation in remedial action is determined to cause a reduction in available system transfer capability, and if the Owners do not agree to pursue any alternative measures, then section 11.2.1 of the Operation Agreement dictates that the available system transfer capability be allocated on a pro rata basis." Complaint Rehearing Order P 45, JA 1448.

The Commission "endeavored to give meaning to all words and clauses of the contract," Complaint Rehearing Order P 24, JA 1440, but reasonably focused on section 8.6.3 as the provision specifically addressing PG&E's obligations upon termination of the State Water contract. The Commission's interpretation of section 8.6.3—informed as it was by the agency's expert knowledge concerning the transition to competitive electricity markets and open-access transmission—was reasonable and should be accorded deference. *See, e.g.*, *National Fuel Gas Supply Corp.*, 811 F.2d at 1570-71; *Lomak Petroleum*, 206 F.3d at 1198.

B. The Remainder of the Operation Agreement, Including Sections 8.7.2.2 and 12.1, Does Not Support Transmission Agency's Position

Even assuming that Transmission Agency is correct in arguing that section 8.6.3 should be read more narrowly—i.e., to only excuse PG&E from replacing the discontinued State Water remedial action scheme with more remedial action (*see* Br. 33-40)—the Operation Agreement provides no basis for granting the petitions. This is because Transmission Agency fails to identify specific provisions in the Operation Agreement that affirmatively obligate PG&E to mitigate any and all impacts that may result from the State Water remedial action discontinuance.

Transmission Agency points to section 8.7.2.2's general prohibition on imposing "undue burdens" on other parties' electric systems, and section 12.1's requirement that parties making system "modifications" avoid "adverse impacts that would reduce [rated system transfer capability]" or "materially reduce [available system transfer capability]." *See* Operation Agreement §§ 8.7.2.2, JA 126 ("undue burden provision"), 12.1, JA 131 ("modifications" provision). The Commission reasonably concluded that neither of these provisions supports Transmission Agency's broad proposition that PG&E is affirmatively obligated to replace the discontinued State Water remedial action with other measures designed to achieve the same effect.

The Commission found that Transmission Agency "has not met its burden of establishing that PG&E has breached the Operation Agreement." Complaint Rehearing Order P 61, JA 1453. Of relevance here, the Commission found that discontinuance of the State Water remedial action would have no impact on the California-Oregon Intertie's path rating, or rated system transfer capability, of 4,800 megawatts north-to-south. Termination Rehearing Order P 19 & nn.32-33, JA 2335-36. Transmission Agency does not contest this factual finding.[7]

Rather, Transmission Agency relies on projections of potential reductions in available system transfer capability on the California-Oregon Intertie in certain seasons and under certain northern California hydropower conditions, in light of the unavailability of the State Water remedial action. *See* Br. 19; *see also* Exhibit TNC-2 (Larsen affidavit) P 39, JA 687-88 (examining potential impacts during the spring and summer seasons at 70, 80, and 90 percent hydropower levels).

Addressing such claims, the Commission credited California System Operator studies that "the path rating [i.e., rated system transfer capability] is

[7] The Commission also found that discontinuance of the State Water remedial action would have no adverse reliability impacts. Complaint Order P 68, JA 1350-51; Complaint Rehearing Order P 55-57, JA 1451-52; *see also* Termination Rehearing Order P 19, n.33, JA 2335-36. Transmission Agency does not dispute the Commission's findings regarding reliability. *See* Complaint Order P 68, JA 1350-51 (noting that "[n]o party disputes" California System Operator conclusion regarding absence of reliability impacts); Termination Order P 65 n.95, JA 2267 (same).

distinct from the [available] transfer capability, which . . . may be reduced in some circumstances following the removal of PG&E's remedial action schemes." Termination Rehearing Order P 19, n.32, JA 2335-36 (citing California System Operator Answer at 25 & Attachment 2 (Subakti Decl.) at P 10, JA 2231).[8] The Commission noted in particular that any economic impacts resulting from the discontinuation of the State Water remedial action would be "*de minimis*." Termination Rehearing Order P 19, JA 2335-36. *See also* Termination Order PP 54-58, JA 2264-65 (summarizing California System Operator studies).

As the California System Operator explained, at worst, termination of the State Water remedial action may result in a reduction in available system transfer capability "under some limited conditions that do not occur frequently." California System Operator Answer, Attachment 2 (Subakti Decl.) at P 10, JA 2231. Moreover, based on an examination of the 2000-2013 period, the California System Operator observed that the 70 percent or greater northern California

[8] The Operation Agreement recognizes that available transfer capability varies depending on system conditions and provides that the California System Operator, the path operator, will determine available system transfer capability "on a pre-schedule and real-time basis" and allocate available capacity among the parties in accordance with the Operation Agreement. *See* Operation Agreement §§ 8.1.6.1, 11.1.1, JA 116, 128.

hydropower conditions analyzed by Transmission Agency occurred infrequently. Termination Order P 56, JA 2264.[9]

In these circumstances, the Operation Agreement provisions cited by Transmission Agency are unavailing. *See* Complaint Rehearing Order P 27, JA 1442 ("neither . . . provision[] takes precedence over the exclusion in [section 8.6.3]"). Transmission Agency failed to establish that PG&E imposed an "undue burden" on other parties' electrical systems in violation of section 8.7.2.2 through its actions (or inaction) in connection with the State Water remedial action discontinuance. Likewise, the modifications provision does not help Transmission Agency. Even assuming that discontinuance of the State Water remedial action scheme constitutes a "modification" under section 12.1, Transmission Agency failed to establish that such discontinuance will result in "adverse impacts that would reduce [rated system transfer capability]" or "materially reduce [available system transfer capability]." *See* Complaint Rehearing Order P 61, JA 1453 (Transmission Agency failed to establish that PG&E breached the Operation

[9] Paragraph 56 states: "90 percent or greater hydropower conditions occurred in approximately one-half of one percent of the hours over the 14-year period, 80 percent or greater hydropower conditions occurred in approximately three percent of the hours during that same period, and 70 percent or greater hydropower production present[ed] in approximately 8 percent of the hours during that period."

Agreement); Termination Rehearing Order P 42, JA 2345 ("[Transmission Agency]'s allegations of harm were, and remain, speculative.").

Moreover, the Commission reasonably found that section 12.1 is inapplicable because discontinuance of the State Water contract remedial action scheme does not constitute a "modification." As the Commission explained, "the definition of '[m]odification' under the Operation Agreement is restricted in scope to physical changes to facilities." Complaint Rehearing Order P 39, JA 1446.[10] And "even assuming . . . that PG&E's loss of [State Water] remedial action will result in physical changes in facilities, the Operation Agreement's definition of [m]odifications addresses direct physical modifications initiated by parties and not to secondary effects as enumerated by [Transmission Agency]." *Id.*

As the Commission explained, a "remedial action scheme is a contingency operating *procedure* . . . [that] allow[s] for the tripping of generators and pumps off-line during system disturbances, but these procedures are not a physical component of discrete generators." Termination Rehearing Order P 27 & n.48, JA 2339 (emphasis added). And as the Commission noted, the Operation Agreement

[10] Section 4.27 of the Operation Agreement defines "[m]odification" as "[t]he connection of generating facilities, loads, substation equipment or transmission lines to, or modifications of, any portion of the System or a Party's Electric System, which may include improvements, additions, extensions, expansions, replacements, substitutions or removals." Operation Agreement § 4.27, JA 102.

defines remedial action as "[t]he *procedures* that are required to maintain reliable operation of the System after a disturbance on the interconnected Electric Systems." Operation Agreement § 4.49, JA 107 (emphasis added).

Moreover, contrary to Transmission Agency's suggestion, Br. 14-15, 47-50, the new interconnection agreements between PG&E and State Water approved in the termination proceeding do not constitute a system "modification." The new interconnection agreements reflect a changed contractual relationship between PG&E and State Water, but do not reflect any physical system changes, especially because State Water facilities have been interconnected to PG&E's transmission system "for decades." *See* Termination Order P 72, JA 2270; *see also* Termination Rehearing Order P 35, JA 2342 (the replacement agreements "continue the existing interconnection arrangements for [State Water]'s generators that had been provided for under the expired [State Water contract]").

Transmission Agency's argument on brief that it identified two "physical changes" resulting from discontinuance of the State Water remedial action lacks merit. *See* Br. 51-54. First, Transmission Agency erroneously contends that its evidence regarding projected impacts to available system transfer capability constitutes a "physical impact" that is "not disputed." *Id.* at 51. *See, e.g.*, Termination Rehearing Order P 42, JA 2345 (Transmission Agency's alleged harm is "speculative"); *see also id.* P 19 & nn.32-33, JA 2335-36 (discussing California

System Operator studies). In any event, the Commission reasonably found that a decline in available transfer capability at best constitutes a "secondary effect" and not a "direct physical modification" for purposes of section 12.1. *See* Complaint Rehearing Order PP 37, 39, JA 1446.

Second, contrary to Transmission Agency's argument, Br. 52-54, the Commission reasonably found that the "reprogramming" of remedial action controllers by PG&E likewise constitutes a "secondary effect" and not a "physical" system modification. Complaint Rehearing Order PP 37, 39, JA 1446. "Reprogramming" is not one of the actions listed in the Operation Agreement's definition of modification. *See* Operation Agreement § 4.27, JA 102. And Transmission Agency's argument that reprogramming computer software and network equipment constitutes a "physical" change in other contexts, Br. 53-54, is irrelevant to whether, in the factual circumstances of this case, reprogramming remedial action controllers constitutes a "modification" within the meaning of the Operation Agreement. In this regard, the considered judgment of FERC—the "expert agency that deals with agreements of this sort on a daily basis"—must be accorded deference. *See Kansas Cities,* 723 F.2d at 87; *see also Electric Power Supply Ass'n,* 136 S. Ct. at 784 (deferring to Commission's decision setting methodology for payments in regional electricity markets where the "disputed question . . . involves both technical understanding and policy judgment").

Finally, contrary to Transmission Agency's contention that FERC's interpretation created a "conflict" in violation of principles of contract construction, Br. 40-43, the Commission reasonably read the Operation Agreement as a whole, "endeavor[ing] to give meaning to all words and clauses of the contract." Complaint Rehearing Order P 24, JA 1440. As in *Transmission Agency*, 628 F.3d at 548, the Commission did not "erroneously presume[] a conflict" between two provisions of the Operation Agreement, but rather, "simply read one section in light of the other."

To the extent there is a conflict between section 8.6.3 and sections 8.7.2.2 and 12.1, however, section 8.6.3's specific language exempting PG&E from replacing the State Water remedial action scheme takes precedence over the general language regarding avoiding "undue burdens" in section 8.7.2.2 and "adverse impacts" from system "modifications" in section 12.1. *See* Complaint Order P 65 & n.99, JA 1350 (citing *National Ins. Underwriters v. Carter*, 551 P.2d 362, 365-66 (Cal. 1976)). *See also Southwest Elec. Coop, Inc. v. FERC*, 347 F.3d 975, 982 (D.C. Cir. 2003) ("[W]here specific contract provisions are irreconcilably in conflict with more general ones, the specific provisions control.").

IV. ASSUMING JURISDICTION, FERC REASONABLY ACCEPTED THE EXPIRATION OF THE STATE WATER CONTRACT AND REASONABLY APPROVED NEW INTERCONNECTION AGREEMENTS BETWEEN PG&E AND STATE WATER

The petition in 15-1241 should be denied because the Commission acted well within its authority in (1) determining that it was appropriate to allow the State Water contract to expire, and (2) approving as just and reasonable the new interconnection agreements between PG&E and State Water. *See* Termination Order PP 67, 69, JA 2268, 2269.[11]

The Commission reasonably determined that it was appropriate to allow the State Water contract to expire according to its terms. Termination Order P 67, JA 2344-45. As the Commission found, the State Water contract was a transmission contract designed to expire in the transition to competitive electricity markets. *Id.*; Termination Rehearing Order P 41, JA 2344-45. Transmission Agency's challenge in the termination proceeding thus merely amounted to an impermissible collateral attack on the Commission's determinations in the complaint proceeding. Termination Order PP 62-66, JA 2266-68; *see also* Termination Rehearing Order P 36, JA 2342 (noting that Transmission Agency's protest in the termination

[11] "Because termination of transmission service constitutes a rate change requiring FERC approval under section 205(d) of the Federal Power Act, 16 U.S.C. § 824d(d), a transmission service provider must file with FERC before terminating service, even if service is provided under a contract ending on its own terms." *Sacramento Mun. Util. Dist.*, 474 F.3d at 800.

proceeding "largely repackaged . . . arguments that the Commission rejected in the [c]omplaint [p]roceeding").

With respect to the approval of new interconnection agreements, Transmission Agency concedes that the Operation Agreement does not require PG&E to renew or obtain additional remedial action rights from State Water upon expiration of the State Water contract. *See* Br. 31. Accordingly, Transmission Agency does not appear to challenge the Commission's approval of the new interconnection agreements on the grounds that the new agreements fail to include certain remedial action rights.

Rather, Transmission Agency suggests that the Commission should have conditioned approval of the new interconnection agreements between PG&E and State Water on PG&E's fulfillment of contractual obligations under the Operation Agreement. Specifically, Transmission Agency argues on brief that PG&E should be required "to ensure that new impacts from new interconnection agreements are consistent with the requirements of section 8.7.2.2 [undue burden provision] and 12.1 [modifications provision] of the Operation Agreement." Br. 59.

As discussed in Argument section III.A and III.B above, the Commission reasonably concluded that section 8.6.3 excused PG&E from acting to mitigate the effect of discontinuance of the State Water remedial action, and moreover found that Transmission Agency failed to establish that discontinuance of the State Water

remedial action would cause PG&E to breach the Operation Agreement. Accordingly, the Commission reasonably approved the new interconnection agreements based on its finding that the terms were just and reasonable. *See, e.g.*, *Electric Power Supply Ass'n*, 136 S. Ct. at 784 (recognizing that courts play a "limited role" in reviewing FERC decisions in areas implicating the Commission's technical expertise, such as electricity rate design).

CONCLUSION

For the foregoing reasons, the petitions should be dismissed for lack of standing and/or ripeness. If the Court proceeds to the merits of the petitions, they should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's December 4, 2015 order because this brief contains 9,135 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

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June 14, 2016

ADDENDUM

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

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for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and de-

livering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

(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.

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§ 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.

underwriting of, or participate in the marketing of, securities of the public utility of which the person holds the position of officer or director;

(iii) the public utility for which the person serves or proposes to serve as an officer or director selects underwriters by competitive procedures; or

(iv) the issuance of securities of the public utility for which the person serves or proposes to serve as an officer or director has been approved by all Federal and State regulatory agencies having jurisdiction over the issuance.

(c) Statement of prior positions; definitions

(1) On or before April 30 of each year, any person, who, during the calendar year preceding the filing date under this subsection, was an officer or director of a public utility and who held, during such calendar year, the position of officer, director, partner, appointee, or representative of any other entity listed in paragraph (2) shall file with the Commission, in such form and manner as the Commission shall by rule prescribe, a written statement concerning such positions held by such person. Such statement shall be available to the public.

(2) The entities listed for purposes of paragraph (1) are as follows—

(A) any investment bank, bank holding company, foreign bank or subsidiary thereof doing business in the United States, insurance company, or any other organization primarily engaged in the business of providing financial services or credit, a mutual savings bank, or a savings and loan association;

(B) any company, firm, or organization which is authorized by law to underwrite or participate in the marketing of securities of a public utility;

(C) any company, firm, or organization which produces or supplies electrical equipment or coal, natural gas, oil, nuclear fuel, or other fuel, for the use of any public utility;

(D) any company, firm, or organization which during any one of the 3 calendar years immediately preceding the filing date was one of the 20 purchasers of electric energy which purchased (for purposes other than for resale) one of the 20 largest annual amounts of electric energy sold by such public utility (or by any public utility which is part of the same holding company system) during any one of such three calendar years;

(E) any entity referred to in subsection (b) of this section; and

(F) any company, firm, or organization which is controlled by any company, firm, or organization referred to in this paragraph.

On or before January 31 of each calendar year, each public utility shall publish a list, pursuant to rules prescribed by the Commission, of the purchasers to which subparagraph (D) applies, for purposes of any filing under paragraph (1) of such calendar year.

(3) For purposes of this subsection—

(A) The term ''public utility'' includes any company which is a part of a holding company system which includes a registered holding company, unless no company in such system is an electric utility.

(B) The terms ''holding company'', ''registered holding company'', and ''holding company system'' have the same meaning as when used in the Public Utility Holding Company Act of 1935.[1]

(June 10, 1920, ch. 285, pt. III, § 305, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 856; amended Pub. L. 95–617, title II, § 211(a), Nov. 9, 1978, 92 Stat. 3147; Pub. L. 106–102, title VII, § 737, Nov. 12, 1999, 113 Stat. 1479.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c)(3)(B), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classi-fied 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

1999—Subsec. (b). Pub. L. 106–102 inserted subsec. heading, designated existing provisions as par. (1), inserted heading, and substituted ''After 6'' for ''After six'', and added par. (2).

1978—Subsec. (c). Pub. L. 95–617 added subsec. (c).

EFFECTIVE DATE OF 1978 AMENDMENT

Pub. L. 95–617, title II, § 211(b), Nov. 9, 1978, 92 Stat. 3147, provided that: ''No person shall be required to file a statement under section 305(c)(1) of the Federal Power Act [subsec. (c)(1) of this section] before April 30 of the second calendar year which begins after the date of the enactment of this Act [Nov. 9, 1978] and no public utility shall be required to publish a list under section 305(c)(2) of such Act [subsec. (c)(2) of this section] before January 31 of such second calendar year.''

§ 825e. Complaints

Any person, electric utility, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee, transmitting utility, or public utility in contravention of the provisions of this chapter may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee, transmitting utility, or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee, transmitting utility, or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.

(June 10, 1920, ch. 285, pt. III, § 306, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 856; amended Pub. L. 109–58, title XII, § 1284(a), Aug. 8, 2005, 119 Stat. 980.)

AMENDMENTS

2005—Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and '', transmitting utility,'' after ''licensee'' wherever appearing.

[1] See References in Text note below.

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

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, on June 14, 2016, I served the foregoing brief on all parties to this proceeding who are registered users of the Court's CM/ECF system through that system. In addition, I served the following attorney via U.S. mail:

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