ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 15-1237 and 15-1275 (consolidated)

PORTLAND GENERAL ELECTRIC COMPANY
AND PÁTU WIND FARM, LLC,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: June 9, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties and intervenors appearing before the Federal Energy Regulatory Commission and this Court are listed in the Brief for Petitioner PáTu Wind Farm, LLC.

B. Rulings Under Review

1. *PáTu Wind Farm, LLC v. Portland General Electric Co.*, 150 FERC ¶ 61,032 (2015) (Complaint Order), R.15, JA 510; and

2. *PáTu Wind Farm, LLC v. Portland General Electric Co.*, 151 FERC ¶ 61,223 (2015) (Rehearing Order), R.26, JA 626.

C. Related Cases

This particular case has not been before this Court or any other Court, and counsel is not aware of any related cases pending before this Court. Petitioners to this action are parties to litigation in the United States District Court for the District of Oregon that concerns similar facts and issues to those of this proceeding, as described on page 17 of this brief. *PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, No. 15-cv-01373 (D. Or., filed July 22, 2015).

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander

FINAL BRIEF: June 9, 2016

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GLOSSARY

Avoided cost	The cost of energy that an electric utility would buy from another source, but for its purchase of energy from a qualifying facility
Bonneville	Bonneville Power Administration
CA	Courtesy Appendix
Commission or FERC	Federal Energy Regulatory Commission
Complaint Order	*PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, 150 FERC ¶ 61,032 (2015), R.15, JA 510
Dynamic scheduling	A telemetered reading or value that is treated as a real-time schedule for transferring energy from one area of the transmission grid to another
Intervenors	Intervenors Northwest and Intermountain Power Producers Coalition and Community Renewable Energy Association
JA	Joint Appendix
Oregon Commission	Public Utilities Commission of Oregon
P	Paragraph in a Commission order
PáTu	Petitioner PáTu Wind Farm, LLC
Portland General	Petitioner Portland General Electric Company
PURPA	Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617 (codified, in relevant respect, at 16 U.S.C. § 824a-3)

GLOSSARY

R.	An item in the certified index to the record
Rehearing Order	*PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, 151 FERC ¶ 61,223 (2015), R.24, JA 626
Second Complaint Order	*PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, 154 FERC ¶ 61,167 (2016), CA 83
Standard Contract	Standard Contract Off System Power Purchase Agreement for Intermittent Resources, as approved by the Oregon Commission for Portland General
Wasco	Wasco Electric Cooperative, Inc.

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BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF ISSUES

Petitioner PáTu Wind Farm, LLC (PáTu) sells electric energy to Petitioner Portland General Electric Company (Portland General) under the terms and conditions of a standard contract that complies with the Public Utility Regulatory Policies Act of 1978 (PURPA). Under PURPA, an electric utility such as Portland General must buy the entire net output of a qualifying facility, such as PáTu, that is made available to the utility.

During the time period relevant to this appeal, the petitioners disagreed on the scope of Portland General's purchase obligation, and on the method that PáTu should use to deliver its output to Portland General. Portland General read the standard contract to require that it purchase PáTu's energy in pre-scheduled, hourly blocks, measured in megawatts. PáTu contended that this reading undermined Portland General's purchase obligation under PURPA, and that Portland General must accept delivery of PáTu's energy using dynamic scheduling – a more precise way to schedule deliveries of power.

In the orders on review, the Commission agreed with PáTu that Portland General's use of hourly block scheduling undermined its statutory obligation to buy all of PáTu's output, and it directed Portland General to purchase all of the energy that PáTu generates. *PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, 150 FERC ¶ 61,032 (2015) (Complaint Order), R.15, JA 510, *reh'g denied*, *PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, 151 FERC ¶ 61,223 (2015) (Rehearing Order), R.24, JA 626. The Commission found that nothing requires the use of dynamic scheduling to facilitate delivery of PáTu's energy, declined to suggest how Portland General might comply with its orders, and did not provide an enforcement mechanism to ensure that Portland General does so.

On appeal, Portland General argues that the Commission's orders went too far, straying beyond FERC's jurisdiction and intruding on state authority. PáTu

contends that the orders did not go far enough, because they denied some of the relief PáTu sought.

The issues presented for review are:

1. Whether the Commission's limited determination of the parties' rights and responsibilities creates a justiciable controversy;

2. Assuming jurisdiction, whether the Commission properly found that Portland General must purchase all of the electricity that the qualifying facility generates (raised by Portland General in No. 15-1237); and

3. Assuming jurisdiction, whether the Commission reasonably held that no further action was needed to remedy alleged undue discrimination (raised by PáTu in No. 15-1275).

COUNTER-STATEMENT OF JURISDICTION

This Court lacks statutory authority to review the orders challenged in this consolidated appeal. The orders do not fix the rights of any party, impose consequences for non-compliance, or articulate new rules; rather, they are limited to stating FERC's interpretation of the PURPA statute and of FERC's implementing regulations. Neither PURPA nor the Federal Power Act provides authority for direct review of such non-binding declarations. *See Midland Power Coop. v. FERC*, 774 F.3d 1, 3-8 (D.C. Cir. 2014); *Xcel Energy Servs. Inc. v. FERC*, 407 F.3d 1242, 1244 (D.C. Cir. 2005); *Niagara Mohawk Power Corp. v. FERC*,

306 F.3d 1264, 1268 (D.C. Cir. 2002); *Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1234 (D.C. Cir. 1995).

STATUTES AND REGULATIONS

The pertinent statutes and regulations are reproduced in the Addendum.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. Federal Power Act

Section 201 of the Federal Power Act gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. 16 U.S.C. §§ 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure that they are just and reasonable, and not unduly discriminatory or preferential. 16 U.S.C. §§ 824d(a), (b), (e).

Section 206 of the Federal Power Act, 16 U.S.C. § 824e, authorizes the Commission, on its own initiative or on a third-party complaint, to investigate whether existing rates are lawful. In a complaint proceeding, the complainant bears "the burden of proof to show that any rate . . . is unjust, unreasonable, unduly

discriminatory, or preferential . . . ." *Id.* § 824e(b); *see also Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (stating complainant's burden of proof). If the Commission finds that the burden has been met, it must determine and set the new just and reasonable rate. 16 U.S.C. § 824e(a).

B. Public Utility Regulatory Policies Act Of 1978

PURPA was part of a package of legislation called the National Energy Act. *FERC v. Mississippi*, 456 U.S. 742, 745 (1982). PURPA was designed to combat a nationwide energy crisis by encouraging conservation of oil and natural gas, and promoting the development of alternative energy resources. Title II of PURPA – specifically Section 210, 16 U.S.C. § 824a-3 – encourages the development of cogeneration and small power production facilities. *Id.* at 750. *See also Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 404 (1983) (same).

In order to "counter traditional utilities' reluctance to deal with these nontraditional facilities, the PURPA charges the Commission with implementing mandatory purchase and sell obligations, requiring electric utilities to purchase electric power from, and sell power to, qualifying cogeneration and small power production facilities (collectively, 'qualifying facilities')." *S. Cal. Edison v. FERC*, 443 F.3d 94, 95 (D.C. Cir. 2006) (citing PURPA Section 210(a)(1)-(2), 16 U.S.C. § 824a-3(a)(1)-(2)). *See also Am. Elec. Paper Inst., Inc.*, 461 U.S. at 405 (same). In addition to requiring FERC to develop implementing regulations,

PURPA directed state regulatory authorities to adopt rules implementing PURPA that comply with FERC's regulations. PURPA Section 210(f)(1), 16 U.S.C. § 824a-3(f)(1).

The Commission promulgated regulations requiring a utility to buy "any energy and capacity which is made available from a qualifying facility," 18 C.F.R. § 292.303(a), and to sell "any energy and capacity requested by the qualifying facility." *Id.* § 292.303(b). "While the utility must sell electricity to a [qualifying facility] at regulated tariff rates, the utility must buy electricity from the [qualifying facility] at a rate equal to the utility's full 'avoided cost.'" *S. Cal. Edison*, 443 F.3d at 95 (citing *Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1040 (D.C. Cir. 2000)). "Avoided cost" is the cost of electric energy that the utility would generate or purchase from another source, but for its purchase from the qualifying facility. *Id.* at 96 (citing PURPA Section 210(d), 16 U.S.C. § 824a-3(d), and cases).

Under Section 210(h) of PURPA, 16 U.S.C. § 824a-3(h), FERC or a private party may enforce Commission rules implementing PURPA in federal district court, against a state regulatory commission or a nonregulated utility. *See Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1234 (D.C. Cir. 2005). If FERC does not initiate an enforcement action within 60 days of receiving a petition for enforcement, then the petitioning party may do so. *Id.* (citing PURPA Section 210(h)(2)(B), 16 U.S.C. § 824a-3(h)(2)(B)). There are two types of enforcement

petitions: implementation challenges, which involve claims that the state agency has not implemented a compliant plan under Section 210(f) of PURPA, 16 U.S.C. § 824a-3(f), and as-applied claims, which involve arguments that a state's plan is unlawful as it applies to or affects an individual petitioner. *Exelon Wind 1 v. Nelson*, 766 F.3d 380, 388 (5th Cir. 2014); *Power Res. Grp., Inc. v. Pub. Util. Comm'n of Tex.*, 422 F.3d 231, 235 (5th Cir. 2005). Federal district courts have exclusive jurisdiction over implementation claims only; jurisdiction over "as applied" claims is reserved to state courts. *Power Res. Grp., Inc.*, 422 F.3d at 235-36.

C. Oregon's Implementation Of PURPA

In order to comply with PURPA's mandate that states adopt implementing rules that comply with FERC's regulations, Oregon enacted state legislation "that closely parallels the federal statute" and administrative rules that, with some exceptions, "are substantively the same as the federal regulations." *Snow Mtn. Pine Co. v. Maudlin*, 734 P.2d 1366, 1367 (Or. App. 1987). Oregon law, like federal law, requires electric utilities to purchase all energy that a qualifying facility makes available. *Id.* at 1368 (citing 18 C.F.R. § 292.303(a); Or. Rev. Stat. § 758.525(2); citing and quoting Or. Admin. R. 860-29-030(1)).

The Oregon Commission then adopted terms and conditions for a qualifying facility standard contract, and each utility filed updated tariffs and standard

contract forms with the state commission for compliance review. *See PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, Administrative Law Judge Disposition at 4, Docket No. UM-1566 (Oregon Commission May 21, 2012) (Oregon Administrative Law Judge Disposition), CA 28. The Oregon Commission later approved two standard contracts for Portland General, and their incorporation into Schedule 201 of Portland General's tariff, finding that the agreements were consistent with PURPA and with Oregon's implementation thereof. *Id.* Only one of the two agreements, the Standard Contract Off System Power Purchase Agreement for Intermittent Resources (Standard Contract), which applies to qualifying facilities outside Portland General's service territory, is at issue here. *See* Complaint Order P 5, JA 511.

II. History Of Dispute

A. Relationship Between PáTu And Portland General

PáTu is a wind farm located in Sherman County, Oregon, with a generation capacity of 9 megawatts. PáTu is interconnected to Wasco Electric Cooperative, Inc. (Wasco), which in turn is interconnected to Bonneville Power Administration (Bonneville). Complaint Order P 4, JA 511. PáTu has self-certified its status as a qualifying facility under PURPA. Form 556 of Oregon Trail Wind Farm, LLC, Docket No. QF06-17 (Apr. 30, 2010), R.2, JA 1; *see also* 18 C.F.R. § 292.207 (self-certification and FERC certification procedures).

As a qualifying facility, PáTu is entitled to certain privileges under Section 210 of PURPA – principally, that it can compel traditional utilities to purchase its output. *See S. Cal. Edison*, 443 F.3d at 95. PáTu sells the power it generates to Portland General, a traditional utility that provides electric service within Oregon, under the terms and conditions of the Standard Contract. Complaint Order P 4, JA 511. Because the parties are not directly interconnected – Wasco and Bonneville are between them – PáTu transmits its power over Wasco's grid, and then over Bonneville's grid, in order to deliver it to Portland General at Portland General's Troutdale substation. *Id.*

PáTu explained that Portland General requires it to pre-schedule deliveries of energy in firm megawatt-hour blocks. *Id.* P 11, JA 514. Because wind farms generally do not produce energy in such increments, PáTu buys various ancillary services from Bonneville in order to levelize its output. *Id.* PP 11-12, JA 514-15. When PáTu produces less energy than scheduled, it buys additional power from Bonneville in order to make up the amount scheduled for delivery. *Id.* When PáTu produces more energy than scheduled, Portland General does not accept or pay for the excess; Bonneville simply absorbs it. *Id.* PáTu prefers to use dynamic scheduling so that it can deliver its entire output to Portland General in smaller, more precise increments, and without incurring the costs of ancillary services, but

Portland General says that it is not required to accept delivery by this method. *Id.* P 10, JA 513-14.

PáTu began commercial operation, and began sales of power to Portland General, in 2010. *Id.* P 5, JA 511. Litigation between the parties concerning their respective responsibilities began within a year, and has continued ever since – before the Oregon Commission (and later, the Oregon Court of Appeals); before FERC (and now, this Court); and before the United States District Court for the District of Oregon.

B. Litigation Before The Oregon Commission

In December 2011, PáTu filed a nine-count complaint before the Oregon Commission. As relevant here, PáTu alleged that Portland General refused to accept the output of PáTu's project via dynamic transfer, and thereby violated the express terms of the Standard Contract, the Oregon Commission's approved rate schedules, PURPA, and the implementing regulations and public policy of FERC and the Oregon Commission. Oregon Administrative Law Judge Disposition at 2, CA 26. PáTu also contended that the Standard Contract requires that Portland General pay a single price – avoided cost – for all energy that PáTu delivers. *PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, Order No. 14-287 at 4-6 (Oregon Commission Aug. 13, 2014), JA 320-22. PáTu asked the Oregon Commission to order Portland General to accept and pay full avoided cost rates for energy

deliveries via dynamic transfer from Bonneville. *PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, Order No. 12-316 at 6 (Oregon Commission Aug. 21, 2012), JA 303.

The Oregon Commission resolved this complaint in two sets of orders. With regard to PáTu's first five claims, an administrative law judge agreed with Portland General that dynamic transfers are a transmission function jurisdictional to FERC; held that PáTu's claims addressed whether the Oregon Commission could order Portland General to participate in a dynamic transfer of PáTu's output; and concluded that the Oregon Commission lacked jurisdiction over the transmission of this output to a utility. Oregon Administrative Law Judge Disposition at 7, CA 31. The Oregon Commission affirmed, noting that the case "turns on an understanding that the claims in dispute are not about *whether* [Portland General] is required to receive power from an off-system [qualifying facility's] energy, but rather about *how* [Portland General] is required to receive the power." Oregon Commission Order No. 12-316 at 8, JA 305. To that end, the Oregon Commission held that the Standard Contract provided no insight, because it "presumes transmission of energy from the [qualifying facility] to the utility, but does not address the details of that transmission." *Id*. Because the dispute was not contractual in nature, the Oregon Commission found that it lacked jurisdiction to resolve it. *Id.* at 8-9, JA 305-06.

In a separate order, the Oregon Commission denied the last four of PáTu's claims, which concern the price that Portland General must pay for energy that PáTu delivers. Oregon Commission Order No. 14-287 at 12-13, JA 328-29. As relevant here, the Oregon Commission held that under Section 4.1 of the Standard Contract, Portland General is required to purchase the entire net output delivered from PáTu's facility to Portland General. *Id.* at 14, JA 330. Portland General must pay the contract price for energy that PáTu produces at its qualifying facility, "consistent with PURPA's mandate that utilities purchase all [qualifying facility] *delivered* output." *Id.* at 13 (citing *Kootenai Elec. Coop. Inc.*, 143 FERC ¶ 61,232, at P 33 (2013)), JA 329. This means that if PáTu delivers energy that it purchased from Bonneville to make up its pre-scheduled delivery amount, Portland General must pay the avoided cost charge only for the amount of energy that PáTu generated itself. *Id.* at 13-14, JA 329-30. But if PáTu delivers less energy than it generates, Portland General is not required to pay for the portion PáTu does not deliver: "Under the plain terms of the [Standard] Contract, we find that [Portland General] is not obligated to purchase undelivered Net Output from PáTu." *Id.* at 14, JA 330.

The Oregon Commission later denied rehearing of this order, holding that "FERC is the proper authority to resolve transmission disputes between PáTu and"

Portland General. *PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, Order No. 14-425 at 3 (Oregon Commission Dec. 8, 2014), CA 69.

PáTu filed for review of Oregon Commission Order Nos. 14-287 and 14-425 before the Oregon Court of Appeals. The case remains pending before the Court of Appeals, which has scheduled oral argument for June 9, 2016. *See* Court of Appeals Calendar, http://www.ojd.state.or.us/coadocket (visited April 26, 2016).

C. FERC Proceeding Under Review

1. PáTu's Complaint And Portland General's Answer

On October 10, 2014 – after the Oregon Commission's first two orders – PáTu filed a complaint at FERC that alleged violations of PURPA and the Commission's implementing regulations. PáTu argued that Portland General was not fulfilling its obligations under PURPA to purchase all of the power PáTu generates, because it has not made dynamic scheduling – "the tool that would allow PáTu to deliver its entire net output" to Portland General on a kilowatt-hour basis – available. Complaint, R.3 at 7, 22-27, JA 21, 34-39. PáTu alleged that when it produces more energy than scheduled, Portland General does not pay for the portion of energy that exceeds the scheduled amount, and, because of the hourly scheduling protocol, that energy never reaches Portland General. *Id.* at 11-12, JA 25-26.

PáTu alleged that Bonneville offers dynamic scheduling transmission service that would allow for scheduling and delivery of PáTu's instantaneous output, and would also allow PáTu to avoid paying Bonneville for the ancillary services that support its deliveries to Portland General on a fixed megawatt-hour basis. *Id.* at 7-8, JA 21-22. But according to PáTu, Portland General refused to provided transmission services necessary to support deliveries of PáTu's power to Portland General via dynamic scheduling, or on a 15-minute schedule. *Id.* at 8, JA 22. PáTu alleged that this denial of service is commercially motivated, and occurred at the behest of Portland General's merchant sales division. *Id.* at 28-29, JA 42-43.

Portland General answered that PáTu's complaint was an effort to reform the Standard Contract. Complaint Order P 30, JA 523. It contended that its merchant function, not PáTu, is the transmission customer under Portland General's FERC-jurisdictional transmission tariff; that Portland General is not obligated to offer ancillary services ("including, presumably, dynamic scheduling") to an entity that is not a transmission customer; and therefore, it had not discriminated against PáTu in providing transmission service. Answer and Motion for Summary Disposition of Portland General Electric Company at 9-12, R.8, JA 420-23. Portland General explained that Section 4.4 of the Standard Contract describes PáTu's obligation to schedule a firm, hourly product, and that allowing dynamic scheduling of PáTu's

energy would transform firm energy into less valuable non-firm energy without any adjustment to the Standard Contract's avoided cost price. *Id.* at 13-14, JA 424-25.

2. The Commission's Orders

In the orders on review, FERC held that while the pleadings focus on dynamic scheduling, the issue presented is whether Portland General is fulfilling its obligations under PURPA and the Commission's regulations, as implemented by the Oregon Commission. Complaint Order P 50, JA 531; Rehearing Order P 47, JA 646. The Commission found that Portland General's merchant function must buy PáTu's entire net output at avoided cost rates, regardless of the transmission service that it later uses to deliver PáTu's energy to Portland General's load. Complaint Order P 54, JA 533; Rehearing Order P 44, JA 644-45. FERC also held that Portland General's hourly block scheduling requirement prevents PáTu from delivering its entire net output, and that this allows Portland General to escape its mandatory purchase obligation. Rehearing Order PP 46-48, JA 645-46.

Like the Oregon Commission, FERC found that the Standard Contract "does not govern or restrict the manner by which PáTu's output is transmitted and delivered to Portland General." Complaint Order P 55, JA 534. And although nothing precludes Portland General from paying PáTu for more precise amounts of

energy than megawatt-hours, Rehearing Order P 51, JA 649, FERC stopped short of requiring Portland General to implement dynamic scheduling. It concluded that because PURPA and the Standard Contract require Portland General to purchase all of the energy PáTu produces at avoided cost rates, FERC need not order the use of dynamic scheduling in order to provide PáTu relief. Rehearing Order P 56, JA 651-52. FERC ordered Portland General to accept PáTu's entire net output, as PURPA requires, and dismissed PáTu's remaining allegations. Complaint Order P 49, JA 530. The Commission left the issue of an appropriate remedy to the Oregon Commission or an appropriate court. *Id*. P 57, JA 534-35.

As for PáTu's allegation that Portland General's transmission function and merchant function employees had communicated, in violation of Commission regulations, about delivery of PáTu's energy to Portland General, the Commission held that it appeared there had been no violation. *Id*. P 56, JA 534; Rehearing Order PP 57-59, JA 652-53.

Portland General filed a petition for review (No. 15-1237) of the Complaint Order and the Rehearing Order on July 22, 2015, and PáTu filed a separate petition for review (No. 15-1275) on August 13, 2015. The Court consolidated the cases for purposes of briefing and decision.

D. Subsequent Events

1. District Court Proceeding

On the same day that Portland General petitioned this Court for review of FERC's orders, PáTu filed a complaint against Portland General in the United States District Court for the District of Oregon. The complaint seeks money damages, as well as declaratory and injunctive relief to enforce the Complaint Order and the Rehearing Order and to amend Portland General's block scheduling requirements. Complaint at PP 93-100, ECF No. 1, No. 15-cv-01373 (D. Or. July 22, 2015), CA 74-75. The district court proceeding has been held in abeyance pending resolution of this appeal of the FERC orders. *See* Order Granting Motion to Stay, ECF No. 13, No. 15-cv-01373 (D. Or. Sept. 23, 2015), CA 82; Joint Motion to Stay at 2, 4-5, ECF No. 11, No. 15-cv-01373 (D. Or. Sept. 18, 2015), CA 77, 79-80.

2. Second Complaint Before FERC

On November 17, 2015, PáTu filed a second complaint against Portland General before FERC, seeking enforcement of the Complaint Order and the Rehearing Order. *PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, 154 FERC ¶ 61,167 (2016) (Second Complaint Order), CA 83. PáTu again alleged that because only dynamic scheduling would enable it to deliver its entire net output to Portland General, and relieve it of the obligation to pay Bonneville for ancillary

services, Portland General was required to cooperate with PáTu and Bonneville to establish dynamic scheduling. *Id.* PP 9-11, CA 86-87. Portland General replied that it allows PáTu to schedule in any manner that it likes; that it is not willing to convert PáTu's off-system contract to an on-system contract; and the Commission lacks jurisdiction under PURPA to grant PáTu's requested relief. *Id.* PP 15, 19, 21, CA 88-90.

The Commission denied PáTu's requested relief, noting that it had never required the use of dynamic scheduling, but "directed Portland General to accept PáTu's entire net output by dynamic scheduling *or some other method.*" *Id.* P 36 (emphasis in original), CA 94-95; *see also id.* P 38 (PURPA mandatory purchase obligation "decidedly does not require" Portland General to accept dynamic transfer from PáTu), CA 95. FERC found that since the Rehearing Order, "Portland General now accepts 15-minute scheduling; provides additional payments for PáTu's unscheduled net output; and allows PáTu to schedule and deliver on a [kilowatt-hour] basis, as opposed to the whole [megawatt-hour] blocks it previously required. Given this, we find that Portland General's combined efforts of physical and financial arrangements comply" with the earlier orders' directives. *Id.* P 36, CA 94-95. PáTu did not seek rehearing of the Second Complaint Order.

SUMMARY OF ARGUMENT

The Court lacks jurisdiction to review the FERC issues challenged here. Although this case was presented to FERC as a Federal Power Act complaint, PáTu's allegations, Portland General's answer, and FERC's resolution all illuminate a problem under the Public Utility Regulatory Policies Act. Portland General must buy all of the energy that PáTu produces and delivers, but its scheduling practices – in particular, its requirement that PáTu schedule energy in advance, measured in fixed megawatt-hour blocks – prevent PáTu from delivering everything that it produces. Portland General claims that the Standard Contract requires this, but its selective reading of that agreement gives insufficient weight to the purchase obligation that is also reflected there.

FERC's orders conclude only that PURPA requires Portland General to buy all of PáTu's energy. Orders of this type, which do no more than indicate the position that FERC would take in a PURPA enforcement proceeding, are not directly reviewable. *See, e.g.*, *Midland*, 774 F.3d at 6-8; *Xcel*, 407 F.3d at 1244. Further, judicial review now, in this Court, would interfere with the PURPA enforcement mechanism. PáTu has sought enforcement of PURPA in federal district court, and the parties agree that reversal or affirmance of the orders challenged here may affect that proceeding. A ruling here may prematurely adjudicate the merits of the positions the parties advance in district court.

To any extent the Court finds that this case is reviewable, it should deny the petitions for review. Portland General contends that the Oregon Commission-administered Standard Contract compels PáTu to deliver its energy to Portland General in fixed megawatt-hour blocks, and that this requirement defines Portland General's purchase obligation. Other provisions of the Standard Contract, however, state that Portland General is required to buy all of PáTu's output, and the Commission properly found that Portland General has not justified elevating the scheduling provision above the purchase obligation.

With regard to PáTu's request for dynamic scheduling, and its associated claims of transmission discrimination, the Standard Contract does not address the means of transmission, but rather the sale of power. Commission precedent requires that an off-system qualifying facility – i.e., one that is not directly connected to the purchasing utility – is responsible for arranging and paying for transmission of its power to the purchasing utility. PáTu and Intervenors allege that Portland General systematically discriminates against qualifying facilities by denying them access to dynamic scheduling; however, Commission precedent does not require Portland General to provide this service. As for PáTu's argument that FERC should require Portland General, now, to amend its tariff to provide such service, this argument was raised in a rejected pleading and the Commission was within its discretion not to order this relief.

Intervenors in support of PáTu worry that this case sets precedent that will make transmission discrimination easier for other utilities in the future, but their claims that these orders "may have" a substantial and detrimental effect are speculative and – were Intervenors participating as petitioners here – would not support a claim of standing. Both PáTu and Intervenors will continue to have the ability to seek redress by the Commission if they perceive transmission discrimination against them going forward.

ARGUMENT

I. The Court Lacks Jurisdiction To Review FERC's Declaratory Ruling Under PURPA

A. The Challenged Orders Are Limited To Stating FERC's Understanding Of The Parties' Rights and Obligations Under PURPA

No statute provides for direct appellate review of FERC decisions interpreting PURPA. *Niagara Mohawk*, 306 F.3d at 1268; *Indus. Cogenerators*, 47 F.3d at 1234. Accordingly, this Court does not review FERC orders that – like the orders challenged here – do not "fix[] the rights of any party or, indeed, do[] anything more than state how FERC interprets its own regulations," *Indus. Cogenerators*, 47 F.3d at 1234, or orders that merely indicate what position FERC would take in a future enforcement proceeding. *Midland*, 774 F.3d at 7 (quoting *Conn. Valley Elec.*, 208 F.3d at 1043). "FERC's position is reviewable by this Court only after someone – a utility, a [qualifying facility], or the Commission –

brings an enforcement action to the district court and appeals therefrom." *Xcel*, 407 F.3d at 1244. *See also Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997) (same).

Midland involved the sale of power from a privately-owned wind farm – a PURPA qualifying facility, like PáTu – to an electric utility. The parties could not agree on how to define the utility's avoided cost, which was the price of energy from the qualifying facility. After a lengthy billing dispute, the utility disconnected the qualifying facility from its system and stopped transacting with it. *See Midland*, 774 F.3d at 2. FERC held that the utility's behavior did not fall into any recognized exemption from PURPA, and ordered it to reconnect with the qualifying facility. *Id.* at 3. But FERC did not include any further directives in its orders, identify a deadline by which it expected compliance, or state any consequences of non-compliance. *Id.* at 7. The Court held that the Commission "manifested no intent to go beyond a statement of FERC's views" of the utility's obligations, and that its order was therefore declaratory in nature. *Id*. For this reason, it fell "squarely within the principles of *Industrial Cogenerators*," and was not reviewable. *Id.* at 8.

Despite Portland General's claim that FERC's orders here "appear to impose requirements" on Portland General and other utilities, Portland General Br. 3, this case is not distinguishable from *Midland*. (Portland General's single sentence on

this topic is petitioners' only attempt to grapple with *Midland*; PáTu does not mention it at all.) As in *Midland*, the core issue of this case is a utility's failure to fulfill its obligations under PURPA, and the Commission's findings on that issue were declaratory in nature. *See* Complaint Order P 50, JA 531 (case boils down to "whether Portland General is fulfilling its obligations under PURPA and the Commission's regulations, as implemented by the Oregon Commission"); *cf. Midland*, 774 F.3d at 3 ("Midland's cessation of sales, and of purchases (as a consequence of the disconnection), did not fall within any of the exemptions from those duties under" Section 210 of PURPA or FERC's regulations). The orders on review were limited to ordering Portland General to accept all of PáTu's energy. *See* Complaint Order at P 49, JA 530. They mentioned no deadline for compliance, no consequences of non-compliance, or any intent to go beyond a statement of FERC's views of Portland General's obligations. *See Midland*, 774 F.3d at 6-7. The orders declined even to suggest how Portland General might attain compliance. *See* Complaint Order P 54 (Portland General's merchant function can decide how to deliver PáTu's net output to its customers, once that output has been accepted), JA 533; Rehearing Order P 56 (same), JA 651-52. Finally, the Commission made no finding as to remedies, but left this determination for the Oregon Commission or an appropriate court to make. Complaint Order P 57, JA 534-35.

B. Review At This Stage Would Disrupt The Enforcement Scheme

Some of the concerns that prompt the Court not to review FERC orders interpreting PURPA are present in this case, because the parties have continued to litigate in other forums – including federal district court. *See supra* pages 13, 17. The structure of PURPA Section 210, 16 U.S.C. § 824a-3, means that any position the Commission takes could become an issue during a subsequent enforcement action. *See Indus. Cogenerators*, 47 F.3d at 1234-35. When a petitioner – like PáTu – simultaneously seeks appellate review of the Commission's orders and enforcement of PURPA before a district court, "the court of appeals would be required to review the merits of the very position upon which [the petitioner] would be relying in its district court case . . . [and] an adverse ruling here would preclude its relitigation of the same issue. . . ." *Id.* at 1235.

This concern is especially relevant here because petitioners relied on the pendency of this appeal as a basis for requesting a stay in the district court, having agreed that "reversal or affirmance of the FERC Orders may have a significant impact on this action." Joint Motion to Stay at 4-5, ECF No. 11, No. 15-cv-01373 (D. Or. Sept. 18, 2015), CA 79-80. Petitioners apparently hope to use the Court's decision here to advance their positions in district court, so review of the challenged orders seems likely to "disrupt the enforcement scheme carefully elaborated" in Section 210 of PURPA – something that this Court has found that

Congress could not have intended. *See Indus. Cogenerators*, 47 F.3d at 1234. Once this Court dismisses these appeals, the parties can resume litigating the (now-abeyed) enforcement proceeding in district court.

Because the Commission limited itself to stating that PURPA requires Portland General to purchase all of PáTu's output, and FERC's announcements of position on PURPA matters are not reviewable – indeed, cannot be reviewed without interfering with the enforcement process – the Court should dismiss the petitions for review to the extent they address PURPA matters. *See Midland* at 6-7 (citing cases); *Indus. Cogenerators*, 47 F.3d at 1234.

C. The Federal Power Act Does Not Provide An Alternative Basis For Jurisdiction Over This Case

PáTu, Portland General, and supporting Intervenors all argue that the orders on review articulate a new rule under PURPA that this Court may review under the provisions of Federal Power Act Section 313(b), 16 U.S.C. § 825*l*(b). PáTu Br. 1; Portland General Br. 1; Intervenors Br. 1. PáTu and Intervenors claim that this Court has jurisdiction because, under PURPA, "any rule prescribed by the Commission . . . with respect to any operations of an electric utility" subject to FERC's Federal Power Act jurisdiction "shall be treated as a rule under the Federal Power Act." PáTu Br. 1 (quoting PURPA Section 210(h)(1), 16 U.S.C. § 824a-3(h)(1)); Intervenors Br. 1 (adopting same by reference). Portland General contends that the orders amend the rules the Commission promulgated to

implement PURPA under PURPA Section 210(f)(1), 16 U.S.C. § 824a-3(f)(1), without the benefit of a notice-and-comment rulemaking procedure under the Administrative Procedure Act or PURPA. Portland General Br. 3, 22. It also argues that FERC's action exceeded its statutory duty under PURPA Section 210(h)(2)(B), 16 U.S.C. § 824a-3(h)(2)(B), to enforce PURPA in federal district court, and that FERC's decisions are a flawed attempt to enforce new scheduling requirements against Portland General under the Federal Power Act. Portland General Br. 25-27.

The merits of each allegation will be discussed in later sections of this brief. For now, it is sufficient that these arguments are similar to petitioner's contentions in *Midland*, which the Court found insufficient to establish jurisdiction. Midland claimed that FERC created new rules about disconnections of retail service without engaging in a notice-and-comment rulemaking, then attempted to enforce them against Midland without bringing an action in federal court as required under PURPA Section 210. *Midland*, 774 F.3d at 4. As in *Midland*, petitioners here claim that the Court can review FERC's PURPA determinations under the Federal Power Act. *Id.* at 4-5; Portland General Br. 1; PáTu Br. 1. *See also Xcel*, 407 F.3d at 1244 (petitioner attempted to establish Federal Power Act jurisdiction over PURPA case based on allegation that FERC's orders interpreted a definition contained in that statute).

But there are "difficulties with this theory." *Midland*, 774 F.3d at 4. Petitioners here cannot clear the second jurisdictional hurdle the Court identified in *Midland*, which is that to establish jurisdiction under the Federal Power Act of a rule articulated under PURPA Section 210(h)(2)(A), 16 U.S.C. § 824a-3(h)(2)(A), FERC must have been attempting to enforce that rule. *Midland*, 774 F.3d at 5-6. FERC's orders were limited to stating its interpretation of PURPA, and noting that Portland General's scheduling practices caused the utility to violate PURPA. *See* Complaint Order PP 50-54, JA 531-33; Rehearing Order PP 44-51, JA 644-49. The Commission did not provide a deadline or a method for attaining compliance, identify consequences of non-compliance, or demonstrate any intent to do more than state its views of Portland General's obligations. *See Midland*, 774 F.3d at 6-7; Complaint Order P 54 (Portland General's merchant function can decide how to deliver PáTu's net output to its customers, once that output has been accepted), JA 533; Rehearing Order P 56 (same), JA 651-52. Nor did the orders suggest that FERC had brought, intended to bring, or encouraged other parties to pursue, an enforcement action in federal district court. *See* Complaint Order P 57 (leaving issue of remedies to Oregon Commission or an appropriate court), JA 534-35. Petitioners therefore cannot establish that FERC was attempting to enforce a rule.

This case was presented to FERC differently than *Midland*, because the initial filing was a Federal Power Act complaint rather than a petition for

enforcement of PURPA. *See* Complaint Order P 1, JA 510. That makes no difference to the outcome here, because this Court has previously declined to find jurisdiction in at least one case where the petitioner had requested relief under the Federal Power Act in its proceeding before FERC. *See N.Y. State Elec. & Gas Corp. v. FERC*, 117 F.3d 1473, 1477 (D.C. Cir. 1997). And there the Commission's orders were not merely declaratory, but "based upon determinations that would, if made binding upon the district court, be dispositive of any future enforcement action under § 210(h)." *Id.*

Petitioners therefore cannot establish that this Court has jurisdiction under either PURPA or the Federal Power Act over the Commission's PURPA pronouncements. They have, however, undertaken litigation in other forums – including an appeal of the Oregon Commission's decision and an action in federal district court, *see supra* pages 13, 17 – and will have ample opportunity to seek appropriate resolutions there. To the extent their petitions for review raise non-reviewable PURPA issues, therefore, the Court should dismiss them.

II. FERC's Handling Of This Case Was Appropriate And Within Its Discretion

A. Standard Of Review

The Court reviews Commission orders under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A); *see also, e.g., Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir.

1999). Under this standard, the court may not substitute its judgment for the Commission's, but must uphold the agency's decision if the agency has examined the relevant considerations and given a satisfactory explanation for its action, "including a rational connection between the facts found and the choice made." *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). This Court will uphold the Commission's factual findings if they are supported by substantial evidence. *Freeport-McMoRan Corp. v. FERC*, 669 F.3d 302, 308 (D.C. Cir. 2012). Substantial evidence "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (internal quotation marks and citation omitted).

The Court affords deference to the Commission's reading of an agreement "even where the issue simply involves the proper construction of language." *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569 (D.C. Cir. 1987). The Court does this when the agency's interpretation "will be influenced by [its] expertise in the technical language of that field and by its greater knowledge of industry conditions and practices." *Id.* at 1568-71. *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").

B. FERC Has Broad Discretion To Manage Its Disposition Of Complaints

As previously noted (*see supra* pages 10-13), PáTu first pursued its complaint against Portland General before the Oregon Commission, alleging that the utility's failure to accept dynamic scheduling of PáTu's energy violated PURPA and the Standard Contract. *See* Oregon Administrative Law Judge Disposition at 4, CA 28. The Oregon Commission declined to rule on the merits of PáTu's complaint, holding that the case presented a transmission problem that the Standard Contract did not address, Oregon Commission Order No. 12-316 at 8, JA 305, and "FERC is the proper authority to resolve transmission disputes between" these parties. Oregon Commission Order No. 14-425 at 3, CA 69.

PáTu then filed its complaint with FERC under the Federal Power Act – the statute under which the Commission regulates the interstate transmission of energy. *See* Rehearing Order P 49, JA 647-48 (Federal Power Act complaint was

appropriate because Portland General's actions, not the Standard Contract, violates PURPA). But FERC disagreed with the Oregon Commission that this case presented a transmission dispute. The core issue was that Portland General's transmission scheduling requirements – which Portland General grounded in the language of the Standard Contract – interfered with its PURPA purchase obligation. *See id.* P 47, JA 646. The transmission of power is merely an intermediate step between the behavior in question (the requirement that PáTu scheduled in fixed hourly blocks) and the consequences of that behavior (that Portland General will only purchase the power that is scheduled). *See id.* P 46 (scheduling practice prevents PáTu from delivering its entire net output), JA 645-46. Portland General's own argument – "[s]cheduling is a necessary predicate to delivery, and delivery is a necessary predicate to payment," Portland General Br. 44 – confirms this.

Having recognized that the issue of the case was rooted in PURPA rather than the Federal Power Act, FERC treated the case as it does other PURPA matters. It issued what is essentially a declaratory order, not fixing the rights of any party or providing itself with an avenue to enforce its views of the case – but providing its views on how to resolve the dispute between the parties. *See generally Midland*, 774 F.3d at 7-8 (FERC's orders did not show intent to go beyond a statement of FERC's views); *Kootenai Elec. Coop., Inc.*, 143 FERC

¶ 61,232 (2013) (declining to pursue PURPA enforcement action in district court, but stating that a utility is obligated to purchase power from a qualifying facility, "as long as the [qualifying facility] can deliver its power to the utility"), *reh'g denied*, 145 FERC ¶ 61,229 (2013).

Portland General complains that this course of action exceeded FERC's authority under PURPA, while PáTu and Intervenors contend that FERC neglected its obligations to remedy undue discrimination under the Federal Power Act. But FERC has ample discretion to control its own docket as it sees fit without violating the "arbitrary and capricious" standard. *See, e.g.*, *Telecomm. Retailers Ass'n v. FCC*, 141 F.3d 1193, 1196 (D.C. Cir. 1998) (quoting *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 2763-74 (D.C. Cir. 1986)) (Commission cannot be said to have abused its discretion by adopting procedures and timetables necessary to the resolution of complex and difficult problems); *Fla. Mun. Power Ass'n v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003) (refusal to consolidate cases was not an abuse of discretion).

While Portland General, PáTu, and Intervenors would have preferred different outcomes, their arguments, as discussed below, do not establish that the Commission's determinations about how to process this case either exceeded or neglected its duty. Nor do they show that FERC's analysis or conclusions are arbitrary or capricious. Assuming jurisdiction, therefore, the Court should deny the petitions for review.

III. The Commission Reasonably Determined That Portland General Must Accept And Pay For All Of PáTu's Delivered Power

The Commission found that "as required by PURPA and the Commission's regulations," Portland General must buy all of PáTu's output. Complaint Order P 50, JA 531. It also found that the Standard Contract expressly provides for the sale of PáTu's net output to Portland General, and this requirement is consistent with Section 292.303(a) of the Commission's regulations, 18 C.F.R. § 292.303(a). *Id.* P 51, JA 531; Rehearing Order P 44, JA 644. FERC noted that PURPA's mandatory purchase obligation was reflected in Sections 1.18 and 4.1 of the Standard Contract, which define the term Net Output and state that PáTu "shall sell to [Portland General] the entire Net Output delivered from the Facility at the Point of Delivery." *See* Complaint Order P 51, JA 531.

Portland General argued that Section 4.4 of the Standard Contract requires PáTu to pre-schedule its deliveries of energy by the hour. *See* Complaint Order P 52 (citing Portland General Answer at 14, 18, R.8, JA 425, 429), JA 531-32. It continues to reason that FERC should have found that Portland General's purchase obligation derives from the scheduling requirements in the Standard Contract. *See* Portland General Br. 44-45. But FERC held that Section 4.4 of the Standard Contract is not more important than the purchase obligation described in Sections 1.18 and 4.1. Complaint Order P 52, JA 53-32. Further, Section 4.4 does not say

that if PáTu schedules inaccurately, Portland General does not have to buy or pay for its output. *Id.*

A. The Challenged Orders Do Not Modify FERC's Regulations

Portland General attempts to distinguish *Midland* – which, as discussed *supra* pages 21-28, establish that the Court lacks jurisdiction to consider this case – and *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485 (D.C. Cir. 1997), by arguing that the orders on review establish a rule of general applicability. Portland General Br. 3. Specifically, Portland General contends that FERC amended Section 292.301(b) of its PURPA regulations, 18 C.F.R. § 292.301(b), without the benefit of a notice-and-comment rulemaking. *Id.* at 28-31. Its arguments are unavailing for three reasons. First, the challenged orders do not even cite Section 292.301(b), much less purport to amend it. Second, even if FERC's orders could be read to have modified the policy articulated in this regulation, a notice-and-comment rulemaking is not required to address every problem the Commission confronts. Third, even if the challenged orders amended FERC's regulations, Portland General still has no avenue to jurisdiction.

Section 292.301(b) of the Commission's regulations, 18 C.F.R. § 292.301(b), describes the scope of the subpart of the Commission's rules concerning sales and purchase of electric energy between electric utilities and qualifying facilities to negotiate rates for the sale of energy under PURPA. It is a

rule of general applicability promulgated in a rulemaking in 1980. *See generally Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12,214, 12,217-18 (1980). The regulation reflects the Commission's views that "the rate provisions of Section 210 of PURPA apply only if a qualifying cogenerator or small power production facility chooses to avail itself of that section," and that agreements between utilities and small power production facilities that contain different rates or different terms and conditions do not violate PURPA. *Id.* at 12,217.

Portland General alleges that, in light of the challenged orders, the plain text of the regulation can no longer be read as the Commission wrote it. Portland General Br. 28-31. Yet the utility does not even establish that FERC considered the application of Section 292.301(b) to this case.[1] Portland General identifies no specific order language that even refers to Section 292.301(b), much less purports to change it. It correctly argues that revisions to this section would have affected individual states' implementation of PURPA rules, but it does not identify any action that any affected party, or any affected state commission, has taken to re-

[1] Indeed, FERC had no need to do so. By signing the Standard Contract, the parties had already decided to use the standard terms and conditions established under PURPA, instead of agreeing to non-standard terms and conditions. *See Small Power Production and Cogeneration Facilities*, 45 Fed. Reg. at 12,217; Oregon Commission Order No. 14-287 at 13, JA 329.

evalutate their own compliance with PURPA or their own agreements in response to FERC's orders. Portland General points only to Paragraph 52 of the Complaint Order, which, as further described *infra*, explained why Portland General's reading of the Standard Contract improperly elevated scheduling over its obligation to purchase power from a qualifying facility. This paragraph nowhere states that parties may no longer agree to non-standard contract terms. *See* Complaint Order P 52, JA 531-32.

But even if the challenged orders had interpreted FERC's regulation, the Commission has discretion to implement a new interpretation by individual order as opposed to notice-and-comment rulemaking. *See, e.g.*, *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947). This is an unusual case in which FERC, at the suggestion of a state regulatory commission, evaluated issues that implicate a regulated utility's ongoing compliance with PURPA. *See* Rehearing Order P 46 (citing *Entergy Servs. Inc.*, 137 FERC ¶ 61,199 at P 52 (2011)), JA 645-46. The "failure of the Commission to anticipate this problem and to promulgate a general rule" ahead of time does not mean that FERC lacks authority to solve the problem; FERC remains equipped to act by individual order. *Chenery*, 322 U.S. at 202; *see also, e.g.*, *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) (when agency interprets a statute as an incident of adjudicatory function, it generally may apply the new interpretation in the

proceeding before it). Going forward, FERC also may decide whether rulemaking is the most appropriate solution to the issues presented here – which it may not be. *See Chenery*, 322 U.S. at 202-03 (problem may be too specialized and varying in nature to be properly captured within the boundaries of a general rule). Portland General's allegation that FERC has exceeded its authority by implementing new rules without a notice-and-comment rulemaking is therefore both factually and legally incorrect.

Even if Portland General could show that the Commission established a new rule of general applicability in the challenged orders, it would still have to find an avenue to jurisdiction. "[I]n *Niagara Mohawk* we agreed with petitioners that the orders in dispute did 'announce a rule of general application,' and then we proceeded to answer – negatively – the question left open in *Industrial Cogenerators*: whether Congress had authorized courts of appeal to review such an order." *Midland*, 774 F.3d at 6 (quoting *Niagara Mohawk*, 117 F.3d at 1488). "An order that does no more than announce the Commission's interpretation of the PURPA or one of the agency's implementing regulations" – and FERC has not even done the latter here – "is of no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA." Portland General's slight efforts (Portland General Br. 3) to distinguish *Midland* and *Niagara Mohawk* therefore are to no avail.

B. FERC Properly Read The Standard Contract, But Did Not Modify It

Portland General next argues that the challenged orders are a misguided effort to address the Oregon Commission's implementation of PURPA, and that they intrude on state authority because they provide FERC's views about the Oregon-administered Standard Contract in something other than an enforcement case in federal district court. Portland General contends that FERC's opinions about the contract are immaterial unless FERC concluded that the contract was inconsistent with PURPA, which it did not do. Portland General Br. 23-25, 28-33.

This argument begs the question of whose views would be material. Portland General argued to the Oregon Commission that this case concerned transmission and lay beyond state jurisdiction. *See* Oregon Commission Order No. 12-316 at 6 (Portland General "seeks dismissal of these claims, and asserts that dynamic transfers are a transmission function within the exclusive jurisdiction of FERC"), JA 303. The Oregon Commission agreed. *See id.* at 9 (dispute is "not contractual in nature"), JA 306; Oregon Commission Order No. 14-425 at 3 ("FERC is the proper authority to resolve transmission disputes between PáTu and" Portland General), CA 69. Having persuaded the Oregon Commission that the Standard Contract is not implicated, before FERC, Portland General grounded its opposition to dynamic scheduling in the language of that agreement. *See* Portland General Answer at 2-3, 13-20 (arguing that the Standard Contract does

not require dynamic scheduling), JA 413-14, 424-31. In light of its earlier arguments, Portland General's claim that FERC's views on the Standard Contract are immaterial to this case is not credible.

On the merits, Portland General complains that FERC's reading "severed" the scheduling sections of the Standard Contract from the delivery sections, "on the obviously incorrect claim that the relationship of these sections is unclear." Portland General Br. 43-44 (citing Complaint Order P 52 & n.93, JA 531-33). Portland General claims that "scheduling is a necessary predicate to delivery," and the Oregon Commission has approved the use of hourly pre-scheduling; therefore, FERC erred in finding that Portland General's purchase obligations did not derive from the scheduling requirements in the Standard Contract. Portland General Br. 44-45. Portland General cannot, however, persuasively explain why the scheduling provisions of the Standard Contract should carry greater legal weight than the purchase obligation found in the plain language of PURPA.

Confronted with Portland General's arguments that Section 4.4 of the Standard Contract defines the energy product that Portland General must purchase, FERC examined the language of the Standard Contract, quoting Section 4.4 in its entirety. Complaint Order P 52, JA 531-32; *see also* Portland General Answer at 14 (Section 4.4 "specifically defines the firm energy product"), JA 425. FERC read this provision together with Sections 1.18 and 4.1 of the Standard Contract,

and concluded that while PáTu is required to provide day-ahead pre-schedules of its energy, Portland General must purchase all of the output that PáTu "produces and delivers" to Portland General's system. Complaint Order P 52, JA 531-32. The Commission pointed out that Section 4.4 does not provide the purchasing flexibility that Portland General assumes. *Id.* ("Section 4.4 decidedly does *not* state that, in the event PáTu schedules inaccurately, Portland General does not have to purchase or pay for . . . the output that PáTu produces and delivers to" Portland General's system.) The Commission further noted that it has every right to expect contracting parties to say what they mean, rather than requiring the Commission to read into their agreements what is not spelled out, and that it is reasonable to conclude that "what someone has not said, someone has not meant." *Id*. n.93 (quoting *Fla. Power & Light Co.*, 67 FERC ¶ 61,141, at 61,396 & n.11 (1994)), JA 532-33; *accord Consol. Gas Supply Corp. v. FERC*, 745 F.2d 281, 291 (4th Cir. 1984).

Most significantly, FERC held that "Section 4.4's providing for day-ahead pre-schedules and hourly real-time schedules does not, however, trump the purchase obligation spelled out in Sections 1.18 and 4.1 of the Standard Contract, or in PURPA and our regulations." *Id*. P 52, JA 531-32. This reading properly "interpreted each clause to define an independent and meaningful aspect of the parties' contractual relation. By declining to find that either clause trumped the

other, the Commission complied with the cardinal principle that apparently contradictory clauses are to be reconciled by affording each the fullest meaning possible." *Ohio Power Co. v. FERC*, 744 F.2d 162, 166-67 (D.C. Cir. 1984) (citing *Papago Tribal Util. Auth. v. FERC*, 610 F.2d 914, 929 (D.C. Cir. 1979)).

FERC did not find that the Standard Contract clauses were "apparently contradictory" and in need of reconciliation, as contemplated in *Ohio Power*, or that their relationship was unclear, as alleged by Portland General. *See* Rehearing Order P 50, JA 648 (Complaint Order "considered the entire Standard Contract"). The challenged orders do not indicate that the Standard Contract is ambiguous or in need of interpretation. Rather, FERC's finding bridges the gap that Portland General perceives between the provisions governing scheduling and purchase of energy: Pre-schedules of energy required in Section 4.4 "amount to no more than best estimates and Section 4.4 does not define those best estimates as Portland General's purchase obligation." Complaint Order n.92, JA 532. FERC further observed that while the Standard Contract defines a qualifying facility's net output (and thus Portland General's purchase obligation) in kilowatt-hours, Portland General requires PáTu to schedule and deliver power in megawatt-hours – a different increment of energy. Rehearing Order P 50, JA 648. And "nothing in the Standard Contract precludes Portland General from paying PáTu for a more precise quantity (i.e., to the nearest [kilowatt]-hour . . .); therefore, we are not persuaded

by Portland General's argument that it is only required to purchase PáTu's pre-scheduled output." *Id.* P 51, JA 649.

The Commission's reading of the Standard Contract considered the document in its entirety, rather than severing its provisions as Portland General alleges. Consequently, FERC cannot be said to have amended the contract in excess of its authority. To the contrary, FERC found that the Standard Contract is consistent with FERC's regulations implementing PURPA, Complaint Order P 51, JA 531, and it has no need to revise a state-administered contract that comports with PURPA and the implementing regulations. Its reading – informed by its expert knowledge of the governing statute and the regulations that implemented it – was reasonable and should be respected. *See, e.g.*, *National Fuel Gas Supply Corp.*, 811 F.2d at 1570-71; *Lomak Petroleum*, 206 F.3d at 1198.

If FERC had perceived a need for such revisions, then – as Portland General itself points out (Portland General Br. 25) – it would have been required to enforce PURPA against the Oregon Commission under Section 210(h)(2)(A), 16 U.S.C. § 824a-3(h)(2)(A). But FERC expressly declined to find that the Standard Contract is inconsistent with FERC's regulations, and it did not find that the Standard Contract violated PURPA. *See* Complaint Order P 51 (Standard Contract is consistent with FERC regulations implementing PURPA), JA 531; Rehearing Order P 49, JA 647-48. Consequently, Portland General errs in arguing that the

Oregon Commission was a necessary party to the proceeding before FERC. Portland General Br. 25.

C. FERC Reasonably Found That Portland General's Scheduling Requirements Undermined Its PURPA Purchase Obligation

Portland General takes issue with the Commission's explanation that if Portland General were permitted to use scheduling mechanisms to refuse to accept PáTu's net output, then Portland General and other utilities could routinely escape the mandatory purchase obligation contained in PURPA and reflected in the Standard Contract. Portland General Br. 22 (quoting Complaint Order P 53, JA 533). This statement was part of a broader discussion in which the Commission explained that Portland General is required to purchase all of PáTu's output; that provisions of the Standard Contract governing scheduling were not more important than those requiring such purchases; and that it is up to Portland General's merchant function to determine how best to transmit the electric energy to its customers after buying it. *See* Complaint Order PP 50-54, JA 531-33.

The language Portland General highlights explains the consequences of allowing Portland General to establish obstacles to delivery of energy that would prevent Portland General from accepting all of PáTu's energy. *Id.* P 53, JA 533. It is not a finding of fact, but rather a look down a slippery slope: "*If* . . . Portland General *were permitted* on this basis to refuse to accept PáTu's entire net output," then other utilities could as well. *Id.* (emphasis added). This paragraph does not

state that anything about the Standard Contract is wrong or needs to be modified. *Id.* Indeed, the Commission noted on rehearing that the Complaint Order "did not find that the Standard Contract violates PURPA," but rather, it is "Portland General's actions dictating the manner by which PáTu delivers its net output, which are not mandated by the Standard Contract, that are in violation of PURPA." Rehearing Order P 49, JA 647-48. Portland General does not explain how FERC's statements on rehearing fit into its theory that the Complaint Order established a rule of general applicability. Nor does it explain how the Commission's finding that Portland General, specifically, had violated PURPA on the facts presented amounts to a finding that other utilities also need to change their practices.

Portland General cites no authority, other than Section 4.4 of the Standard Contract, to support its argument that it can reasonably accept less than PáTu's entire net output. Its claim that PáTu was actually able to schedule and deliver 97.89 percent of the power that it generated from December 2010 to September 2014 (Portland General Br. 36 & n.58) demonstrate only that the utility is not satisfying its PURPA purchase obligations – not (as it implies) that it is doing a good enough job.

Finally, Portland General complains in its brief that FERC's orders mandate dynamic scheduling. Portland General Br. 39-42. The plain language of the Rehearing Order refutes this. On rehearing, PáTu asked FERC to clarify that

dynamic scheduling was required, and Portland General sought confirmation that it was not. *See* Rehearing Order PP 8, 27, JA 629-30, 637-38. Satisfying neither party entirely, the Commission held that Portland General could not hide behind an argument that on-system and off-system qualifying facilities warranted different treatment, and that where PáTu has arranged to transmit its entire output to Portland General by dynamic scheduling, the utility could not claim that a different form of schedule was required and purchase a lesser amount of energy according to that schedule. *Id*. P 46, JA 645-46. In light of its holdings that Portland General must "purchase PáTu's entire output, including both the scheduled and the unscheduled net output delivered to Portland General's system, at full avoided cost rates," FERC saw "no need" to state that dynamic scheduling was required. *Id*. P 56, JA 651-52. It concluded that Portland General must accept PáTu's entire output "by dynamic scheduling or some other method," as it had in the Complaint Order. *Id.*; Complaint Order P 54, JA 533.

Moreover, it seems that this argument has been overtaken by events. When PáTu again complained to the Commission that Portland General would not accept dynamic scheduling, *see supra* pages 17-18, FERC held that Portland General "now accepts 15-minute scheduling; provides additional payments for PáTu's unscheduled net output; and allows PáTu to schedule and deliver on a [kilowatt-hour] basis, as opposed to the whole [megawatt-hour] blocks it previously

required. . . . Portland General's combined efforts of physical and financial arrangements comply" with the directives in the orders on review. Second Complaint Order PP 36-38 (reiterating that the Complaint Order and the Rehearing Order did not require Portland General to accept PáTu's output on an "instantaneous basis"), CA 94-95.

IV. The Commission Properly Determined That No Further Action Was Needed To Remedy The Alleged Undue Discrimination

PáTu and Intervenors contended before FERC, and continue to argue on appeal, that Portland General's refusal to accept power via dynamic scheduling discriminates against PURPA qualifying facilities. PáTu raises broad allegations that Portland General requires dynamic scheduling in some circumstances, but systematically denies it to PáTu and other qualifying facilities. PáTu Br. 28-31. It contends that the Commission's focus on PURPA merely recharacterizes the issue of the case, fails to consider evidence of discrimination, and is not reasoned decision-making. *Id.* at 31. But FERC's determination demonstrates an understanding of the record, of the issues raised, and of how to resolve them. Its conclusions permissibly reflect a different view of the evidence than that of PáTu and Intervenors, and reflect its expertise and judgment – not an unreasoned analysis. *See Elec. Power Supply Ass'n*, 136 S.Ct. at 784 (respecting the Commission's consideration and resolution of a "disputed question [that] involves

both technical understanding and policy judgment," and finding that it is "not our job to render that judgment, on which reasonable minds can differ").

Intervenors argue that going forward, FERC's failure to address transmission discrimination against PáTu and other small power producers "may have" a detrimental effect on Intervenors or independent generators, and that FERC's orders "could be read" to create a safe haven for utilities to engage in improper conduct in the future. Intervenor Br. 7. These concerns are speculative and – were Intervenors participating here as petitioners – would not support a claim of standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (petitioner must establish injury to a protected interest); *NO Gas Pipeline v. FERC*, 756 F.3d 764,768 (D.C. Cir. 2014) (members' "concerns over injuries that have neither occurred nor become imminent" do not support an association's claim of standing). Should these concerns be realized in the future, however, PáTu and Intervenors retain the opportunity to raise this issue before the Commission again. *See* 16 U.S.C. § 824e; *see also supra* pages 17-18 (Commission has already considered and decided a second complaint arising out of the dispute between PáTu and Portland General).

A. The Commission's Orders Addressed The Fundamental Problem Presented In This Case

PáTu claims that it is aggrieved by the Commission's orders because it did not receive all of the relief it sought – specifically, because PáTu believes that it is

entitled to deliver its energy to Portland General using dynamic scheduling. PáTu Br. 31-36. But here FERC has articulated a rational connection between the facts and its conclusions, and explained why it focused its orders on Portland General's violation of its PURPA purchase obligation; accordingly, its decision deserves deference. *See Elec. Power Supply Ass'n*, 136 S.Ct. at 782 ("[N]owhere is that more true than in a technical area like electricity rate design.").

PáTu's complaint was not limited to issues of undue discrimination, but also raised the problem of Portland General not accepting its entire output. Complaint at 7, 22-27, JA 21, 36-41. The Commission agreed with PáTu that the record supported this claim, and that the law required a different result: "Portland General (and not PáTu) has dictated the manner by which PáTu currently delivers its net output. . . . Portland General must treat PáTu, an off-system [qualifying facility] as it would treat an on-system [qualifying facility], and Portland General must purchase PáTu's entire net output." Rehearing Order P 46, JA 645-46. FERC also held, as PáTu had urged, that Portland General's hourly block scheduling requirements – which it derived from the Standard Contract used for off-system qualifying facilities – were not an acceptable way for it to fulfill its PURPA purchase obligations. *Id*. This holding demonstrated sensitivity to the unique status of qualifying facilities, and to their right to sell energy to traditional utilities.

Next, the Commission considered the issue of transmitting energy to Portland General from distant resources, and held that Portland General's effort to distinguish off-system qualifying facilities from others was ineffective. "Portland General seeks to establish a distinction not previously recognized by the Commission; the Commission's regulations require that 'any electric utility . . . shall purchase such energy or capacity'" made available indirectly by an off-system qualifying facility "'as if the qualifying facility were supplying energy and capacity directly to such utility.'" Rehearing Order P 46 (quoting 18 C.F.R § 292.303(d)), JA 645-46. Portland General's purchase obligation applies equally to on-system and off-system qualifying facilities. *Id.* (citing *Entergy Servs. Inc.*, 137 FERC ¶ 61,199). Coupled with the previous holding that Portland General must purchase all of a qualifying facility's output, this acknowledgement means that Portland General may not discriminate against qualifying facilities that transmit their energy across Bonneville's system. This holding does not amount to recharacterizing an issue; rather, the Commission's holdings require Portland General to fulfill its PURPA obligations in a non-discriminatory way.

Third, the Commission's finding that PáTu is not Portland General's transmission customer is neither a "baseless technicality," PáTu Br. 31, nor a way to argue that PáTu cannot be subject to undue discrimination, Intervenor Br. 11-14. Rather, this relationship demarcates the parties' responsibility to transmit and

deliver power, and to pay the costs of doing so. *See Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,213, at P 38 (2013) (qualifying facility's obligation to the purchasing utility is limited to delivering energy to the point of interconnection with that utility; it is not responsible for obtaining transmission service to deliver its energy from the point of interconnection to the purchasing utility's load). PáTu itself explained that it has a transmission service agreement with Wasco, and another with Bonneville, to transmit its power to the border of Portland General's system. Complaint at 6, JA 20. Portland General's merchant division is the transmission customer responsible for purchasing output from qualifying facilities that is delivered to the Portland General system. Complaint at 10, JA 24; Complaint Order n.17, JA 514. Under this arrangement, PáTu is financially responsible for moving its own energy to the Troutdale Station, where Portland General's merchant function buys it and transmits it to customers on Portland General's system. Rehearing Order P 56, JA 651-52; Second Complaint Order P 40, CA 96.

PáTu's arguments concerning discrimination focus on dynamic scheduling as the only acceptable means of delivering energy to Portland General in smaller increments than the unacceptable megawatt-hour blocks. *See* PáTu Br. 14; *see also* Intervenor Br. 16 (refusing to allow dynamic and intra-hour scheduling "effectively curtails" the qualifying facility's ability to sell power to the Oregon

utility of its choice). This scheduling mechanism would also allow PáTu to avoid the costs of wind integration services it pays to Bonneville to transmit its power. Complaint Order P 7, JA 512; Second Complaint Order P 40, CA 96. But PáTu does not explain why Commission precedent requiring it to pay the costs of transmission is inapplicable here. Moreover, subsequent events (*see supra* pages 17-18) suggest that implementation of 15-minute scheduling – to which PáTu also claimed that it was entitled – may have been sufficient to resolve PáTu's concerns. Specifically, PáTu did not seek rehearing of the Commission's 2016 finding that Portland General's revised physical and financial arrangements for delivery, including 15-minute scheduling, satisfy the directives of the Complaint Order. *See* Second Complaint Order P 36, CA 94-95.

B. FERC Reasonably Declined To Consider PáTu's Arguments Proposing Modifications To Portland General's Transmission Tariff

Both PáTu and Intervenors contend that FERC did not consider all of the evidence that PáTu raised in support of its claim of transmission discrimination, or address PáTu's arguments that FERC should require Portland General to incorporate a non-discriminatory dynamic scheduling provision into its tariff. PáTu Br. 35-39; Intervenor Br. 13. PáTu states that it first introduced evidence that Portland General's dynamic scheduling policies violate FERC open access requirements in its November 14, 2014 answer to Portland General's Motion for

Summary Disposition, but that the Commission improperly rejected its pleading. PáTu Br. 35-36. Intervenors raise similar arguments. Intervenor Br. 13.

The Commission controls its own docket, and has substantial discretion to manage its own proceedings. *See, e.g.*, *Mobil Oil Expl. & Prods. Se. v. United Dist. Cos.*, 498 U.S. 211, 230-31 (1991) (agency "need not solve every problem before it in the same proceeding" and has "broad discretion" in developing procedures and priorities). It need not simply accept the manner in which a petitioner frames its pleading, but may address the pleading according to its substance. *See, e.g.*, *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001, at n.3 (1984) (style in which a petitioner frames a document does not necessarily dictate how the Commission must treat it). The Commission determined that despite the style of Portland General's motion for summary disposition, it was, in substance, an answer to PáTu's Complaint. *See* Rehearing Order P 60, JA 653. The Commission's Rules of Practice and Procedure prohibit answers to answers, and so the Commission properly rejected the subsequent filings. Complaint Order P 48 (citing 18 C.F.R. § 385.213(a)(2)), JA 530; Rehearing Order P 60 & n.132, JA 653. *See also, e.g.*, *High Prairie Pipeline, LLC v. Enbridge Energy Ltd. P'ship*, 149 FERC ¶ 61,004, at PP 6-8 (2014) (Commission reasonably treated answer with embedded motion to dismiss as an answer to a complaint).

Because FERC properly rejected the answer under its rules, it was justified in finding that PáTu properly raised this issue for the first time on rehearing, at which time the Commission may not consider it (and Portland General may not respond to it). *See* Rehearing Order P 59, JA 653. PáTu cannot fairly claim prejudice from the Commission's processing of its proceedings – particularly because PáTu later filed a second complaint that sought enforcement of these very orders, as well as additional relief. *See supra* pages 17-18.

C. FERC Properly Interpreted And Applied Its Own Rules Concerning Standards Of Conduct

The Commission's Standards of Conduct require, among other things, that a transmission provider "must treat all transmission customers, affiliated and non-affiliated, on a not unduly discriminatory basis," and not provide undue preferences, advantages, or disadvantages to anyone with respect to the transmission of electric energy in interstate commerce. 18 C.F.R. § 358.2(a). The Standards of Conduct were created and implemented to address the problem of natural gas and electric utilities granting undue preferences to their own marketing affiliates or wholesale merchant functions. *See Standards of Conduct for Transmission Providers*, 73 Fed. Reg. 63,796, at P 3 (2008). The Standards of Conduct require three essential things:

> (1) Independent functioning: Transmission employees of a utility must function separately from the transmission provider's marketing employees, 18 C.F.R. § 358.5;

(2) No conduit: A transmission provider may not use anyone as a conduit for the disclosure of non-public transmission function information to its marketing function employees, *id.* § 358.6;

(3) Transparency: With limited exceptions, if a transmission provider discloses non-public transmission function information in a way that is inconsistent with the "no conduit" rule, then the transmission provider must immediately post the information that was disclosed on its Internet web site, *id*. § 358.7.

The Commission found that because Portland General's merchant arm – not PáTu – is the customer transmitting energy on Portland General's system, communications between Portland General's merchant arm and Portland General's transmission division concerning transmission of PáTu's power did not violate the independent functioning rule or the transparency rule. *See* Complaint Order P 56, JA 534; Rehearing Order P 57, JA 652.

PáTu contends on appeal that FERC drew incorrect conclusions from the record evidence. PáTu Br. 43-50. First, it argues that FERC misunderstood the evidence as relating solely to transmission within Portland General's system. PáTu contends that, in fact, the evidence shows that Portland General's merchant division directed the transmission division to deny PáTu's request for dynamic scheduling across the Bonneville system. *Id.* at 44-45. PáTu contends that these discussions violated the independent functioning rule and the rule prohibiting non-discrimination. *Id.* at 45.

PáTu's arguments do not further illuminate the claims that the Commission considered and denied. FERC held that the communications between Portland General's transmission and merchant functions were permissible under the Standards of Conduct. *See* Complaint Order P 56, JA 534; Rehearing Order PP 57-58, JA 652-53. FERC further found that it was reasonable that these communications included discussions about how PáTu's output would be transmitted over Bonneville's system and delivered to Portland General's system. Rehearing Order P 57, JA 652. Portland General's merchant function has the right to choose the form of transmission service that it will use to deliver PáTu's output to Portland General's load. *Id.* PP 57-58, JA 652-53. The transmission function of a transmission provider may communicate with the merchant function of the same transmission provider concerning transmission service for which the merchant function is a transmission customer. Complaint Order P 56 (citing 18 C.F.R. § 358.7(b)), JA 534; Rehearing Order P 57, JA 652. FERC held that the record showed that Portland General's transmission function provided the merchant function – its transmission customer – with "several transmission delivery options for the subsequent transmission of PáTu's output following delivery" to Portland General. Complaint Order P 56, JA 534. The record demonstrated that Portland General's merchant function permissibly decided the form of transmission delivery that it would take to deliver PáTu's output from the Troutdale substation to

Portland General's load. *Id.* This decision would have concerned transmission over Portland General's system only, and not transmission over Bonneville's system.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petitions for review because they are beyond the Court's jurisdiction to review under PURPA. If the Court proceeds to the merits of this case, then it should deny the petitions for review in all respects.

Respectfully submitted,

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FINAL BRIEF: June 9, 2016

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) because this brief contains 12,585 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.

/s/ Elizabeth E. Rylander
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Attorney

FINAL BRIEF: June 9, 2016

ADDENDUM

Statutes & Regulations

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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].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

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

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

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

§824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

Subsec. (f). Pub. L. 109–58, § 1291(c), which directed amendment of subsec. (f) by substituting ''political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year,'' for ''political subdivision of a state,'', was executed by making the substitution for ''political subdivision of a State,'' to reflect the probable intent of Congress.

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

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

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

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

EFFECTIVE DATE OF 2005 AMENDMENT

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

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

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

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

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

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

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

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under

any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or 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

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.

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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.

[1] See References in Text note below.

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

LIMITATION ON AUTHORITY PROVIDED

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

STUDY

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

§ 824f. Ordering furnishing of adequate service

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

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

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

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

(b) Request for inventory and cost statements

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

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

§ 824h. References to State boards by Commission

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

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

(b) Cooperation with State commissions

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

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

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient

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

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

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

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, §312, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, §1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

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

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Documents.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§ 825*l*. Review of orders

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

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

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

(b) Writs of mandamus

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

(c) Employment of attorneys

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

(d) Prohibitions on violators

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or

§ 824a–2. Reliability

(a) Study

(1) The Secretary, in consultation with the Commission, shall conduct a study with respect to—

(A) the level of reliability appropriate to adequately serve the needs of electric consumers, taking into account cost effectiveness and the need for energy conservation,

(B) the various methods which could be used in order to achieve such level of reliability and the cost effectiveness of such methods, and

(C) the various procedures that might be used in case of an emergency outage to minimize the public disruption and economic loss that might be caused by such an outage and the cost effectiveness of such procedures.

Such study shall be completed and submitted to the President and the Congress not later than 18 months after November 9, 1978. Before such submittal the Secretary shall provide an opportunity for public comment on the results of such study.

(2) The study under paragraph (1) shall include consideration of the following:

(A) the cost effectiveness of investments in each of the components involved in providing adequate and reliable electric service, including generation, transmission, and distribution facilities, and devices available to the electric consumer;

(B) the environmental and other effects of the investments considered under subparagraph (A);

(C) various types of electric utility systems in terms of generation, transmission, distribution and customer mix, the extent to which differences in reliability levels may be desirable, and the cost-effectiveness of the various methods which could be used to decrease the number and severity of any outages among the various types of systems;

(D) alternatives to adding new generation facilities to achieve such desired levels of reliability (including conservation);

(E) the cost-effectiveness of adding a number of small, decentralized conventional and nonconventional generating units rather than a small number of large generating units with a similar total megawatt capacity for achieving the desired level of reliability; and

(F) any standards for electric utility reliability used by, or suggested for use by, the electric utility industry in terms of cost-effectiveness in achieving the desired level of reliability, including equipment standards, standards for operating procedures and training of personnel, and standards relating the number and severity of outages to periods of time.

(b) Examination of reliability issues by reliability councils

The Secretary, in consultation with the Commission, may, from time to time, request the reliability councils established under section 202(a) of the Federal Power Act [16 U.S.C. 824a(a) of this title] or other appropriate persons (including Federal agencies) to examine and report to him concerning any electric utility reliability issue. The Secretary shall report to the Congress (in its annual report or in the report required under subsection (a) of this section if appropriate) the results of any examination under the preceding sentence.

(c) Department of Energy recommendations

The Secretary, in consultation with the Commission, and after opportunity for public comment, may recommend industry standards for reliability to the electric utility industry, including standards with respect to equipment, operating procedures and training of personnel, and standards relating to the level or levels of reliability appropriate to adequately and reliably serve the needs of electric consumers. The Secretary shall include in his annual report—

(1) any recommendations made under this subsection or any recommendations respecting electric utility reliability problems under any other provision of law, and

(2) a description of actions taken by electric utilities with respect to such recommendations.

(Pub. L. 95–617, title II, § 209, Nov. 9, 1978, 92 Stat. 3143.)

CODIFICATION

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

DEFINITIONS

For definitions of terms used in this section, see section 2602 of this title.

§ 824a–3. Cogeneration and small power production

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to—

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities[1] and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not au-

[1] So in original. Probably should be followed by a comma.

thorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale—

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term ''incremental cost of alternative electric energy'' means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions

(1) Not later than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act [16 U.S.C. 791a et seq.], from the Public Utility Holding Company Act,[2] from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility (other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined in section 3(17)(E) of the Federal Power Act [16 U.S.C. 796(17)(E)]) which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act[2] and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from—

(A) any State law or regulation in effect in a State pursuant to subsection (f) of this section,

(B) the provisions of section 210, 211, or 212 of the Federal Power Act [16 U.S.C. 824i, 824j, or 824k] or the necessary authorities for enforcement of any such provision under the Federal Power Act [16 U.S.C. 791a et seq.], or

(C) any license or permit requirement under part I of the Federal Power Act [16 U.S.C. 791a et seq.] any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) of this section in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility,

[2] See References in Text note below.

qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f) of this section. Any such action shall be brought only in the manner, and under the requirements, as provided under section 2633 of this title with respect to an action to which section 2633 of this title applies.

(h) Commission enforcement

(1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) of this section with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act [16 U.S.C. 824 et seq.], such rule shall be treated as a rule under the Federal Power Act [16 U.S.C. 791a et seq.]. Nothing in subsection (g) of this section shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.

(2)(A) The Commission may enforce the requirements of subsection (f) of this section against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f)(1) of this section shall be treated as a rule enforceable under the Federal Power Act [16 U.S.C. 791a et seq.]. For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act. No enforcement action may be brought by the Commission under this section other than—

(i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f) of this section[3] or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

(i) Federal contracts

No contract between a Federal agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered into after November 9, 1978, may contain any provision which will have the effect of preventing the implementation of any rule under this section with respect to such utility. Any provision in any such contract which has such effect shall be null and void.

(j) New dams and diversions

Except for a hydroelectric project located at a Government dam (as defined in section 3(10) of the Federal Power Act [16 U.S.C. 796(10)]) at which non-Federal hydroelectric development is permissible, this section shall not apply to any hydroelectric project which impounds or diverts the water of a natural watercourse by means of a new dam or diversion unless the project meets each of the following requirements:

(1) No substantial adverse effects

At the time of issuance of the license or exemption for the project, the Commission finds that the project will not have substantial adverse effects on the environment, including recreation and water quality. Such finding shall be made by the Commission after taking into consideration terms and conditions imposed under either paragraph (3) of this subsection or section 10 of the Federal Power Act [16 U.S.C. 803] (whichever is appropriate as required by that Act [16 U.S.C. 791a et seq.] or the Electric Consumers Protection Act of 1986) and compliance with other environmental requirements applicable to the project.

(2) Protected rivers

At the time the application for a license or exemption for the project is accepted by the Commission (in accordance with the Commission's regulations and procedures in effect on January 1, 1986, including those relating to environmental consultation), such project is not located on either of the following:

(A) Any segment of a natural watercourse which is included in (or designated for potential inclusion in) a State or national wild and scenic river system.

(B) Any segment of a natural watercourse which the State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural, or scenic attributes which would be adversely affected by hydroelectric development.

(3) Fish and wildlife terms and conditions

The project meets the terms and conditions set by fish and wildlife agencies under the same procedures as provided for under section 30(c) of the Federal Power Act [16 U.S.C. 823a(c)].

(k) "New dam or diversion" defined

For purposes of this section, the term ''new dam or diversion'' means a dam or diversion which requires, for purposes of installing any hydroelectric power project, any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards or similar adjustable devices)[4]

***(l)* Definitions**

For purposes of this section, the terms ''small power production facility'', ''qualifying small

[3] So in original. Probably should be followed by a comma.

[4] So in original. Probably should be followed by a period.

power production facility'', ''qualifying small power producer'', ''primary energy source'', ''cogeneration facility'', ''qualifying cogeneration facility'', and ''qualifying cogenerator'' have the respective meanings provided for such terms under section 3(17) and (18) of the Federal Power Act [16 U.S.C. 796(17), (18)].

(m) Termination of mandatory purchase and sale requirements

(1) Obligation to purchase

After August 8, 2005, no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to—

(A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or

(B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

(2) Revised purchase and sale obligation for new facilities

(A) After August 8, 2005, no electric utility shall be required pursuant to this section to enter into a new contract or obligation to purchase from or sell electric energy to a facility that is not an existing qualifying cogeneration facility unless the facility meets the criteria for qualifying cogeneration facilities established by the Commission pursuant to the rulemaking required by subsection (n) of this section.

(B) For the purposes of this paragraph, the term ''existing qualifying cogeneration facility'' means a facility that—

(i) was a qualifying cogeneration facility on August 8, 2005; or

(ii) had filed with the Commission a notice of self-certification, self recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by subsection (n) of this section.

(3) Commission review

Any electric utility may file an application with the Commission for relief from the mandatory purchase obligation pursuant to this subsection on a service territory-wide basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) of this subsection have been met. After notice, including sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) have been met.

(4) Reinstatement of obligation to purchase

At any time after the Commission makes a finding under paragraph (3) relieving an electric utility of its obligation to purchase electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section. Such application shall set forth the factual basis upon which the application is based and describe why the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) of this subsection are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to purchase electric energy under this section if the Commission finds that the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) which relieved the obligation to purchase, are no longer met.

(5) Obligation to sell

After August 8, 2005, no electric utility shall be required to enter into a new contract or obligation to sell electric energy to a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that—

(A) competing retail electric suppliers are willing and able to sell and deliver electric energy to the qualifying cogeneration facility or qualifying small power production facility; and

(B) the electric utility is not required by State law to sell electric energy in its service territory.

(6) No effect on existing rights and remedies

Nothing in this subsection affects the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on August 8, 2005, to purchase electric energy or capacity from or to sell electric energy or capacity to a qualifying cogeneration facility or qualifying small power production facility under this Act (including the right to recover costs of purchasing electric energy or capacity).

(7) Recovery of costs

(A) The Commission shall issue and enforce such regulations as are necessary to ensure that an electric utility that purchases electric energy or capacity from a qualifying cogeneration facility or qualifying small power production facility in accordance with any legally enforceable obligation entered into or imposed under this section recovers all prudently incurred costs associated with the purchase.

(B) A regulation under subparagraph (A) shall be enforceable in accordance with the provisions of law applicable to enforcement of regulations under the Federal Power Act (16 U.S.C. 791a et seq.).

(n) Rulemaking for new qualifying facilities

(1)(A) Not later than 180 days after August 8, 2005, the Commission shall issue a rule revising the criteria in 18 CFR 292.205 for new qualifying cogeneration facilities seeking to sell electric energy pursuant to this section to ensure—

(i) that the thermal energy output of a new qualifying cogeneration facility is used in a productive and beneficial manner;

(ii) the electrical, thermal, and chemical output of the cogeneration facility is used fundamentally for industrial, commercial, or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as State laws applicable to sales of electric energy from a qualifying facility to its host facility; and

(iii) continuing progress in the development of efficient electric energy generating technology.

(B) The rule issued pursuant to paragraph (1)(A) of this subsection shall be applicable only to facilities that seek to sell electric energy pursuant to this section. For all other purposes, except as specifically provided in subsection (m)(2)(A) of this section, qualifying facility status shall be determined in accordance with the rules and regulations of this Act.

(2) Notwithstanding rule revisions under paragraph (1), the Commission's criteria for qualifying cogeneration facilities in effect prior to the date on which the Commission issues the final rule required by paragraph (1) shall continue to apply to any cogeneration facility that—

(A) was a qualifying cogeneration facility on August 8, 2005, or

(B) had filed with the Commission a notice of self-certification, self-recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by paragraph (1).

(Pub. L. 95–617, title II, §210, Nov. 9, 1978, 92 Stat. 3144; Pub. L. 96–294, title VI, §643(b), June 30, 1980, 94 Stat. 770; Pub. L. 99–495, §8(a), Oct. 16, 1986, 100 Stat. 1249; Pub. L. 101–575, §2, Nov. 15, 1990, 104 Stat. 2834; Pub. L. 109–58, title XII, §1253(a), Aug. 8, 2005, 119 Stat. 967.)

REFERENCES IN TEXT

The Federal Power Act, referred to in subsecs. (e), (h), (j)(1), and (m)(7)(B), is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended, which is classified generally to this chapter (§791a et seq.). Part I of the Federal Power Act is classified generally to subchapter I (§791a et seq.) of this chapter. Part II of the Federal Power Act is classified generally to this subchapter (§824 et seq.). For complete classification of this Act to the Code, see section 791a of this title and Tables.

The Public Utility Holding Company Act, referred to in subsec. (e), probably means the Public Utility Holding Company Act of 1935, 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.

The Electric Consumers Protection Act of 1986, referred to in subsec. (j)(1), is Pub. L. 99–495, Oct. 16, 1986, 100 Stat. 1243. For complete classification of this Act to the Code, see Short Title of 1986 Amendment note set out under section 791a of this title and Tables.

This Act, referred to in subsecs. (m)(6) and (n)(1)(B), is Pub. L. 95–617, Nov. 9, 1978, 92 Stat. 3117, as amended, known as the Public Utility Regulatory Policies Act of 1978. For complete classification of this Act to the Code, see Short Title note set out under section 2601 of this title and Tables.

CODIFICATION

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

August 8, 2005, referred to in subsec. (n)(1)(A), was in the original ''the date of enactment of this section'', which was translated as meaning the date of enactment of Pub. L. 109–58, which enacted subsecs. (m) and (n) of this section, to reflect the probable intent of Congress.

AMENDMENTS

2005—Subsecs. (m), (n). Pub. L. 109–58 added subsecs. (m) and (n).

1990—Subsec. (e)(2). Pub. L. 101–575 inserted ''(other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined in section 3(17)(E) of the Federal Power Act)'' after first reference to ''facility''.

1986—Subsecs. (j) to (*l*). Pub. L. 99–495 added subsecs. (j) and (k) and redesignated former subsec. (j) as (*l*).

1980—Subsec. (a). Pub. L. 96–294, §643(b)(1), inserted provisions relating to encouragement of geothermal small power production facilities.

Subsec. (e)(1). Pub. L. 96–294, §643(b)(2), inserted provisions relating to applicability to geothermal small power production facilities.

Subsec. (e)(2). Pub. L. 96–294, §643(b)(3), inserted provisions respecting a qualifying small power production facility using geothermal energy as the primary energy source.

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99–495, §8(b), Oct. 16, 1986, 100 Stat. 1250, provided that:

''(1) Subsection (j) of section 210 of the Public Utility Regulatory Policies Act of 1978 (as amended by subsection (a) of this section) [16 U.S.C. 824a–3(j)] shall apply to any project for which benefits under section 210 of the Public Utility Regulatory Policies Act of 1978 are sought and for which a license or exemption is issued by the Federal Energy Regulatory Commission after the enactment of this Act [Oct. 16, 1986], except as otherwise provided in paragraph (2), (3) or (4) of this subsection.

''(2) Subsection (j) shall not apply to the project if the application for license or exemption for the project was filed, and accepted for filing by the Commission, before the enactment of this Act [Oct. 16, 1986].

''(3) Paragraphs (1) and (3) of such subsection (j) shall not apply if the application for the license or exemption for the project was filed before the enactment of

this Act [Oct. 16, 1986] and accepted for filing by the Commission (in accordance with the Commission's regulations and procedures in effect on January 1, 1986, including those relating to the requirement for environmental consultation) within 3 years after such enactment.

''(4)(A) Paragraph (3) of subsection (j) shall not apply for projects where the license or exemption application was filed after enactment of this Act [Oct. 16, 1986] if, based on a petition filed by the applicant for such project within 18 months after such enactment, the Commission determines (after public notice and opportunity for public comment of at least 45 days) that the applicant has demonstrated that he had committed (prior to the enactment of this Act) substantial monetary resources directly related to the development of the project and to the diligent and timely completion of all requirements of the Commission for filing an acceptable application for license or exemption. Such petition shall be publicly available and shall be filed in such form as the Commission shall require by rule issued within 120 days after the enactment of this Act. The public notice required under this subparagraph shall include written notice by the petitioner to affected Federal and State agencies.

''(B) In the case of any petition referred to in subparagraph (A), if the applicant had a preliminary permit and had completed environmental consultations (required by Commission regulations and procedures in effect on January 1, 1986) prior to enactment, there shall be a rebuttable presumption that such applicant had committed substantial monetary resources prior to enactment.

''(C) The applicant for a license or exemption for a project described in subparagraph (A) may petition the Commission for an initial determination under paragraph (1) of section 210(j) of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3(j)(1)] prior to the time the license or exemption is issued. If the Commission initially finds that the project will have substantial adverse effects on the environment within the meaning of such paragraph (1), prior to making a final finding under that paragraph the Commission shall afford the applicant a reasonable opportunity to provide for mitigation of such adverse effects. The Commission shall make a final finding under such paragraph (1) at the time the license or exemption is issued. If the Federal Energy Regulatory Commission has notified the State of its initial finding and the State has not taken any action described in paragraph (2) of section 210(j) before such final finding, the failure to take such action shall be the basis for a rebuttable presumption that there is not a substantial adverse effect on the environment related to natural, recreational, cultural, or scenic attributes for purposes of such finding.

''(D) If a petition under subparagraph (A) is denied, all provisions of section 210(j) of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3(j)] shall apply to the project regardless of when the license or exemption is issued.''

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

Calculation of Avoided Cost

Pub. L. 102–486, title XIII, § 1335, Oct. 24, 1992, 106 Stat. 2984, provided that: ''Nothing in section 210 of the Public Utility Regulatory Policies Act of 1978 (Public Law 95–617) [16 U.S.C. 824a–3] requires a State regulatory authority or nonregulated electric utility to treat a cost reasonably identified to be incurred or to have been incurred in the construction or operation of a facility or a project which has been selected by the Department of Energy and provided Federal funding pursuant to the Clean Coal Program authorized by Public Law 98–473 [see Tables for classification] as an incremental cost of alternative electric energy.''

Applicability of 1980 Amendment to Facilities Using Solar Energy as Primary Energy Source

Pub. L. 100–202, § 101(d) [title III, § 310], Dec. 22, 1987, 101 Stat. 1329–104, 1329–126, provided that:

''(a) The amendments made by section 643(b) of the Energy Security Act (Public Law 96–294) [amending this section] and any regulations issued to implement such amendment shall apply to qualifying small power production facilities (as such term is defined in the Federal Power Act [16 U.S.C. 791a et seq.]) using solar energy as the primary energy source to the same extent such amendments and regulations apply to qualifying small power production facilities using geothermal energy as the primary energy source, except that nothing in this Act [see Tables for classification] shall preclude the Federal Energy Regulatory Commission from revising its regulations to limit the availability of exemptions authorized under this Act as it determines to be required in the public interest and consistent with its obligations and duties under section 210 of the Public Utility Regulatory Policies Act of 1978 [this section].

''(b) The provisions of subsection (a) shall apply to a facility using solar energy as the primary energy source only if either of the following is submitted to the Federal Energy Regulatory Commission during the two-year period beginning on the date of enactment of this Act [Dec. 22, 1987]:

''(1) An application for certification of the facility as a qualifying small power production facility.

''(2) Notice that the facility meets the requirements for qualification.''

Study and Report to Congressional Committees on Application of Provisions Relating to Cogeneration, Small Power Production, and Interconnection Authority to Hydroelectric Power Facilities

Pub. L. 99–495, § 8(d), Oct. 16, 1986, 100 Stat. 1251, provided that:

''(1) The Commission shall conduct a study (in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969 [42 U.S.C. 4332(2)(C)]) of whether the benefits of section 210 of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3] and section 210 of the Federal Power Act [16 U.S.C. 824i] should be applied to hydroelectric power facilities utilizing new dams or diversions (within the meaning of section 210(k) of the Public Utility Regulatory Policies Act of 1978).

''(2) The study under this subsection shall take into consideration the need for such new dams or diversions for power purposes, the environmental impacts of such new dams and diversions (both with and without the application of the amendments made by this Act to sections 4, 10, and 30 of the Federal Power Act [16 U.S.C. 797, 803, 823a] and section 210 of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3]), the environmental effects of such facilities alone and in combination with other existing or proposed dams or diversions on the same waterway, the intent of Congress to encourage and give priority to the application of section 210 of Public Utility Regulatory Policies Act of 1978 to existing dams and diversions rather than such new dams or diversions, and the impact of such section 210 on the rates paid by electric power consumers.

''(3) The study under this subsection shall be initiated within 3 months after enactment of this Act [Oct. 16, 1986] and completed as promptly as practicable.

''(4) A report containing the results of the study conducted under this subsection shall be submitted to the Committee on Energy and Commerce of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate while both Houses are in session.

''(5) The report submitted under paragraph (4) shall include a determination (and the basis thereof) by the Commission, based on the study and a public hearing and subject to review under section 313(b) of the Fed-

eral Power Act [16 U.S.C. 825*l*(b)], whether any of the benefits referred to in paragraph (1) should be available for such facilities and whether applications for preliminary permits (or licenses where no preliminary permit has been issued) for such small power production facilities utilizing new dams or diversions should be accepted by the Commission after the moratorium period specified in subsection (e). The report shall include such other administrative and legislative recommendations as the Commission deems appropriate.

''(6) If the study under this subsection has not been completed within 18 months after its initiation, the Commission shall notify the Committees referred to in paragraph (4) of the reasons for the delay and specify a date when it will be completed and a report submitted.''

MORATORIUM ON APPLICATION OF THIS SECTION TO NEW DAMS

Pub. L. 99–495, § 8(e), Oct. 16, 1986, 100 Stat. 1251, provided that: ''Notwithstanding the amendments made by subsection (a) of this section [amending section 824a–3 of this title], in the case of a project for which a license or exemption is issued after the enactment of this Act [Oct. 16, 1986], section 210 of the Public Utility Regulatory Policies Act of 1978 [16 U.S.C. 824a–3] shall not apply during the moratorium period if the project utilizes a new dam or diversion (as defined in section 210(k) of such Act) unless the project is either—

''(1) a project located at a Government dam (as defined in section 3(10) of the Federal Power Act [16 U.S.C. 796(10)]) at which non-Federal hydroelectric development is permissible, or

''(2) a project described in paragraphs (2), (3), or (4) of subsection (b) [set out as a note above].

For purposes of this subsection, the term 'moratorium period' means the period beginning on the date of the enactment of this Act and ending at the expiration of the first full session of Congress after the session during which the report under subsection (d) [set out as a note above] has been submitted to the Congress.''

DEFINITIONS

For definitions of terms used in this section, see section 2602 of this title.

§ 824a–4. Seasonal diversity electricity exchange

(a) Authority

The Secretary may acquire rights-of-way by purchase, including eminent domain, through North Dakota, South Dakota, and Nebraska for transmission facilities for the seasonal diversity exchange of electric power to and from Canada if he determines—

(1) after opportunity for public hearing—

(A) that the exchange is in the public interest and would further the purposes referred to in section 2611(1) and (2) of this title and that the acquisition of such rights-of-way and the construction and operation of such transmission facilities for such purposes is otherwise in the public interest,

(B) that a permit has been issued in accordance with subsection (b) of this section for such construction, operation, maintenance, and connection of the facilities at the border for the transmission of electric energy between the United States and Canada as is necessary for such exchange of electric power, and

(C) that each affected State has approved the portion of the transmission route located in each State in accordance with applicable State law, or if there is no such applicable State law in such State, the Governor has approved such portion; and

(2) after consultation with the Secretary of the Interior and the heads of other affected Federal agencies, that the Secretary of the Interior and the heads of such,[1] other agencies concur in writing in the location of such portion of the transmission facilities as crosses Federal land under the jurisdiction of such Secretary or such other Federal agency, as the case may be.

The Secretary shall provide to any State such cooperation and technical assistance as the State may request and as he determines appropriate in the selection of a transmission route. If the transmission route approved by any State does not appear to be feasible and in the public interest, the Secretary shall encourage such State to review such route and to develop a route that is feasible and in the public interest. Any exercise by the Secretary of the power of eminent domain under this section shall be in accordance with other applicable provisions of Federal law. The Secretary shall provide public notice of his intention to acquire any right-of-way before exercising such power of eminent domain with respect to such right-of-way.

(b) Permit

Notwithstanding any transfer of functions under the first sentence of section 301(b) of the Department of Energy Organization Act [42 U.S.C. 7151(b)], no permit referred to in subsection (a)(1)(B) may be issued unless the Commission has conducted hearings and made the findings required under section 202(e) of the Federal Power Act [16 U.S.C. 824a(e)] and under the applicable execution order respecting the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country. Any finding of the Commission under an applicable executive order referred to in this subsection shall be treated for purposes of judicial review as an order issued under section 202(e) of the Federal Power Act.

(c) Timely acquisition by other means

The Secretary may not acquire any rights-of-day[2] under this section unless he determines that the holder or holders of a permit referred to in subsection (a)(1)(B) of this section are unable to acquire such rights-of-way under State condemnation authority, or after reasonable opportunity for negotiation, without unreasonably delaying construction, taking into consideration the impact of such delay on completion of the facilities in a timely fashion.

(d) Payments by permittees

(1) The property interest acquired by the Secretary under this section (whether by eminent domain or other purchase) shall be transferred by the Secretary to the holder of a permit referred to in subsection (b) of this section if such holder has made payment to the Secretary of the entire costs of the acquisition of such property interest, including administrative costs. The Secretary may accept, and expend, for purposes of such acquisition, amounts from any

[1] So in original. The comma probably should not appear.

[2] So in original. Probably should be ''rights-of-way''.

to section 210 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 824a–1, must also show:

(1) The thermal energy output of the cogeneration facility is used in a productive and beneficial manner; and

(2) The electrical, thermal, chemical and mechanical output of the cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentality for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as state laws applicable to sales of electric energy from a qualifying facility to its host facility.

(3) Fundamental use test. For the purpose of satisfying paragraph (d)(2) of this section, the electrical, thermal, chemical and mechanical output of the cogeneration facility will be considered used fundamentally for industrial, commercial, or institutional purposes, and not intended fundamentally for sale to an electric utility if at least 50 percent of the aggregate of such output, on an annual basis, is used for industrial, commercial, residential or institutional purposes. In addition, applicants for facilities that do not meet this safe harbor standard may present evidence to the Commission that the facilities should nevertheless be certified given state laws applicable to sales of electric energy or unique technological, efficiency, economic, and variable thermal energy requirements.

(4) For purposes of paragraphs (d)(1) and (2) of this section, a new cogeneration facility of 5 MW or smaller will be presumed to satisfy the requirements of those paragraphs.

(5) For purposes of paragraph (d)(1) of this section, where a thermal host existed prior to the development of a new cogeneration facility whose thermal output will supplant the thermal source previously in use by the thermal host, the thermal output of such new cogeneration facility will be presumed to satisfy the requirements of paragraph (d)(1).

[45 FR 17972, Mar. 20, 1980, as amended by Order 478, 52 FR 28467, July 30, 1987; Order 575, 60 FR 4857, Jan. 25, 1995; Order 671, 71 FR 7868, Feb. 15, 2006; Order 732, 75 FR 15966, Mar. 30, 2010; 76 FR 50663, Aug. 16, 2011]

§ 292.207 Procedures for obtaining qualifying status.

(a) *Self-certification.* The qualifying facility status of an existing or a proposed facility that meets the requirements of § 292.203 may be self-certified by the owner or operator of the facility or its representative by properly completing a Form No. 556 and filing that form with the Commission, pursuant to § 131.80 of this chapter, and complying with paragraph (c) of this section.

(b) *Optional procedure*—(1) *Application for Commission certification.* In lieu of the self-certification procedures in paragraph (a) of this section, an owner or operator of an existing or a proposed facility, or its representative, may file with the Commission an application for Commission certification that the facility is a qualifying facility. The application must be accompanied by the fee prescribed by part 381 of this chapter, and the applicant for Commission certification must comply with paragraph (c) of this section.

(2) *General contents of application.* The application must include a properly completed Form No. 556 pursuant to § 131.80 of this chapter.

(3) *Commission action.* (i) Within 90 days of the later of the filing of an application or the filing of a supplement, amendment or other change to the application, the Commission will either: Inform the applicant that the application is deficient; or issue an order granting or denying the application; or toll the time for issuance of an order. Any order denying certification shall identify the specific requirements which were not met. If the Commission does not act within 90 days of the date of the latest filing, the application shall be deemed to have been granted.

(ii) For purposes of paragraph (b) of this section, the date an application is filed is the date by which the Office of the Secretary has received all of the information and the appropriate filing fee necessary to comply with the requirements of this Part.

(c) *Notice requirements*—(1) *General.* An applicant filing a self-certification, self-recertification, application for Commission certification or application for Commission recertification of the qualifying status of its facility must concurrently serve a copy of such

filing on each electric utility with which it expects to interconnect, transmit or sell electric energy to, or purchase supplementary, standby, back-up or maintenance power from, and the State regulatory authority of each state where the facility and each affected electric utility is located. The Commission will publish a notice in the FEDERAL REGISTER for each application for Commission certification and for each self-certification of a cogeneration facility that is subject to the requirements of § 292.205(d).

(2) *Facilities of 500 kW or more.* An electric utility is not required to purchase electric energy from a facility with a net power production capacity of 500 kW or more until 90 days after the facility notifies the facility that it is a qualifying facility or 90 days after the utility meets the notice requirements in paragraph (c)(1) of this section.

(d) *Revocation of qualifying status.* (1)(i) If a qualifying facility fails to conform with any material facts or representations presented by the cogenerator or small power producer in its submittals to the Commission, the notice of self-certification or Commission order certifying the qualifying status of the facility may no longer be relied upon. At that point, if the facility continues to conform to the Commission's qualifying criteria under this part, the cogenerator or small power producer may file either a notice of self-recertification of qualifying status pursuant to the requirements of paragraph (a) of this section, or an application for Commission recertification pursuant to the requirements of paragraph (b) of this section, as appropriate.

(ii) The Commission may, on its own motion or on the motion of any person, revoke the qualifying status of a facility that has been certified under paragraph (b) of this section, if the facility fails to conform to any of the Commission's qualifying facility criteria under this part.

(iii) The Commission may, on its own motion or on the motion of any person, revoke the qualifying status of a self-certified or self-recertified qualifying facility if it finds that the self-certified or self-recertified qualifying facility does not meet the applicable requirements for qualifying facilities.

(2) Prior to undertaking any substantial alteration or modification of a qualifying facility which has been certified under paragraph (b) of this section, a small power producer or cogenerator may apply to the Commission for a determination that the proposed alteration or modification will not result in a revocation of qualifying status. This application for Commission recertification of qualifying status should be submitted in accordance with paragraph (b) of this section.

[45 FR 17972, Mar. 20, 1980]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 292.207, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§ 292.208 Special requirements for hydroelectric small power production facilities located at a new dam or diversion.

(a) A hydroelectric small power production facility that impounds or diverts the water of a natural watercourse by means of a new dam or diversion (as that term is defined in § 292.202(p)) is a qualifying facility only if it meets the requirements of:

(1) Paragraph (b) of this section;

(2) Section 292.203(c); and

(3) Part 4 of this chapter.

(b) A hydroelectric small power production described in paragraph (a) is a qualifying facility only if:

(1) The Commission finds, at the time it issues the license or exemption, that the project will not have a substantial adverse effect on the environment (as that term is defined in § 292.202(q)), including recreation and water quality;

(2) The Commission finds, at the time the application for the license or exemption is accepted for filing under § 4.32 of this chapter, that the project is not located on any segment of a natural watercourse which:

(i) Is included, or designated for potential inclusion in, a State or National wild and scenic river system; or

(ii) The State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural or scenic attributes which

exceed the scope of, mitigating substantial adverse effects. If the Commission finds the proposed mitigative measures constitute a material amendment, the application will be considered filed with the Commission on the date on which the applicant filed the proposed mitigative measures, and all other provisions of §4.35(a) of this chapter will apply.

(j) *Final determination on the petition.* The Commission will make a final determination on the petition at the time the Commission issues a license or exemption for the project.

(k) *Presumption.* (1) If, between the Commission's initial and final findings on the AEE petition, the State does not take any action under §292.208(b)(2), the failure to take action can be the basis for a presumption that there is not substantial adverse effect on the environment (as that term is defined in §292.202(q)).

(2) If the presumption in paragraph (k)(1) of this section comes into effect, it:

(i) Is only available for those adverse effects related to the natural, recreational, cultural, or scenic attributes of the environment;

(ii) Can only operate during the time between the Commission's initial and final findings on the AEE petition; and

(iii) Has no affect on the Commission's independent obligation to find that the project will not have a substantial adverse effect on the environment under §292.208(b)(1).

(3) The presumption in paragraph (k)(1) of this section does not take effect if the State, the Commission or an interested person demonstrates that the State has acted to protect the natural watercourse under §292.208(b)(2).

(4) The presumption in paragraph (k)(1) of this section can be rebutted if:

(i) The Commission determines that the project will have a substantial adverse effect on the environment related to the environmental attributes listed in paragraph (k)(2)(i) of this section; or

(ii) Any interested person, including a State, demonstrates that the project will have a substantial adverse effect on the environment related to the environmental attributes listed in paragraph (k)(2)(i) of this section.

[Order 499, 53 FR 27004, July 18, 1988, as amended by Order 499-A, 53 FR 40724, Oct. 18, 1988; Order 699, 72 FR 45325, Aug. 14, 2007]

Subpart C—Arrangements Between Electric Utilities and Qualifying Cogeneration and Small Power Production Facilities Under Section 210 of the Public Utility Regulatory Policies Act of 1978

AUTHORITY: Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601 *et seq.*, Energy Supply and Environmental Coordination Act, 15 U.S.C. 791 *et seq.* Federal Power Act, 16 U.S.C. 792 *et seq.*, Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, E.O. 12009, 42 FR 46267.

SOURCE: Order 69, 45 FR 12234, Feb. 25, 1980, unless otherwise noted.

§292.301 Scope.

(a) *Applicability.* This subpart applies to the regulation of sales and purchases between qualifying facilities and electric utilities.

(b) *Negotiated rates or terms.* Nothing in this subpart:

(1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or

(2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.

§292.302 Availability of electric utility system cost data.

(a) *Applicability.* (1) Except as provided in paragraph (a)(2) of this section, paragraph (b) applies to each electric utility, in any calendar year, if the total sales of electric energy by such utility for purposes other than resale exceeded 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year.

(2) Each utility having total sales of electric energy for purposes other than resale of less than one billion kilowatt-

hours during any calendar year beginning after December 31, 1975, and before the immediately preceding year, shall not be subject to the provisions of this section until June 30, 1982.

(b) *General rule.* To make available data from which avoided costs may be derived, not later than November 1, 1980, June 30, 1982, and not less often than every two years thereafter, each regulated electric utility described in paragraph (a) of this section shall provide to its State regulatory authority, and shall maintain for public inspection, and each nonregulated electric utility described in paragraph (a) of this section shall maintain for public inspection, the following data:

(1) The estimated avoided cost on the electric utility's system, solely with respect to the energy component, for various levels of purchases from qualifying facilities. Such levels of purchases shall be stated in blocks of not more than 100 megawatts for systems with peak demand of 1000 megawatts or more, and in blocks equivalent to not more than 10 percent of the system peak demand for systems of less than 1000 megawatts. The avoided costs shall be stated on a cents per kilowatthour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next 5 years;

(2) The electric utility's plan for the addition of capacity by amount and type, for purchases of firm energy and capacity, and for capacity retirements for each year during the succeeding 10 years; and

(3) The estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour. These costs shall be expressed in terms of individual generating units and of individual planned firm purchases.

(c) *Special rule for small electric utilities.* (1) Each electric utility (other than any electric utility to which paragraph (b) of this section applies) shall, upon request:

(i) Provide comparable data to that required under paragraph (b) of this section to enable qualifying facilities to estimate the electric utility's avoided costs for periods described in paragraph (b) of this section; or

(ii) With regard to an electric utility which is legally obligated to obtain all its requirements for electric energy and capacity from another electric utility, provide the data of its supplying utility and the rates at which it currently purchases such energy and capacity.

(2) If any such electric utility fails to provide such information on request, the qualifying facility may apply to the State regulatory authority (which has ratemaking authority over the electric utility) or the Commission for an order requiring that the information be provided.

(d) *Substitution of alternative method.* (1) After public notice in the area served by the electric utility, and after opportunity for public comment, any State regulatory authority may require (with respect to any electric utility over which it has ratemaking authority), or any non-regulated electric utility may provide, data different than those which are otherwise required by this section if it determines that avoided costs can be derived from such data.

(2) Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated utility which requires such different data shall notify the Commission within 30 days of making such determination.

(e) *State Review.* (1) Any data submitted by an electric utility under this section shall be subject to review by the State regulatory authority which has ratemaking authority over such electric utility.

(2) In any such review, the electric utility has the burden of coming forward with justification for its data.

[45 FR 12234, Feb. 25, 1980; 45 FR 24126, Apr. 9, 1980]

§ 292.303 Electric utility obligations under this subpart.

(a) *Obligation to purchase from qualifying facilities.* Each electric utility shall purchase, in accordance with § 292.304, unless exempted by § 292.309 and § 292.310, any energy and capacity

which is made available from a qualifying facility:

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

(b) *Obligation to sell to qualifying facilities.* Each electric utility shall sell to any qualifying facility, in accordance with § 292.305, unless exempted by § 292.312, energy and capacity requested by the qualifying facility.

(c) *Obligation to interconnect.* (1) Subject to paragraph (c)(2) of this section, any electric utility shall make such interconnection with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart. The obligation to pay for any interconnection costs shall be determined in accordance with § 292.306.

(2) No electric utility is required to interconnect with any qualifying facility if, solely by reason of purchases or sales over the interconnection, the electric utility would become subject to regulation as a public utility under part II of the Federal Power Act.

(d) *Transmission to other electric utilities.* If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to § 292.304(e)(4) and shall not include any charges for transmission.

(e) *Parallel operation.* Each electric utility shall offer to operate in parallel with a qualifying facility, provided that the qualifying facility complies with any applicable standards established in accordance with § 292.308.

[Order 688, 71 FR 64372, Nov. 1, 2006; 71 FR 75662, Dec. 18, 2006]

§ 292.304 Rates for purchases.

(a) *Rates for purchases.* (1) Rates for purchases shall:

(i) Be just and reasonable to the electric consumer of the electric utility and in the public interest; and

(ii) Not discriminate against qualifying cogeneration and small power production facilities.

(2) Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.

(b) *Relationship to avoided costs.* (1) For purposes of this paragraph, ''new capacity'' means any purchase from capacity of a qualifying facility, construction of which was commenced on or after November 9, 1978.

(2) Subject to paragraph (b)(3) of this section, a rate for purchases satisfies the requirements of paragraph (a) of this section if the rate equals the avoided costs determined after consideration of the factors set forth in paragraph (e) of this section

(3) A rate for purchases (other than from new capacity) may be less than the avoided cost if the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or the nonregulated electric utility determines that a lower rate is consistent with paragraph (a) of this section, and is sufficient to encourage cogeneration and small power production.

(4) Rates for purchases from new capacity shall be in accordance with paragraph (b)(2) of this section, regardless of whether the electric utility making such purchases is simultaneously making sales to the qualifying facility.

(5) In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.

(c) *Standard rates for purchases.* (1) There shall be put into effect (with respect to each electric utility) standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less.

(2) There may be put into effect standard rates for purchases from qualifying facilities with a design capacity of more than 100 kilowatts.

SUBCHAPTER S—STANDARDS OF CONDUCT FOR TRANSMISSION PROVIDERS

PART 358—STANDARDS OF CONDUCT

Sec.
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AUTHORITY: 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

SOURCE: 73 FR 63829, Oct. 27, 2008, unless otherwise noted.

§ 358.1 Applicability.

(a) This part applies to any interstate natural gas pipeline that transports gas for others pursuant to subparts B or G of part 284 of this chapter and conducts transmission transactions with an affiliate that engages in marketing functions.

(b) This part applies to any public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce and conducts transmission transactions with an affiliate that engages in marketing functions.

(c) This part does not apply to a public utility transmission provider that is a Commission-approved Independent System Operator (ISO) or Regional Transmission Organization (RTO). If a public utility transmission owner participates in a Commission-approved ISO or RTO and does not operate or control its transmission system and has no access to transmission function information, it may request a waiver from this part.

(d) A transmission provider may file a request for a waiver from all or some of the requirements of this part for good cause.

§ 358.2 General principles.

(a) As more fully described and implemented in subsequent sections of this part, a transmission provider must treat all transmission customers, affiliated and non-affiliated, on a not unduly discriminatory basis, and must not make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage with respect to any transportation of natural gas or transmission of electric energy in interstate commerce, or with respect to the wholesale sale of natural gas or of electric energy in interstate commerce.

(b) As more fully described and implemented in subsequent sections of this part, a transmission provider's transmission function employees must function independently from its marketing function employees, except as permitted in this part or otherwise permitted by Commission order.

(c) As more fully described and implemented in subsequent sections of this part, a transmission provider and its employees, contractors, consultants and agents are prohibited from disclosing, or using a conduit to disclose, non-public transmission function information to the transmission provider's marketing function employees.

(d) As more fully described and implemented in subsequent sections of this part, a transmission provider must provide equal access to non-public transmission function information disclosed to marketing function employees to all its transmission customers, affiliated and non-affiliated, except as permitted in this part or otherwise permitted by Commission order.

[74 FR 54482, Oct. 22, 2009]

§ 358.3 Definitions.

(a) *Affiliate* of a specified entity means:

(1) Another person that controls, is controlled by or is under common control with, the specified entity. An affiliate includes a division of the specified entity that operates as a functional unit.

(2) For any exempt wholesale generator (as defined under § 366.1 of this

(m) *Waiver* means the determination by a transmission provider, if authorized by its tariff, to waive any provisions of its tariff for a given entity.

[73 FR 63829, Oct. 27, 2008, as amended at 74 FR 54482, Oct. 22, 2009]

§ 358.4 Non-discrimination requirements.

(a) A transmission provider must strictly enforce all tariff provisions relating to the sale or purchase of open access transmission service, if the tariff provisions do not permit the use of discretion.

(b) A transmission provider must apply all tariff provisions relating to the sale or purchase of open access transmission service in a fair and impartial manner that treats all transmission customers in a not unduly discriminatory manner, if the tariff provisions permit the use of discretion.

(c) A transmission provider may not, through its tariffs or otherwise, give undue preference to any person in matters relating to the sale or purchase of transmission service (including, but not limited to, issues of price, curtailments, scheduling, priority, ancillary services, or balancing).

(d) A transmission provider must process all similar requests for transmission in the same manner and within the same period of time.

§ 358.5 Independent functioning rule.

(a) *General rule.* Except as permitted in this part or otherwise permitted by Commission order, a transmission provider's transmission function employees must function independently of its marketing function employees.

(b) *Separation of functions.* (1) A transmission provider is prohibited from permitting its marketing function employees to:

(i) Conduct transmission functions; or

(ii) Have access to the system control center or similar facilities used for transmission operations that differs in any way from the access available to other transmission customers.

(2) A transmission provider is prohibited from permitting its transmission function employees to conduct marketing functions.

§ 358.6 No conduit rule.

(a) A transmission provider is prohibited from using anyone as a conduit for the disclosure of non-public transmission function information to its marketing function employees.

(b) An employee, contractor, consultant or agent of a transmission provider, and an employee, contractor, consultant or agent of an affiliate of a transmission provider that is engaged in marketing functions, is prohibited from disclosing non-public transmission function information to any of the transmission provider's marketing function employees.

§ 358.7 Transparency rule.

(a) *Contemporaneous disclosure.* (1) If a transmission provider discloses non-public transmission function information, other than information identified in paragraph (a)(2) of this section, in a manner contrary to the requirements of § 358.6, the transmission provider must immediately post the information that was disclosed on its Internet Web site.

(2) If a transmission provider discloses, in a manner contrary to the requirements of § 358.6, non-public transmission customer information, critical energy infrastructure information (CEII) as defined in § 388.113(c)(1) of this chapter or any successor provision, or any other information that the Commission by law has determined is to be subject to limited dissemination, the transmission provider must immediately post notice on its Web site that the information was disclosed.

(b) *Exclusion for specific transaction information.* A transmission provider's transmission function employee may discuss with its marketing function employee a specific request for transmission service submitted by the marketing function employee. The transmission provider is not required to contemporaneously disclose information otherwise covered by § 358.6 if the information relates solely to a marketing function employee's specific request for transmission service.

(c) *Voluntary consent provision.* A transmission customer may voluntarily consent, in writing, to allow the transmission provider to disclose the

(b) *Dates for filing interventions and protests.* A notice given under this section will establish the dates for filing interventions and protests. Only those filings made within the time prescribed in the notice will be considered timely.

§ 385.211 Protests other than under Rule 208 (Rule 211).

(a) *General rule.* (1) Any person may file a protest to object to any application, complaint, petition, order to show cause, notice of tariff or rate examination, or tariff or rate filing.

(2) The filing of a protest does not make the protestant a party to the proceeding. The protestant must intervene under Rule 214 to become a party.

(3) Subject to paragraph (a)(4) of this section, the Commission will consider protests in determining further appropriate action. Protests will be placed in the public file associated with the proceeding.

(4) If a proceeding is set for hearing under subpart E of this part, the protest is not part of the record upon which the decision is made.

(b) *Service.* (1) Any protest directed against a person in a proceeding must be served by the protestant on the person against whom the protest is directed.

(2) The Secretary may waive any procedural requirement of this subpart applicable to protests. If the requirement of service under this paragraph is waived, the Secretary will place the protest in the public file and may send a copy thereof to any person against whom the protest is directed.

§ 385.212 Motions (Rule 212).

(a) *General rule.* A motion may be filed:

(1) At any time, unless otherwise provided;

(2) By a participant or a person who has filed a timely motion to intervene which has not been denied;

(3) In any proceeding except an informal rulemaking proceeding.

(b) *Written and oral motions.* Any motion must be filed in writing, except that the presiding officer may permit an oral motion to be made on the record during a hearing or conference.

(c) *Contents.* A motion must contain a clear and concise statement of:

(1) The facts and law which support the motion; and

(2) The specific relief or ruling requested.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 225–A, 47 FR 35956, Aug. 18, 1982; Order 376, 49 FR 21705, May 23, 1984]

§ 385.213 Answers (Rule 213).

(a) *Required or permitted.* (1) Any respondent to a complaint or order to show cause must make an answer, unless the Commission orders otherwise.

(2) An answer may not be made to a protest, an answer, a motion for oral argument, or a request for rehearing, unless otherwise ordered by the decisional authority. A presiding officer may prohibit an answer to a motion for interlocutory appeal. If an answer is not otherwise permitted under this paragraph, no responsive pleading may be made.

(3) An answer may be made to any pleading, if not prohibited under paragraph (a)(2) of this section.

(4) An answer to a notice of tariff or rate examination must be made in accordance with the provisions of such notice.

(b) *Written or oral answers.* Any answer must be in writing, except that the presiding officer may permit an oral answer to a motion made on the record during a hearing conducted under subpart E or during a conference.

(c) *Contents.* (1) An answer must contain a clear and concise statement of:

(i) Any disputed factual allegations; and

(ii) Any law upon which the answer relies.

(2) When an answer is made in response to a complaint, an order to show cause, or an amendment to such pleading, the answerer must, to the extent practicable:

(i) Admit or deny, specifically and in detail, each material allegation of the pleading answered; and

(ii) Set forth every defense relied on.

(3) General denials of facts referred to in any order to show cause, unsupported by the specific facts upon which the respondent relies, do not comply with paragraph (a)(1) of this section and may be a basis for summary disposition under Rule 217, unless otherwise required by statute.

(4) An answer to a complaint must include documents that support the facts in the answer in possession of, or otherwise attainable by, the respondent, including, but not limited to, contracts and affidavits. An answer is also required to describe the formal or consensual process it proposes for resolving the complaint.

(5) When submitting with its answer any request for privileged treatment of documents and information in accordance with this chapter, a respondent must provide a public version of its answer without the information for which privileged treatment is claimed and its proposed form of protective agreement to each entity that has either been served pursuant to § 385.206(c) or whose name is on the official service list for the proceeding compiled by the Secretary.

(d) *Time limitations.* (1) Any answer to a motion or to an amendment to a motion must be made within 15 days after the motion or amendment is filed, except as described below or unless otherwise ordered.

(i) If a motion requests an extension of time or a shortened time period for action, then answers to the motion to extend or shorten the time period shall be made within 5 days after the motion is filed, unless otherwise ordered.

(ii) [Reserved]

(2) Any answer to a pleading or amendment to a pleading, other than a complaint or an answer to a motion under paragraph (d)(1) of this section, must be made:

(i) If notice of the pleading or amendment is published in the FEDERAL REGISTER, not later than 30 days after such publication, unless otherwise ordered; or

(ii) If notice of the pleading or amendment is not published in the FEDERAL REGISTER, not later than 30 days after the filing of the pleading or amendment, unless otherwise ordered.

(e) *Failure to answer.* (1) Any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted.

(2) Failure to answer an order to show cause will be treated as a general denial to which paragraph (c)(3) of this section applies.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 602, 64 FR 17099, Apr. 8, 1999; Order 602–A, 64 FR 43608, Aug. 11, 1999; Order 769, 77 FR 65476, Oct. 29, 2012]

§ 385.214 Intervention (Rule 214).

(a) *Filing.* (1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(2) Any State Commission, the Advisory Council on Historic Preservation, the U.S. Departments of Agriculture, Commerce, and the Interior, any state fish and wildlife, water quality certification, or water rights agency; or Indian tribe with authority to issue a water quality certification is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, each entity identified in this paragraph must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section, must file a motion to intervene.

(4) No person, including entities listed in paragraphs (a)(1) and (a)(2) of this section, may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

(b) *Contents of motion.* (1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.

(2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:

(i) The movant has a right to participate which is expressly conferred by

Portland General Electric Company **Docket No.: EL15-6**
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D.C. Cir. Nos 15-1237 & 15-1275 (consolidated)

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 9th day of June 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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