ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 15-1450

SEMINOLE ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Commission
Washington, D.C. 20426

June 13, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties:

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

B. Rulings Under Review:

1. Order On Complaint and Proposed Tariff Revisions, *Seminole Electric Cooperative, Inc. v. Florida Power & Light Co., Florida Power & Light Co.*, FERC Docket Nos. EL12-53-000 and ER12-1576-000, 139 FERC ¶ 61,254 (June 28, 2012) ("Initial Order"), R.12, JA 213; and

2. Order On Rehearing, *Seminole Electric Cooperative, Inc. v. Florida Power & Light Co.*, FERC Docket No. ER12-53-001, 153 FERC ¶ 61,037 (Oct. 15, 2015) ("Rehearing Order"), R.23, JA 294.

C. Related Cases:

The orders under review in this proceeding have not previously been before this Court or any other court.

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

June 13, 2016

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GLOSSARY

Bonneville	Bonneville Power Administration
Br.	Opening Brief of Petitioner Seminole Electric Cooperative, Inc.
Commission or FERC	Federal Energy Regulatory Commission
Florida Power	Intervenor Florida Power & Light Company
Initial Order	Order On Complaint and Proposed Tariff Revisions, *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.; Fla. Power & Light Co.*, FERC Docket Nos. EL12-53-000 and ER12-1576-000, 139 FERC ¶ 61,254 (June 28, 2012), R.12, JA 213
JA	Joint Appendix
Order No. 890	*Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009)
P	Denotes a paragraph number in a Commission order
R.	Indicates an item in the certified index to the record
Rehearing Order	Order On Rehearing, *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, FERC Docket No. ER12-53-001, 153 FERC ¶ 61,037 (Oct. 15, 2015), R.23, JA 294
Seminole	Petitioner Seminole Electric Cooperative, Inc.

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

The Federal Energy Regulatory Commission granted in part and denied in part a complaint filed by Seminole Electric Cooperative, Inc. ("Seminole") against Florida Power & Light Company ("Florida Power"), with respect to energy imbalance service taken pursuant to Florida Power's tariff. Florida Power provides energy imbalance service whenever Seminole consumes more or less electricity than that scheduled for delivery to Seminole's customers. This case concerns Florida Power's bills to Seminole for such service.

The issues presented on appeal are:

1. Severity of tariff violation: Whether the Commission's partial denial of Seminole's complaint was appropriate, based on the agency's reasonable construction of ambiguous tariff language, and where nothing in the agency rulemaking adopting the tariff language offers any indication to the contrary.

2. Refunds for tariff violation: With respect to the partial grant of Seminole's complaint, whether the Commission properly limited Florida Power's refund liability to the period 24 months prior to Seminole first notifying Florida Power of the issue, based on both a refund limitation provision in the parties' transmission contract and the Commission's exercise of equitable discretion.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

INTRODUCTION

Seminole is an electric transmission customer of Florida Power. Seminole schedules wholesale electricity to be delivered over the Florida Power transmission system to Seminole's ten, non-profit, rural electric cooperative customers located in Florida Power's service area. Seminole takes transmission service from Florida Power pursuant to a utility-specific transmission contract, but also pursuant to standard terms and conditions of a generally-applicable tariff. These tariff provisions are applicable to all of Florida Power's transmission customers.

Seminole filed a complaint with the Commission alleging that Florida Power violated its tariff. The specific tariff provision, Schedule 4 Energy Imbalance Service, applies when Seminole's wholesale electricity customers use more or less energy than Seminole scheduled to be delivered to them. When more energy is taken from the transmission system than was scheduled to be delivered for a given hour, or when less energy is taken from the transmission system than was scheduled to be delivered for a given hour, this creates an imbalance on the system, and Florida Power must either make up the difference or absorb the excess. The cost for Florida Power providing this "energy imbalance service," as it is called under the tariff, is set forth in Schedule 4 of the tariff.

Schedule 4 of Florida Power's tariff includes three different tier thresholds for imbalance service – the greater the actual electricity usage deviates from the scheduled usage, the more expensive the charge. Seminole's complaint urged that Florida Power was violating its tariff in two respects: first, by misapplying the three tier thresholds (i.e. by using the wrong measure to determine which threshold applies); and second, by applying the highest threshold rate to the entire imbalance amount rather than apportioning the imbalance and applying the different threshold rates for each portion of the imbalance that falls within each tier.

The Commission found that the tariff language was ambiguous on both counts and looked to the Commission rulemaking, Order No. 890, where the

specific tariff provision was adopted to discern its meaning. On one issue, the tier threshold issue, the Commission granted Seminole's complaint because the context of Order No. 890 demonstrated that Florida Power should have been implementing the tariff as Seminole advocated. On the other issue, the apportionment issue, the Commission denied Seminole's complaint because it could not discern anything from Order No. 890, or other Commission precedent, showing that the method Florida Power had been using was inconsistent with the tariff provision.

While asserting that it had not violated its tariff in any respect, Florida Power filed tariff changes to implement both of Seminole's preferences (on tier thresholds and apportionment) for calculating energy imbalance charges. The Commission accepted the revisions to apply prospectively. Therefore, for the part of the complaint that the Commission granted (the tier threshold issue), the Commission ordered Florida Power to pay refunds for the period from August 2009 through to the effective date of the tariff revisions. Not satisfied with this relief, Seminole appealed.

STATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Power Act

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

sales at wholesale by public utilities in interstate commerce. 16 U.S.C. § 824(b); *see generally New York v. FERC*, 535 U.S. 1 (2002). Under section 205 of the Act, 16 U.S.C. § 824d(a)-(b), the Commission must ensure that jurisdictional rates and services are "just and reasonable." Section 206 of the Act, 16 U.S.C. § 824e, authorizes FERC to investigate, on its own motion or upon complaint, existing rates and terms of service. The entity instituting the section 206 investigation – either FERC or a complaining party – bears the burden to show that the existing rate is unjust and unreasonable. 16 U.S.C. § 824e(b); *see also Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009). If the Commission finds that an existing rate is "unjust, unreasonable, unduly discriminatory, or preferential," it must determine and set the just and reasonable rate. 16 U.S.C. § 824e(a); *see generally Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011) (discussing Federal Power Act § 206 burden).

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

§ 824e(b). However, unlike challenges to change an existing rate found unlawful which are resolved prospectively, the Commission has allowed refunds for violations of the filed rate back to the start of the violation. *See Towns of Concord v. FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992) (explaining that the Commission has broad remedial discretion under section 309 of the Federal Power Act, 16 U.S.C. § 825h, to order refunds for tariff violations); *see also Xcel Energy Servs., Inc. v. FERC*, 815 F.3d 947, 955-56 (D.C. Cir. 2016) (Commission has authority under section 309 of the Federal Power Act to remedy its own errors).

B. Commission Transmission Service Reforms

"Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities and selling these services as a 'bundled' package to wholesale and retail customers in a limited geographical service area." *Pub. Util. Dist. No. 1 of Snohomish Cnty. v. FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001). This began to change in 1996 when the Commission adopted Order No. 888, which required the unbundling of services offered by public utilities subject to FERC's jurisdiction.[1] To implement this directive, public utilities were required to offer service to all customers (including their own affiliates) on an equal basis

[1] *See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg.

through open access tariffs that offered separate rates for wholesale generation, transmission, and ancillary services. *See New York*, 535 U.S. at 11.

The Commission concluded that an acceptable Open Access Transmission Tariff must include six ancillary services, one of which is energy imbalance service, and developed a standard or "pro forma" model for that tariff language. Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,703. The Commission found that energy imbalance service should have an energy deviation band appropriate for load variations and a price for exceeding the deviation band that is appropriate for excessive load variations. The Commission established an hourly deviation band of +/- 1.5 percent (with a minimum of 2 megawatts) for energy imbalance, meaning actual usage deviations of greater than 1.5 percent or 2 megawatts of the scheduled load would incur an energy imbalance fee or charge. For imbalances less than 1.5 percent (2 megawatt minimum), the transmission customer could adjust energy deliveries to eliminate the imbalance within 30 days. Imbalances not offset within the adjustment period would also incur a charge. The Commission explained that that deviation band promoted good scheduling practices by transmission customers, so that the implementation of one scheduled transaction does not overly burden another. Order No. 888-A, FERC Stats. & Regs. ¶ 31,048

12,274, *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

at 30,232 (adopting a Schedule 4 energy imbalance service to the Commission's standard tariff or, as referred to by the Commission, its "pro forma" tariff).

Almost 10 years later, in Order No. 890, the Commission reevaluated its standard Schedule 4 energy imbalance service and "whether the level of the charges provides the proper incentive to keep schedules accurate without being excessive." *Preventing Undue Discrimination and Preference in Transmission Services*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,603 at P 238 (2006); *see also* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 646. The Commission proposed to modify its standard tariff Schedule 4 based on three principles: (1) the imbalance charges must be based on incremental cost or some multiple thereof; (2) the charges must provide an incentive for accurate scheduling, such as by increasing the percentage of the adder above (and below) incremental cost as the deviations become larger; and (3) the provisions must account for the special circumstances presented by intermittent generators (e.g. wind and solar) and their limited ability to precisely forecast or control generation levels, such as by waiving the more punitive adders associated with higher deviations. Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,603 at P 239; *see also* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 635.

The Commission observed in the Notice of Proposed Rulemaking that one transmission provider, the Bonneville Power Administration ("Bonneville"), "has

adopted an energy imbalance pricing approach based on a three-tiered deviation band that appears workable" for energy imbalance service. Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,603 at P 240; *see also* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 636. The Commission asked parties to the rulemaking whether Bonneville's approach provides sufficient incentive to ensure that transmission systems can be operated in a reliable manner and ensure that customers are treated in a just and reasonable manner. *See* Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,603 at P 238.

After receiving comments, the Commission adopted the tiered approach in Order No. 890, noting that "a number of entities generally support a tiered approach to imbalance penalties that progressively increases the penalties for imbalances, as implemented by Bonneville." Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 638. "In order to increase consistency among transmission providers in the application of imbalance charges, and to ensure that the level of charges provides appropriate incentives to keep schedules accurate without being excessive, the Commission adopts in the pro forma [tariff] imbalance provisions similar to those implemented by Bonneville." *Id*. P 663. The Commission affirmed this approach on rehearing in Order No. 890-A. Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 270.

II. THE COMMISSION PROCEEDINGS AND ORDERS

On March 30, 2012, Seminole filed a complaint pursuant to sections 206, 306 and 309 of the Federal Power Act,[2] 16 U.S.C. §§ 824e, 825e, 825h, and Rule 206 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206, against Florida Power, charging that Florida Power had violated the filed rate by misapplying Schedule 4 (Energy Imbalance Service) of its tariff. *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 136 FERC ¶ 61,254, P 1 (2012) ("Initial Order"), R.12, JA 213; *see also* Seminole March 30, 2012 Complaint, Docket No. EL12-53-000 ("Complaint") at 1, 4, R.1, JA 9, 12. Seminole argued that Florida Power was misapplying its tariff in two respects: (1) by determining which threshold applies to a given imbalance by using the "lesser of" either the megawatt amount or the percentage of deviation; and (2) by applying the highest tier rate to the entire imbalance amount rather than apportioning the imbalance and applying the tier rates to the portion of the deviation that applies for each threshold tier. Complaint at 4-5, JA 12-13.

Seminole stated that from August 2007 through January 2012, Florida Power overcharged Seminole 4.4 million dollars associated with these tariff violations ($3,166,103 associated with the tier threshold issue, and $1,265,995 from the

[2] Federal Power Act sections 306 and 309 confer broad authority to the Commission to order refunds for violations of a filed tariff rate. *See Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 967 (D.C. Cir. 2003) (discussing relevant statutory provisions).

apportionment issue). Initial Order P 22, JA 221. On April 19, 2012, Florida Power submitted an answer to the complaint. It also filed that same day, pursuant to section 205 of the Federal Power Act, 16 U.S.C. § 824d, proposed revisions to its tariff to reflect the method for calculating imbalance charges in the manner Seminole requested. *See id*. P 10, JA 217; *see also id*. P 51, JA 233-34 (accepting tariff revisions).

A. The Tier Threshold Issue

Schedule 4 of the Florida Power tariff is identical to Schedule 4 of the Commission's standard Open Access Transmission Tariff. Initial Order P 15, JA 218. Schedule 4, JA 44-45, provides a three-tiered penalty structure with percentage and/or megawatt thresholds for deviations, as follows:

> Charges for energy imbalance shall be based on the deviation bands as follows: (i) deviations within +/- 1.5 percent (with a minimum of 2 MW) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the Transmission Customer's scheduled transaction(s) will be netted on a monthly basis and settled financially, at the end of the month, at 100 percent of incremental or decremental cost; (ii) deviations greater than +/- 1.5 percent up to 7.5 percent (or greater than 2 MW up to 10 MW) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the Transmission Customer's scheduled transaction(s) will be settled financially, at the end of each month, 110 percent of the incremental cost or 90 percent of decremental cost; and (iii) deviations greater than +/- 7.5 percent (or 10 MW) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the Transmission Customer's scheduled transaction(s) will be

> settled financially, at the end of each month, at 125 percent of incremental cost or 75 percent of decremental cost.[3]

Seminole argued that Florida Power violated Schedule 4 by incorrectly reading the tier thresholds by using a "lesser of" approach – i.e., the tier threshold was satisfied if either the percentage deviation or megawatt amount, whichever is less, was satisfied. For example, if the imbalance amount is 14 megawatts, because the megawatt amount exceeds 10 megawatts, Florida Power applied the highest tier charge even if that imbalance only represented a 2.5 percent deviation from the scheduled amount. *See* Florida Power April 19, 2012 Answer, Docket No. EL12-53-000 ("Florida Power Answer"), at 7, R.4, JA 149; *see also* Initial Order P 16, JA 219. Instead, Seminole argued that Florida Power was required to use the "greater of" either the deviation percentage or megawatt amount from the hourly schedule in order to determine which tier applies. *See* Initial Order P 16, JA 219.

Seminole based its interpretation on its claim that the Commission expressly adopted the multiple tiers approach to calculating imbalance penalties used by Bonneville. *See* Initial Order P 17, JA 219. Seminole also argued that language in the preamble of Order No. 890 described the pro forma Schedule 4 tariff language

[3] Incremental and decremental costs are defined to capture the cost to the transmission provider of providing energy imbalance service. *See* Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,603 at P 244 (seeking comment on how to define incremental or decremental costs).

as applying a "whichever is larger" approach to applying the tier thresholds. *See* Initial Order P 17, JA 219-20 (citing Complaint at 3 and n.2, JA 11, 12 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 664)).

Florida Power answered that the plain language of Schedule 4 allows it to use either the percentage or megawatt amount, and that Seminole's interpretation requires substituting the word "and" for the word "or." *See* Initial Order P 24, JA 222. Florida Power argued that, under Seminole's interpretation, the imbalance penalty would not be triggered unless an imbalance (deviation from scheduled electricity) exceeded both the relative threshold and the nominal threshold. *Id*. (citing Florida Power Answer at 4, JA 146). Florida Power noted that the language adopted by the Commission in Order No. 890 is different than Bonneville's tariff language in that it does not include the phrase "whichever is larger." *See* Initial Order P 25, JA 222. Further, Florida Power argued that the plain language of the tariff should govern over the preamble of the promulgating order. *Id*. (citing Florida Power Answer at 4, JA 146 (quoting *Entergy Servs., Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004)).

The Commission granted Seminole's complaint with respect to the tier thresholds. Initial Order P 30, JA 224. The Commission found that the tariff is ambiguous, because it was susceptible to different constructions or interpretations. *Id*. P 31, JA 224. The Commission reasoned that "[b]ecause it is not clear whether

the greater of or the lesser of the percent or [megawatt] is the threshold for the deviation band, we turn to the Order No. 890 and Order No. 890-A preambles for further guidance." *Id*. P 32, JA 224-25. Because the preambles indicated the Commission's intent to adopt Bonneville's tiered approach, including the graduated percent or megawatt thresholds, "whichever is larger," the Commission granted the complaint with respect to tier thresholds. *Id*.

Having granted this aspect of the complaint, the Commission determined the appropriate refund period. *See* Initial Order P 35, JA 226. Seminole argued that a violation of the filed rate doctrine required Florida Power to refund, with interest, any overcharges back to the date they began, or October 2007. *Id*. P 36, JA 227. Florida Power argued that Section 12.0 of its transmission agreement with Seminole demonstrated the parties' intent to impose reasonable time limitations on billing challenges and that Seminole should have known how each imbalance charge was calculated by inspecting its bills. *Id*. PP 37-38, JA 227-28. Seminole responded that Section 12.0 does not apply to tariff violations, but only challenges to bills "rendered in accordance with" Florida Power's tariff. *Id*. P 36, JA 227. Seminole cited Commission precedent distinguishing billing limitation provisions that limit challenges to the mathematical accuracy of bills and those that preclude claims of tariff violations. *Id*.

The Commission found that Section 12.0 of the Florida Power-Seminole transmission agreement applies and limited refunds to the period beginning October 20, 2009, the date 24 months prior to the date that Seminole first sent Florida Power a letter protesting imbalance charges. *Id*. PP 40-44, JA 229-232; *see also Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 153 FERC ¶ 61,037, PP 24-28 (2015) ("Rehearing Order"), R.23, JA 303-04. Moreover, the Commission noted that even if Section 12.0 did not limit refunds for violations of the filed rate, the Commission would nevertheless decline to order two additional years of refunds (back to 2007), because the information showing how Florida Power calculated imbalance charges was discernible from the monthly invoices that Seminole received. Initial Order P 45, JA 231.

B. The Apportionment Issue

The second of Seminole's claims is that the plain language of Schedule 4 required Florida Power to apportion deviations within each tier in each hour for the amount specified for imbalance within that tier. *See* Initial Order PP 18-19, JA 220-21. For example, if the deviation in one hour was 11 megawatts, Florida Power would apply the third tier penalty to the entire amount, as opposed to waiving a penalty for the first 2 megawatts, applying the middle or "second" tier penalty to the 2-10 megawatt amount, and applying the third or highest penalty to only 1 megawatt. *See* Florida Power Answer at 7, JA 149; *see also* Br. at 6

(drawing analogy to federal income tax scheme). Seminole based its argument on the plain language in Schedule 4, its assertion that Schedule 4 was based on Bonneville's tariff, which uses the apportionment approach, and that the Commission accepted a tariff filed by another utility, Louisville Gas & Electric Co., which uses the apportionment method, finding it "consistent" with the standard pro forma tariff. *See* Initial Order PP 17-19, JA 219-221.

Florida Power responded that the Commission, in adopting its standard pro forma tariff language, did not include the specific language from the Bonneville tariff provision requiring apportionment of an imbalance among multiple tiers. Initial Order P 26, JA 223 (citing Florida Power Answer at 5, JA 147). Florida Power argued that Schedule 4 and Order No. 890 both contemplate a single imbalance charge for exceeding a given threshold – not multiple charges based on multiple percentages. *Id*. (citing Florida Power Answer at 6, JA 148). Florida Power also argued that the Commission's decision to accept Louisville Gas & Electric's tariff changes to implement the Bonneville apportionment approach does not support Seminole's position because, if the Schedule 4 pro forma tariff language already contemplated apportionment, Louisville Gas & Electric would not have needed to make any changes from the pro forma tariff. *Id*. P 27, JA 223. Florida Power also agreed to treat imbalances in the manner Seminole advocates (apportionment approach) on a prospective basis. *Id*. P 28, JA 223.

The Commission denied Seminole's complaint with respect to apportionment. *See id*. PP 33-34, JA 225-26; *see also* Rehearing Order PP 17-20, JA 300-01 (denying rehearing). The Commission held that Schedule 4 does not specify a single manner of apportionment, nor did Order No. 890 address that issue. Initial Order PP 33-34, JA 225-26; Rehearing Order P 17, JA 300. The Commission noted that Schedule 4 does not include the precise apportionment language used in the Bonneville tariff, which provides that the tier thresholds will apply to the "portion of the deviation" within each band. *See* Initial Order P 33, JA 225-26 (quoting Complaint at Att. 2, Bonneville Tariff 2006, Schedule II.D.1.b.-c., JA 140-41). Because the Commission found that both Schedule 4 and Order No. 890 are silent with respect to apportionment, the Commission found "no guidance regarding what the Commission intended regarding apportionment." *Id*. P 34, JA 226. Consequently, the Commission concluded that Florida Power's reading of Schedule 4 is not unreasonable, and that Florida Power did not violate Schedule 4 by levying imbalance charges on a single imbalance in the highest applicable tier. *Id.*

SUMMARY OF ARGUMENT

The Commission was asked to determine whether Florida Power was violating its tariff and, if so, whether a contract provision limiting refunds to Seminole would apply to the tariff violation in question. The Commission's

determinations on each issue are well-reasoned and produce an equitable result for both parties.

As to apportionment, Seminole asserts – in order to avoid a more deferential standard of review – that the tariff provision is clear and could only be interpreted the precise way it advances. But Seminole cannot point to any clear indication from the Commission, in the rulemaking developing the tariff language or any subsequent precedent, to show that the Commission shared Seminole's view. Vague references in the rulemaking to Bonneville's tariff or a Commission order accepting Louisville Gas & Electric's tariff as "consistent with" the Commission's pro forma tariff – the same as Florida Power's tariff – do not rise to the level of a definitive interpretation. Absent a clear indication that the tariff language prohibited Florida Power's method for calculating imbalance penalties, the Commission properly dismissed Seminole's complaint on that issue.

The Commission granted Seminole's complaint in one significant respect. Although the tariff was not clear, the Commission found enough support in its rulemaking to show that Florida Power was misapplying the tier thresholds applicable to imbalance service. The Commission even granted a refund effective date back to two years prior to Seminole first raising the issue to Florida Power (a date three years prior to Seminole filing the complaint). The Commission arrived at this date based on its reasonable interpretation of a claims limitation provision in

the transmission contract and, alternatively, its discretion to set an equitable remedy. The Commission's orders under review present a fair resolution to a difficult problem – a time-limited problem because Florida Power filed tariff changes to implement prospectively Seminole's preferred approach to imbalance service – and should be respected.

ARGUMENT

I. THE COMMISSION REASONABLY DENIED SEMINOLE'S COMPLAINT WITH RESPECT TO APPORTIONMENT

A. Standard Of Review

This Court reviews Commission actions under the Administrative Procedure Act's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow," and the Court "may not substitute [its] own judgment for that of the Commission." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Commission decisions will be upheld so long as the Commission "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation omitted).

The apportionment issue is a complex ratemaking matter concerning FERC's interpretation of a jurisdictional tariff, as well as application of its own

precedent. Courts "'afford great deference to the Commission in its rate decisions.'" *Elec. Power Supply Ass'n*, 136 S.Ct. at 782 (quoting *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)). The Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) (applying "highly deferential" standard of review to technical rate design issues).

Additionally, applying the standard set forth in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), courts afford substantial deference to the Commission's interpretation of filed tariffs even where the issue simply involves the proper construction of language. *See Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998) (citation omitted); *see also Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 701 (D.C. Cir. 2010) (same). Likewise, courts must respect the Commission's interpretation of its own precedent. *See Colo. Interstate Gas Co.*, 599 F.3d at 703-704; *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007).

Finally, the Commission's factual findings must be supported by "more than a scintilla" of evidence, but "can be satisfied by something less than a preponderance of the evidence." *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362,

365-66 (D.C. Cir. 2003) (citations omitted); *see also* 16 U.S.C. § 825*l*(b) ("The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."). Merely pointing to some contradictory evidence is insufficient. *Cogeneration Ass'n of Cal. v. FERC*, 525 F.3d 1279, 1283 (D.C. Cir. 2008) (citing cases).

B. The Commission Reasonably Found No Tariff Violation On The Apportionment Issue

Seminole complained to the Commission that Florida Power violated its tariff in two respects. The Commission agreed with Seminole that Florida Power was misapplying the tier thresholds in Schedule 4, and thus granted its complaint, and provided a remedy (addressed later in this brief) on the tier threshold issue. *See supra* pp. 11-14 (explaining the tier threshold issue). Florida Power does not appeal as to this issue – indeed, it provided refunds and has amended its tariff, with the Commission's approval, to adopt prospectively Seminole's preferred approach for calculating energy imbalance charges with respect to tier thresholds and apportionment.

Seminole appeals to this Court the Commission's orders to the partial extent they fail to give Seminole all the relief it sought from the Commission. In the orders on review, the Commission interpreted Florida Power's FERC-approved tariff to allow for either an apportionment or non-apportionment approach to calculating charges for imbalance service. Because either of these approaches is

allowable under the tariff language, the Commission reasonably concluded that Florida Power did not violate its tariff to the extent it did not apportion the imbalance charges within each tier.

Schedule 4 provides, in pertinent part, that "charges for energy imbalance service shall be based on the deviation bands as follows:"

- Deviations within +/- 1.5 percent (with a minimum of 2 megawatts) to be applied hourly and netted on a monthly basis and settled at 100 percent of incremental or decremental cost;
- Deviations greater than 1.5 percent up to 7.5 percent (or greater than 2 megawatts up to 10 megawatts) to be applied hourly and settled at 110 percent of incremental cost or 90 percent of decremental cost;
- Deviations greater than 7.5 percent (or 10 megawatts) to be applied hourly and settled at 125 percent of incremental cost or 75 percent of decremental cost.

See Initial Order P 15, JA 218-19; *see also supra* p. 11 (quoting Schedule 4 in its entirety).

Seminole argues that Schedule 4 of the Florida Power tariff has "clear apportionment language." Br. at 21; *see also* Br. at 23 ("Schedule 4 is clear and unambiguous on its face"). In support, Seminole reads the phrase that charges "shall be based on the deviation bands" as demonstrating that the different charges

will apply within each band. In contrast, Florida Power argued that Schedule 4 contemplates a single penalty for a single tier – rather than apportionment among tiers. *See* Initial Order P 26, JA 223 (citing Florida Power Answer at 6, JA 148 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 636)). The Commission itself found nothing in the tariff language that would require the apportionment that Seminole favors. *See* Rehearing Order P 17, n.22, JA 300 (explaining, for an 11 megawatt imbalance, there is nothing in the express language of the tariff that would require apportionment of those 11 megawatts to all three tiers). Where, as here, a tariff is susceptible to different constructions or interpretations, the language does not compel a single approach. *See* Initial Order P 31, JA 224 (citing *Duquesne Light Co.*, 122 FERC ¶ 61,039, at P 85, *clarified*, 123 FERC ¶ 61,060 (2009); *S. Cal. Edison Co.*, 41 FERC ¶ 61,188 (1987)).

Indeed, there are two different formulations of Schedule 4 of the tariff which support the Commission's finding of ambiguity. On the one hand, the Commission's standard tariff (using language identical to that in the Florida Power tariff) sets forth three tiers with different corresponding charges. *See supra* p. 11. On the other hand, the tariff formulation adopted by Bonneville and Louisville Gas & Electric (discussed further *infra* pp. 24, 26-27) includes the same three tier thresholds as in the standard tariff, but also includes additional language specifying that each tier charge will apply to the "portion of the deviation" within each tier.

See Initial Order P 33, JA 225; *see also* Bonneville Tariff 2006, Schedule II.D.1.b.-c., JA 140-41. It is the use of the word "portion" that suggests that imbalances will be divided and separate charges applied based on the individual tier.

Finding a lack of clarity in the tariff language itself, the Commission closely examined its Order No. 890 rulemaking to see if there was a clear indication (or any indication at all) that the Commission intended to apply an apportionment approach. *See* Initial Order P 34, JA 226. Seminole argues that because the Commission based its tariff on Bonneville's tariff, which used the apportionment method, this is sufficient to show the Commission's intent. However, Order No. 890 only adopted an approach "similar" to Bonneville, and the tariff language adopted in Schedule 4 of the Commission's standard tariff is materially different than that in Bonneville's tariff in the very important respect of not including the "portion of" language. *See id*. n.54, JA 226 (explaining that Order No. 890 repeats the "whichever is larger" language from the Bonneville tariff, but not the "portion of" apportionment language); *see* Rehearing Order P 17, JA 300 (explaining that Order No. 890 was only adopting an approach similar to Bonneville – not identical).

Seminole argues that if the Commission had intended either apportionment or non-apportionment to be allowed, it should have said so definitively in Order No. 890. Br. at 28, 30. Perhaps, as a matter of policy, the Commission could have

foreseen the differences in how this language could be applied. But no party raised the precise issue in the Order No. 890 proceeding and the Commission did not address it. There is nothing that prohibits the Commission from proceeding by adjudication to clarify any gaps in its earlier rulemaking. *See SEC v. Chenery*, 332 U.S. 194, 202 (1947) ("problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule"); *Wis. Gas Co. v. FERC*, 770 F.2d 1144, 1166 (D.C. Cir. 1985) (discussing the "well-settled principle of administrative law that the decision whether to proceed by rulemaking or adjudication lies within the broad discretion of the agency").

All that remains is Seminole's argument that Order No. 890 was intended to standardize charges for energy imbalance service. *See* Br. at 32-34. But the Commission's goal of "increasing consistency among transmission providers" is hardly the same as Seminole's assertion that the Commission was establishing absolute uniformity for such service. *See* Rehearing Order P 19, JA 301 (finding that Schedule 4 revisions in fact do enhance consistency in imbalance charges by standardizing the requirement for a three-tiered approach, the thresholds for each tier, and the charges for each tier); *see also* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 663. "Seminole provides no evidence that the Commission expected uniformity on [the apportionment issue] throughout the country." Rehearing Order

P 19, JA 301. The Commission is best positioned to determine the meaning and weight of its own precedent. *See Colo. Interstate Gas Co.*, 599 F.3d at 703-704.

C. The Commission's Interpretation Is Not Inconsistent With Precedent

Seminole attempts (Br. at 36-39) to convert the Commission's 2007 decision in *Louisville Gas & Electric Co.* into a definitive interpretation of Schedule 4 that requires apportionment. But as the Commission notes, Seminole "attempts to prove too much with this case." Rehearing Order P 18, JA 301. In fact, the tariff revisions in *Louisville Gas & Electric* support – rather than refute – the fact that the tariff language is ambiguous. Indeed, Louisville Gas & Electric's filing was made to revise the language in standard Schedule 4 to, among other things, "clarify . . . how the charges for each tier would be calculated." 120 FERC ¶ 61,227, at P 8 (2007); *see also id*. P 4 (explaining that transmission providers may, in compliance with Order No. 890, submit filings proposing rates for the services provided for in their tariffs, as well as non-rate terms and conditions, that differ from those set forth in Order No. 890 if those provisions are "consistent with or superior to" the standard pro forma tariff).

Louisville proposed to modify its "Schedule[] 4 . . . to clarify that[] imbalance charges for each tier would apply to the portion of the deviation in each tier. . . ." *Louisville*, 120 FERC ¶ 61,227, at P 17. Louisville explained in its filing that its proposed tariff revisions are "superior to" the pro forma Schedule 4

"because they provide customers with additional detail regarding how charges will be calculated." E.ON U.S. LLC, on behalf of Louisville Gas & Electric Co., July 12, 2007 Filing at 4, Docket No. OA07-27-000, Accession No. 20070712-5047; *see also Louisville*, 120 FERC ¶ 61,227, at P 24 (describing the filing as "superior to" the standard tariff because of additional details on how charges will be calculated). The fact that Louisville had to propose such clarifications underscores the ambiguity (or silence) in Schedule 4 with respect to apportionment.

Further, the finding that Louisville's language is "consistent with" the standard pro forma tariff is entirely consistent with the Commission's reasoning in the orders under review. The Commission held that Schedule 4 of the tariff can reasonably be read to support either approach. *See* Initial Order P 34, JA 226; *see also* Rehearing Order P 17, JA 300 ("we continue to read the express language of [Schedule 4] as supporting the use of either the apportionment or non-apportionment approach"). Consequently, both the Seminole-preferred apportionment approach (as sometimes clarified by the language in Louisville's and Bonneville's tariff to include the "portion of" language) and the non-apportionment approach that Florida Power used up until the effective date of its April 19, 2012 filing to adopt the apportionment approach, are both "consistent with" the standard pro forma Schedule 4. The Commission is entitled to deference on the interpretation of its own precedent. *See Colo. Interstate Gas Co.*, 599 F.3d

at 703-04.

Contrary to Seminole's assertions that the Commission in *Louisville* established a "prior interpretation of the pro forma [tariff]" (Br. at 36), the Commission was passing on language that differs in critical respects from the standard pro forma tariff used by Florida Power. In particular, Louisville was proposing to include the "portion of" tariff language that Bonneville used to specify that it would be applying the apportionment approach to calculating imbalance charges. Seminole has not identified a case where the Commission interpreted the un-modified pro forma tariff language (Florida Power's Schedule 4 language) to mean apportionment, nor is FERC counsel aware of any.[4] Additionally, even if *Louisville* rose to the level of a prior interpretation – which it does not – the Commission would be free to change its interpretation in a subsequent adjudication. *See Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1206 (2015) (agencies are not required to use notice-and-comment rulemaking procedures to change an interpretive rule).

D. The Commission Reasonably Denied Seminole's Belated Suggestion That Florida Power's Interpretation Is Unjust and Unreasonable

[4] Seminole's citation to *Avista Corp.*, 120 FERC ¶ 61,046 at P 11 (2007) (Br. at 37, n.91), demonstrates the utter lack of FERC precedent on this issue. The *Avista* decision, including the quoted passage from that order, gives no indication that the Commission was addressing the apportionment issue.

Seminole asserts that the Commission failed to address its argument that Florida Power's charges were not just and reasonable. Br. at 39-41. Seminole points to arguments it made on rehearing that the charges under the apportionment or non-apportionment approach are different, and claims that the Commission did not assess "whether the substantially higher charges were just and reasonable." Br. at 40.

As an initial matter, the Commission was not bound to address Seminole's new argument on rehearing because Seminole's complaint was plainly limited to claims that Florida Power violated its tariff. *See* Complaint at 11, JA 19 ("the only matters before the Commission are (i) whether [Florida Power] violated its filed rate when it charged Seminole for energy imbalance . . . , and (ii) whether [Florida Power] must refund to Seminole with interest the entire amount of the overcharges[]."). Seminole's new theory (that non-apportionment of penalties is unjust and unreasonable and is an excessive penalty) amounts to an amendment of Seminole's complaint and is procedurally improper. *See CAlifornians for Renewable Energy, Inc. v. Pac. Gas and Elec. Co.*, 134 FERC ¶ 61,207, at P 12 (2011) (rejecting new argument in a request for rehearing because it violates the due process rights of a respondent who is not allowed to file answers to requests for rehearing); *see also* 18 C.F.R. § 385.713(d)(1) ("The Commission will not permit answers to requests for rehearing.").

The Commission nevertheless addressed Seminole's new arguments. First, the Commission explained that it is not inherently unjust and unreasonable to use the non-apportionment approach. *See* Rehearing Order P 19, JA 301 (explaining that some regions of the country may need higher charges than others to encourage accurate scheduling, and thus would prefer to adopt the non-apportionment approach). Second, the Commission held that, so long as a transmission owner consistently applies the same interpretation to all of its customers, there is no potential for undue discrimination under either interpretation. *Id*. P 20, JA 301. Moreover, as explained *supra* at p. 10, the Commission provided Seminole prospective relief and accepted as just and reasonable Florida Power's filing of tariff revisions adopting Seminole's preferred approach effective July 1, 2012. Absent a tariff violation, the Commission would not have been compelled to provide Seminole any additional relief. *See* 16 U.S.C. 824e(b) (refund effective date is no earlier than the date of the filing of a complaint nor later than five months after the filing of the complaint).

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

The Commission granted Seminole's complaint in one significant respect, concerning the tier threshold issue (*see supra* pp. 11-14) that is not presented on judicial review. *See* Seminole Br. 9-10 (estimating that Florida Power's misapplication of the tariff resulted in overcharges of about $3.18 million between

August 2007 and January 2012). Although Seminole sought relief back to August 2007, the Commission found that Section 12.0 of the Florida Power-Seminole transmission contract limited refunds to the period 24 months prior to Seminole's first notification to Florida Power of the billing issue. *See* Initial Order P 40, JA 229. This established October 2009 (24 months prior to the first letter from Seminole to Florida Power raising the issue) as the earliest date Seminole would be entitled to refunds. *Id*. The Commission found that, based on the contractual limitation, and its exercise of remedial discretion, October 2009 was an appropriate date for establishing refunds. As a result, Seminole received $1,381,900.57 in refunds. *See* Florida Power Refund Report, JA 239.

A. Standard Of Review

The Commission's refund decision was based on its reasonable interpretation of a jurisdictional contract, and its general exercise of remedial discretion. This Court affords deference to the Commission's interpretation of contracts within its jurisdiction. *See Appalachian Power Co. v. FERC*, 101 F.3d 1432, 1435 (D.C. Cir. 1996); *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1135 (D.C. Cir. 1991).

Additionally, the Commission found that the circumstances warranted a more limited refund period. The Court "owe[s] FERC great deference in reviewing its selection of a remedy, for the breadth of agency discretion is, if

anything, at its zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions." *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008) (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)). *See also, e.g., Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 956 (D.C. Cir. 2005) (similarly noting that FERC "wields maximum discretion" when choosing a remedy).

B. The Commission's Remedy Is Consistent With Seminole's Transmission Contract and Commission Precedent

Section 12.0 of the Network Integration Transmission Service Agreement between Florida Power ("FPL") and Seminole ("the Customer") provides:

> The Customer may, in good faith, challenge the correctness of any bill rendered under the Tariff no later than twenty-four (24) months after the date the bill was rendered. Any billing challenge will be in writing and will state the specific basis for the challenge. A bill rendered under the Tariff will be binding on the Customer twenty-four months after the bill is rendered or adjusted, except to the extent of any specific challenge to the bill made by the customer prior to such time. Customer's challenge of any bill rendered under and in accordance with this Tariff is limited to: (i) the arithmetical accuracy of the bill and use of the correct rate and billing determinants for the service provided; (ii) the determination of redispatch costs allocated to the customer; and (iii) the application of the incremental fuel cost mechanism. FPL will provide the Customer, upon request, such fuel cost information as is reasonably necessary to confirm the correctness of the bill; provided, however, that neither the Customer's challenge nor the Customer's request shall serve as a basis for a general audit or investigation of FPL's books and records.

JA 94.

Seminole asserts that Section 12.0 is clearly limited to challenges to the

arithmetical accuracy of a bill and that claims of tariff violations fall outside of Section 12.0. Br. at 43-53. To demonstrate this "clarity," Seminole focuses on the use of the word "correctness" and the phrase "under and in accordance with this Tariff." *See* Br. at 43. In contrast, the Commission took a different view of the word "correctness," and focused on the language that allows challenges to both "arithmetical accuracy" and "use of the correct rate," as well as the sentence that bills "will be binding on the Customer" after the 24-month period. *See* Initial Order PP 41-43, JA 229-31; *see also* Rehearing Order PP 24-26, JA 303-04. As discussed below, the Commission's interpretation is reasonable and due respect.

Seminole asserts that the word "correctness" is equivalent to the word "accuracy," and, therefore, under Commission precedent, the billing limitation should not apply to a tariff violation (i.e., the billing limitation only prevents a party from raising old challenges based on the mathematical calculation of a bill). Br. at 44-46. The Commission has found that refund limitation provisions that are limited to the "accuracy" of a bill do not include broader challenges to the filed rate, but refund limitations that allow challenges to the "propriety" of a bill would also bar challenges that a bill violated the filed rate. *See Boston Edison Co. v. FERC*, 856 F.2d 361, 371 (1st Cir. 1988) (affirming FERC finding that challenges to the "propriety" of a bill include claims of tariff violations); *but see People of Cal. v. Powerex*, 135 FERC ¶ 61,178 (2011) (finding claims limitation to the

"accuracy" of a bill inapplicable to market-wide remedy). Here, the Commission found that "correctness" is broader than "accuracy" and "encompass[es] not just computational errors in bills that correctly used the filed rate, but also bills that are based on a rate other than the filed rate." Initial Order P 41, JA 229. Seminole has not shown any precedent or policy interpreting the word "correctness" to be limited to mere arithmetical accuracy. *See* Rehearing Order P 26, JA 304 ("the cases that Seminole cites in its rehearing request do not call into question the core elements of the Commission's reasoning in denying refunds. . . . Each case turns on the specific language in the particular case limiting refund liability.").

Seminole also argues that the two types of challenges (arithmetical accuracy and use of the correct rate) in the fourth sentence are qualified by the phrase in the beginning of the sentence "under and in accordance with" the tariff. *See* Br. at 48-49. But the Commission explained that Seminole's reading "would eviscerate the rest of the sentence, as there would be no reason to challenge the bill or to limit challenges to any bill as provided in Section 12.0." Rehearing Order P 25, JA 303. Stated differently, if a bill is rendered "under and in accordance with" the tariff, then it would necessarily be correct and not subject to challenge. The Commission also rejected Seminole's alternative suggestion that "correct rate" means inadvertently using the wrong input, because this interpretation failed to provide

any meaningful distinction between the phrases "arithmetical accuracy" and "use of the correct rate." *Id*.

Finally, the Commission viewed the third sentence of Section 12.0 as an absolute billing limitation. The sentence clarifies that a Florida Power bill "will be binding on the Customer twenty-four months after the bill is rendered or adjusted, except to the extent of any specific challenge to the bill made by the customer prior to such time." The Commission found that this sentence would apply to "any" bill, and dictates the point in time at which any bill becomes final. *See* Initial Order P 42, JA 229; Rehearing Order P 26, JA 304. The Commission has consistently construed this kind of limitation broadly. *See* Initial Order P 43, JA 230 (citing cases construing billing limitation provisions substantially similar to Section 12.0, and recognizing the parties' right to place a premium on financial certainty); *see also N.Y. State Elec. & Gas Corp.*, 133 FERC ¶ 61,094, at P 63 (2010) (explaining the billing limitation at issue "reflects the Commission policy that, once invoices are finalized, they should generally remain unchanged, even if later found to contain errors, so that market participants can rely on the charges contained in the invoices.").

The Commission's reasoned analysis gives meaning to each sentence – limiting the timing and type of any billing challenge, and stating how challenges are to be made – and should be affirmed. *See 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); *Kan. 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").

C. The Commission Alternatively Found That Extending The Refund Period Would Be Inequitable

The Commission granted Seminole substantial relief from Florida Power's misapplication of an ambiguous tariff provision – relief far greater than the prospective-only relief it would typically receive for a complaint filed pursuant to section 206 of the Federal Power Act. *See* Initial Order P 40, JA 229 (granting relief back to October 20, 2009, even though Seminole filed its complaint on March 30, 2012). Against this backdrop, the Commission determined to apply Section 12.0's refund limitation to these circumstances "even if Section 12.0 did not limit refunds for violations of the filed rate." Initial Order P 45; *see also* Rehearing Order P 28, JA 304 (citing *Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 2000) (noting Commission's broad discretion in fashioning remedies)).

In limiting refunds to October 20, 2009, the Commission considered Section 12.0 as a "balance struck between billing accuracy, on the one hand, and financial certainty, on the other." Initial Order, P 44, JA 231; *see also id*. P 45 (citing *Boston Edison*, 856 F.2d at 373 (recognizing that billing limitation provisions are "not inherently unconscionable" and it is not "inequitable to hold less diligent purchasers to forfeit"). The Commission also considered that, although the bills were not explicit in how the imbalance charges were calculated, "that information is discernable from billing information that accompanied the monthly invoices." Initial Order P 45, JA 231 (citing, e.g., *N.Y. Indep. Sys. Operator, Inc.*, 128 FERC ¶ 61,086 at P 20 (2009) (purchasing utility's "failure to carefully review its invoices for the 46-month period is the primary reason that the error was not discovered earlier")).

Seminole argues that the Commission did not weigh the appropriate factors in exercising its discretion not to order additional refunds. *See* Br. at 52-57. But there is no one test that can be applied to every refund situation, and the Commission balances the equities in each individual case. *See Towns of Concord*, 955 F.2d at 75-76 (no statutory command to order refunds, but agency must show that it considered relevant factors and that the decision is equitable under the circumstances). The Commission's orders on review, combining both prospective relief and some retroactive relief, strike a reasonable accommodation between

granting additional relief to Seminole, while respecting rate certainty to Florida Power. *See Morgan Stanley*, 554 U.S. at 532-36 (Federal Power Act is founded on both contracts and tariffs, and reflects respect for settled expectations); *see also Elec. Power Supply Ass'n*, 136 S.Ct. at 784 (because electricity regulation "involves both technical understanding and policy judgment," court's "important but limited role is to ensure that the Commission engaged in reasoned decisionmaking").

CONCLUSION

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

Respectfully submitted,

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June 13, 2016

Seminole Electric Cooperative, Inc. v. FERC **FERC Docket No. EL12-53**
D.C. Cir. No. 15-1450

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 8,931 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum.

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

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June 13, 2016

ADDENDUM
STATUTES AND REGULATIONS

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injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for 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;

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

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

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

(c) Statement of prior positions; definitions

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

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

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

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

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

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

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

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

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

(3) For purposes of this subsection—

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

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

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

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c)(3)(B), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classi-fied generally to chapter 2C (§ 79 et seq.) of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

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

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

EFFECTIVE DATE OF 1978 AMENDMENT

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

§ 825e. Complaints

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

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

AMENDMENTS

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

[1] See References in Text note below.

individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

EFFECTIVE DATE OF 1970 AMENDMENT

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

§ 825g. Hearings; rules of procedure

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

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

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

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

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

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

COMMISSION REVIEW

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

§ 825i. Appointment of officers and employees; compensation

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

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

CODIFICATION

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

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

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

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

AMENDMENTS

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

REPEALS

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

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

each tariff or rate filing must include, as appropriate:

(1) If known, the reference numbers, docket numbers, or other identifying symbols of any relevant tariff, rate, schedule, contract, application, rule, or similar matter or material;

(2) The name of each participant for whom the filing is made or, if the filing is made for a group of participants, the name of the group, provided that the name of each member of the group is set forth in a previously filed document which is identified in the filing being made;

(3) The specific authorization or relief sought;

(4) The tariff or rate sheets or sections;

(5) The name and address of each person against whom the complaint is directed;

(6) The relevant facts, if not set forth in a previously filed document which is identified in the filing being made;

(7) The position taken by the participant filing any pleading, to the extent known when the pleading is filed, and the basis in fact and law for such position;

(8) Subscription or verification, if required;

(9) A certificate of service under Rule 2010(h), if service is required;

(10) The name, address, and telephone number of an individual who, with respect to any matter contained in the filing, represents the person for whom filing is made; and

(11) Any additional information required to be included by statute, rule, or order.

(b) *Requirement for any initial pleading or tariff or rate filing.* The initial pleading or tariff or rate filing submitted by a participant or a person seeking to become a party must conform to the requirements of paragraph (a) of this section and must include:

(1) The exact name of the person for whom the filing is made;

(2) The location of that person's principal place of business; and

(3) The name, address, and telephone number of at least one, but not more than two, persons upon whom service is to be made and to whom communications are to be addressed in the proceeding.

(c) *Combined filings.* If two or more pleadings, or one or more pleadings and a tariff or rate filing are included as items in a single filing each such item must be separately designated and must conform to the requirements which would be applicable to it if filed separately.

(d) *Form of notice.* If a pleading or tariff or rate filing must include a form of notice suitable for publication in the FEDERAL REGISTER, the company shall submit the draft notice in accordance with the form of notice specifications prescribed by the Secretary and posted under the Filing Procedures link at *http://www.ferc.gov* and available in the Commission's Public Reference Room.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 647, 69 FR 32439, June 10, 2004; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006; Order 714, 73 FR 57538, Oct. 3, 2008]

§ 385.204 Applications (Rule 204).

Any person seeking a license, permit, certification, or similar authorization or permission, must file an application to obtain that authorization or permission.

§ 385.205 Tariff or rate filings (Rule 205).

A person must make a tariff or rate filing in order to establish or change any specific rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation established by and for the applicant.

§ 385.206 Complaints (Rule 206).

(a) *General rule.* Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.

(b) *Contents.* A complaint must:

(1) Clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements;

(2) Explain how the action or inaction violates applicable statutory standards or regulatory requirements;

(3) Set forth the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant;

(4) Make a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction;

(5) Indicate the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction, including, where applicable, the environmental, safety or reliability impacts of the action or inaction;

(6) State whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party, and if so, provide an explanation why timely resolution cannot be achieved in that forum;

(7) State the specific relief or remedy requested, including any request for stay or extension of time, and the basis for that relief;

(8) Include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits;

(9) State

(i) Whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used;

(ii) Whether the complainant believes that alternative dispute resolution (ADR) under the Commission's supervision could successfully resolve the complaint;

(iii) What types of ADR procedures could be used; and

(iv) Any process that has been agreed on for resolving the complaint.

(10) Include a form of notice of the complaint suitable for publication in the FEDERAL REGISTER in accordance with the specifications in §385.203(d) of this part. The form of notice shall be on electronic media as specified by the Secretary.

(11) Explain with respect to requests for Fast Track processing pursuant to section 385.206(h), why the standard processes will not be adequate for expeditiously resolving the complaint.

(c) *Service.* Any person filing a complaint must serve a copy of the complaint on the respondent, affected regulatory agencies, and others the complainant reasonably knows may be expected to be affected by the complaint. Service must be simultaneous with filing at the Commission for respondents. Simultaneous or overnight service is permissible for other affected entities. Simultaneous service can be accomplished by electronic mail in accordance with §385.2010(f)(3), facsimile, express delivery, or messenger.

(d) *Notice.* Public notice of the complaint will be issued by the Commission.

(e) [Reserved]

(f) *Answers, interventions and comments.* Unless otherwise ordered by the Commission, answers, interventions, and comments to a complaint must be filed within 20 days after the complaint is filed. In cases where the complainant requests privileged treatment for information in its complaint, answers, interventions, and comments are due within 30 days after the complaint is filed. In the event there is an objection to the protective agreement, the Commission will establish when answers will be due.

(g) *Complaint resolution paths.* One of the following procedures may be used to resolve complaints:

(1) The Commission may assign a case to be resolved through alternative dispute resolution procedures in accordance with §§385.604–385.606, in cases where the affected parties consent, or the Commission may order the appointment of a settlement judge in accordance with §385.603;

(2) The Commission may issue an order on the merits based upon the pleadings;

(3) The Commission may establish a hearing before an ALJ;

(h) *Fast Track processing.* (1) The Commission may resolve complaints using Fast Track procedures if the complaint requires expeditious resolution. Fast Track procedures may include expedited action on the pleadings by the Commission, expedited hearing before an ALJ, or expedited action on requests for stay, extension of time, or other relief by the Commission or an ALJ.

(2) A complainant may request Fast Track processing of a complaint by including such a request in its complaint, captioning the complaint in bold type face ''COMPLAINT REQUESTING FAST TRACK PROCESSING,'' and explaining why expedition is necessary as required by section 385.206(b)(11).

(3) Based on an assessment of the need for expedition, the period for filing answers, interventions and comments to a complaint requesting Fast Track processing may be shortened by the Commission from the time provided in section 385.206(f).

(4) After the answer is filed, the Commission will issue promptly an order specifying the procedure and any schedule to be followed.

(i) *Simplified procedure for small controversies.* A simplified procedure for complaints involving small controversies is found in section 385.218 of this subpart.

(j) *Satisfaction.* (1) If the respondent to a complaint satisfies such complaint, in whole or in part, either before or after an answer is filed, the complainant and the respondent must sign and file:

(i) A statement setting forth when and how the complaint was satisfied; and

(ii) A motion for dismissal of, or an amendment to, the complaint based on the satisfaction.

(2) The decisional authority may order the submission of additional information before acting on a motion for dismissal or an amendment under paragraph (c)(1)(ii) of this section.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 602, 64 FR 17097, Apr. 8, 1999; Order 602–A, 64 FR 43608, Aug. 11, 1999; Order 647, 69 FR 32440, June 10, 2004; Order 769, 77 FR 65476, Oct. 29, 2012]

§ 385.207 Petitions (Rule 207).

(a) *General rule.* A person must file a petition when seeking:

(1) Relief under subpart I, J, or K of this part;

(2) A declaratory order or rule to terminate a controversy or remove uncertainty;

(3) Action on appeal from a staff action, other than a decision or ruling of a presiding officer, under Rule 1902;

(4) A rule of general applicability; or

(5) Any other action which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading.

(b) *Declarations of intent under the Federal Power Act.* For purposes of this part, a declaration of intent under section 23(b) of the Federal Power Act is treated as a petition for a declaratory order.

(c) Except as provided in § 381.302(b), each petition for issuance of a declaratory order must be accompanied by the fee prescribed in § 381.302(a).

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 395, 49 FR 35357, Sept. 7, 1984]

§ 385.208 [Reserved]

§ 385.209 Notices of tariff or rate examination and orders to show cause (Rule 209).

(a) *Issuance.* (1) If the Commission seeks to determine the validity of any rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation established by and for the applicant which is demanded, observed, charged, or collected, the Commission will initiate a proceeding by issuing a notice of tariff or rate examination.

(2) The Commission may initiate a proceeding against a person by issuing an order to show cause.

(b) *Contents.* A notice of examination or an order to show cause will contain a statement of the matters about which the Commission is inquiring, and a statement of the authority under which the Commission is acting. The statement is tentative and sets forth issues to be considered by the Commission.

(c) *Answers.* A person who is ordered to show cause must answer in accordance with Rule 213.

§ 385.210 Method of notice; dates established in notice (Rule 210).

(a) *Method.* When the Secretary gives notice of tariff or rate filings, applications, petitions, notices of tariff or rate examinations, and orders to show cause, the Secretary will give such notice in accordance with Rule 2009.

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver*. If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver*. If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver*. Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule*. If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument*. When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review*. After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability*. (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file*. A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request*. Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled ''Statement of Issues,'' listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers*. (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay*. Unless otherwise ordered by the Commission, the filing of a request for rehearing does

not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification under this section does not suspend the proceeding.

§ 385.715 Interlocutory appeals to the Commission from rulings of presiding officers (Rule 715).

(a) *General rule.* A participant may not appeal to the Commission any rul-ing of a presiding officer during a pro-ceeding, unless the presiding officer under paragraph (b) of this section, or the motions Commissioner, under para-graph (c) of this section, finds extraor- dinary circumstances which make prompt Commission review of the con-tested ruling necessary to prevent det-riment to the public interest or irrep-arable harm to any person.

(b) *Motion to the presiding officer to permit appeal.* (1) Any participant in a proceeding may, during the proceeding, move that the presiding officer permit appeal to the Commission from a ruling of the presiding officer. The motion must be made within 15 days of the ruling of the presiding officer and must state why prompt Commission review is necessary under the standards of paragraph (a) of this section

(2) Upon receipt of a motion to permit appeal under subparagraph (a)(1) of this section, the presiding officer will determine, according to the standards of paragraph (a) of this section, whether to permit appeal of the ruling to the Commission. The presiding officer need not consider any answer to this motion.

(3) Any motion to permit appeal to the Commission of an order issued under Rule 604, or appeal of a ruling under paragraph (a) or (b) of Rule 905, must be granted by the presiding officer.

(4) A presiding officer must issue an order, orally or in writing, containing the determination made under paragraph (b)(2) of this section, including the date of the action taken.

(5) If the presiding officer permits appeal, the presiding officer will transmit to the Commission:

(i) A memorandum which sets forth the relevant issues and an explanation of the rulings on the issues; and

(ii) the participant's motion under paragraph (b)(1) of this section and any answer permitted to the motion.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 13th 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 or via U.S. Mail, as indicated below:

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