ORAL ARGUMENT NOT YET SCHEDULED

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

Nos. 15-1452 and 15-1454 (Consolidated)

NRG POWER MARKETING, LLC, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Final Brief: September 27, 2016

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

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying agency docket are as stated in the Brief of Petitioners.

B. Rulings Under Review

1. *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 (May 2, 2013), R. 104, JA 670; and

2. *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,066 (Oct. 15, 2015), R. 137, JA 847.

C. Related Cases

This case has not previously been before this Court or any other court. This Court previously considered petitions for review of earlier Commission orders that established rules for all auctions in this regional (PJM) electricity capacity market (*Pub. Serv. Elec. & Gas Co. v. FERC*, 324 F. App'x 1 (D.C. Cir. 2009)) and that upheld the results of transitional auctions (*Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283 (D.C. Cir. 2011)). The Third Circuit previously considered petitions for review of earlier Commission orders that approved changes to the market rules (*N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014)).

In another case pending before this Court, PJM Power Providers Group, which also is a petitioner in this case (No. 15-1454), challenges other Commission orders concerning market rules in the same capacity market. *PJM Power Providers Group, et al. v. FERC*, Nos. 15-1453 & 15-1455 (briefing complete). In addition, another petition seeks review of Commission orders approving further changes to the capacity market. *Advanced Energy Management Alliance, et al. v. FERC*, Nos. 16-1234, *et al.* (D.C. Cir. filed July 8, 2016) (briefing in progress).

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2011 Orders	Collectively, the April 2011 Order, the November 2011 Order, and the March 2012 Order (included in the separate Addendum of Relevant FERC Orders)
April 2011 Order	*PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (2011)
Commission or FERC	Respondent Federal Energy Regulatory Commission
December 2006 Order	*PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006) (included in the separate Addendum of Relevant FERC Orders)
FPA	Federal Power Act
JA	Joint Appendix
March 2012 Order	*PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,194 (2012)
November 2011 Order	*PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 (2011)
NRG	Petitioner NRG Companies
P	Paragraph in a FERC order
PJM	Intervenor PJM Interconnection, L.L.C., operator of the regional grid in 13 states and the District of Columbia
Power Providers	Petitioner PJM Power Providers Group
R.	Record item

GLOSSARY

Rehearing Order	*PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,066 (2015), R. 137, JA 847
Suppliers	Collectively, Petitioners NRG and Power Providers
Tariff Order	*PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 (2013), R. 104, JA 670

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

STATEMENT OF THE ISSUES

PJM Interconnection, L.L.C. ("PJM") operates the high-voltage electric transmission network in the mid-Atlantic region and manages the largest competitive wholesale electricity market in the country. (PJM is named after the smaller Pennsylvania-New Jersey-Maryland region in which it first operated.) PJM also administers a tariff, approved by the Federal Energy Regulatory Commission ("Commission" or "FERC"), that details the rates, terms, and conditions of regional transmission service and wholesale market mechanisms.

In the orders challenged on review, the Commission ruled on tariff revisions that PJM proposed to update the rules governing its wholesale capacity market. (Capacity is not electricity itself; rather, it is the ability to produce electricity when necessary.) In particular, PJM proposed revisions to the Minimum Offer Price Rule applied to its capacity auctions. In simple terms, PJM proposed new tariff provisions B and C to replace existing provision A; the Commission accepted B and C on the condition that PJM retain A, to balance competing policy concerns. PJM later accepted the condition.

The issues presented for review are:

(1) Whether the Commission properly exercised its authority under section 205 of the Federal Power Act, 16 U.S.C. § 824d, in conditionally approving PJM's proposed changes to its capacity market rules:

(a) where the Commission found that the proposed categorical exemptions (B and C) were not just and reasonable standing alone, but would be just and reasonable if PJM retained its existing process for unit-specific review of auction bids (A, B, and C), and PJM consented to that modification;

(b) where the Commission determined that the categorical exemptions were appropriately designed to apply to resources that would lack the incentive to bid below actual costs; and

(2) Whether the Commission reasonably rejected PJM's proposal to extend mitigation to new entrants for three years.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum. (A separate Addendum of Relevant FERC Orders contains orders issued in related proceedings that are cited frequently in this Brief.)

INTRODUCTION

This is the latest in a series of cases concerning the ongoing efforts of the Commission, regional transmission operators, and wholesale electricity market participants to create and implement rate designs that promote the development of sufficient capacity resources to ensure system reliability. The orders on review arose from the third Commission proceeding to consider measures to mitigate buyer market power in the form of artificial price suppression caused by below-cost offers into the PJM capacity auction, known as the Minimum Offer Price Rule.

PJM spent seven years developing a replacement rate design to ensure reliability, especially in capacity-deficient areas of New Jersey, Maryland, the District of Columbia, and the Delmarva Peninsula. This Court upheld the Commission's approval in 2006 of that forward-looking locational capacity market. *Pub. Serv. Elec. & Gas Co. v. FERC*, 324 F. App'x 1 (D.C. Cir. 2009). In

2011, PJM proposed reforms to the Minimum Offer Price Rule; the U.S. Court of Appeals for the Third Circuit upheld the Commission's rulings on those reforms. *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014).

In 2012, PJM again proposed revisions to its tariff to modify the Minimum Offer Price Rule. The Commission conditionally accepted some of those proposals and rejected others. *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 (2013) ("Tariff Order"), R. 104, JA 670, *on reh'g and compliance*, 153 FERC ¶ 61,066 (2015) ("Rehearing Order"), R. 137, JA 847. In this appeal, capacity suppliers NRG Companies ("NRG") and PJM Power Providers Group ("Power Providers" and together with NRG, "Suppliers") challenge those orders.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Power Act

Section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). It includes the power to set rates for electricity capacity, either directly or indirectly through a market mechanism, and to review capacity requirements that

affect those rates. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 482-84 (D.C. Cir. 2009).[1]

All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA § 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e).

Section 206 of the Federal Power Act, 16 U.S.C. § 824e, authorizes the Commission to investigate whether existing rates are lawful. If the Commission, on its own initiative or on a third-party complaint, finds that an existing rate or charge is "unjust, unreasonable, unduly discriminatory or preferential," it must determine and set the just and reasonable rate. FPA § 206(a), 16 U.S.C. § 824e(a).

B. Developing Supplier Competition And Regional Markets

Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition among power suppliers. The expansion of vast regional grids and the possibility of long distance transmission has enabled electric utilities to make large transfers of electricity in response to market conditions, thereby creating opportunities for competition among suppliers.

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[1] "'Capacity' is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties — generally, generators — who can either produce more or consume less when required." *Id.* at 479.

See New York, 535 U.S. at 7-8 (explaining evolution of competitive markets). In 1996, the Commission furthered the development of such competition with a landmark rulemaking, affirmed by the Supreme Court, that ordered functional unbundling of wholesale generation and transmission services, requiring utilities to provide open, non-discriminatory access to their transmission facilities to competing suppliers.[2] *See New York*, 535 U.S. at 11-13; *cf. Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 536 (2008) ("the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity").

To broaden the geographic reach of wholesale competition and to promote efficiencies, the Commission has also encouraged the creation of "regional transmission organizations," independent regional entities that operate the transmission grid on behalf of transmission-owning member utilities and are required to maintain system reliability. *See NRG Power Mktg., LLC v. Me. Pub.*

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[2] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part, Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York*, 535 U.S. 1.

Utils. Comm'n, 558 U.S. 165, 130 S. Ct. 693, 697 & n.1 (2010) (explaining responsibilities of an independent system operator). As these regional entities restructured electricity supply options with greater reliance on auction-based electricity markets and price caps or market power mitigation in those markets, they developed different approaches to address reliability needs. *See generally Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 252 (D.C. Cir. 2001) (California required reliability contracts to ensure that generators were available when needed); *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1235 (D.C. Cir. 2005) (New York system operator adopted a capacity market); *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 467 (D.C. Cir. 2008) (New England regional system adopted a capacity market) (reversed in one unrelated respect in *NRG Power Mktg*.).

These regional entities also run auction markets for electricity sales. *See Morgan Stanley*, 554 U.S. at 537. Such organized regional markets are subject to FERC market rules that help mitigate the exercise of market power, to price caps in some instances, and to oversight of market behavior and conditions by the regional entities' own market monitors. *See, e.g.*, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904, FERC Stats. & Regs. ¶ 31,252, 119 FERC ¶ 61,295 at P 955 (2007), *on reh'g and clarification*, Order No. 697-A, 73 Fed. Reg. 25,382,

FERC Stats. & Regs. ¶ 31,268, 123 FERC ¶ 61,055 at P 395 (2008), *aff'd, Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011). *See generally New Jersey*, 744 F.3d at 81 ("FERC now seeks to ensure that market-based rates are 'just and reasonable' largely by overseeing the integrity of the interstate energy markets").

PJM is the independent system operator for a regional transmission system that spans thirteen mid-Atlantic states, plus the District of Columbia, stretching as far south as North Carolina and as far west as Chicago. *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1293 (2016); *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1284 (D.C. Cir. 2011); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at PP 2, 8 (2006). Among its responsibilities is "ensuring that its system has sufficient generating capacity," in order to prevent service interruptions. *Maryland*, 632 F.3d at 1284.

II. BACKGROUND OF PJM'S CAPACITY MARKET

A. 2006: Implementation of PJM's Capacity Market

Like other regional entities, PJM tried several different mechanisms to ensure reliability on its system. *See generally New Jersey*, 744 F.3d at 83. In 2005, PJM market participants agreed to a settlement that proposed a forward capacity market to ensure the development of sufficient generation facilities to meet the needs of the PJM region; the Commission approved that rate design, with

modifications. *See PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 (2006); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006) ("December 2006 Order"), *on reh'g, clarification, and compliance*, 119 FERC ¶ 61,318 (2007), *reh'g denied*, 121 FERC ¶ 61,173 (2007).

The capacity market, as modified by the Commission, was incorporated into PJM's tariff as a new set of market rules. PJM conducts an auction every year to procure capacity three years in advance of the year in which the capacity will be provided. December 2006 Order P 6. "This lag time allows competition from new suppliers that lack the capacity to deliver electricity now but could develop that capacity within three years of winning a bid." *Maryland*, 632 F.3d at 1285. PJM predicts electricity demand for the delivery year and assigns a share of that demand to each load-serving entity participating in the market. *See Hughes*, 136 S. Ct. at 1293. Utilities can opt out of the reliability auctions by supplying sufficient capacity from their own generation or through bilateral contracts with suppliers. December 2006 Order P 6.

A proxy demand curve is used to set the price and amount of annual capacity needed for each of the 23 delivery areas established for the market. *See id.* PP 25-26. The curve is a downward sloping demand curve, and the height of the curve is determined by the net cost of new entry, the calculation of which is governed by PJM's tariff. *See id.* P 26. In general, the net cost of new entry is the gross cost of

new entry less an offset for energy and ancillary services revenues. *See id.* PJM is required to evaluate the need for changes to the demand curve and its inputs, including the net new entry cost, at least every three years. *Id.* P 27. (Another case pending before this Court, *PJM Power Providers Group, et al. v. FERC*, Nos. 15-1453 & 15-1455, is on review of Commission orders concerning revisions to the demand curve that PJM proposed in 2014.)

Owners of generation resources that will provide capacity in the delivery year submit offers to sell that capacity to PJM. *See Hughes*, 136 S. Ct. at 1293. Using the demand curve, PJM accepts bids, beginning with the lowest offers, until it meets the projected demand for capacity. *See id.* All resources that "clear" in the auction (i.e., that PJM accepts) receive the highest accepted rate (the clearing price). *See id.* Load-serving entities then must purchase their assigned shares of capacity from PJM at the clearing price. *See id.* PJM's market design also incorporates a deliverability requirement, ensuring that generators committing capacity can deliver that capacity to the load, even in the presence of transmission constraints. December 2006 Order P 14. The capacity market is intended to identify the need for new generation: A high clearing price encourages new resources to enter the market, while "a low clearing price discourages new entry and encourages retirement of existing high-cost generators." *Hughes*, 136 S. Ct. at 1293.

The capacity market also includes measures to mitigate any supplier market power identified by PJM's Independent Market Monitor.[3] *See* December 2006 Order PP 33-35. The tariff prevents existing capacity resources from physically withholding their supply by requiring "that all available capacity must be offered in the [annual auction] and incremental auctions . . . ." *Id*. P 33 (explaining that the Commission will halt auction processes if the Market Monitor suspects physical withholding). To prevent suppliers from driving prices to above-competitive levels through bidding strategies, the tariff specifies rules for capping bids in noncompetitive conditions at a supplier's avoidable or opportunity cost. *Id*.

PJM's capacity market also includes measures to mitigate buyer market power in the form of artificial price suppression caused by below-cost offers. The Minimum Offer Price Rule was designed to prevent the exercise of monopsony power — that is, price suppression by utilities that offer capacity into the market but buy more capacity than they sell. For example, a load-serving entity might own a generation resource, which it must offer into the auction to count toward the entity's capacity requirement. The entity might also need to purchase other capacity to satisfy all of its requirement. If a load-serving entity must buy more capacity than it offers, it has an incentive to keep the clearing price as low as

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[3] The Independent Market Monitor is a neutral entity charged with monitoring compliance with the market rules. *See New Jersey*, 744 F.3d at 91 n.15.

possible. "Theoretically, those net-buyers can achieve that objective by offering their capacity at artificially low prices that are sure to clear the auction. Such offers crowd out other capacity that is priced at a higher, cost-based rate, and thus result in a lower overall clearing price." *New Jersey*, 744 F.3d at 85.

To prevent such market manipulation, the Minimum Offer Price Rule is designed to identify new resources with the incentive and ability to depress auction clearing prices. *See id.* at 85-86 (describing preliminary screens used to identify such resources). Once identified, such a resource is subject to mitigation, raising its offer to a competitive level. *See also New Jersey*, 744 F.3d at 785 (rule mitigates such offers "by raising them to a price that more accurately approximates their net costs"). Under the original market design, the mitigated price was 90 percent of the applicable net entry cost for combustion turbine and combined cycle resources; other resources were mitigated to 80 percent. *See* December 2006 Order P 103. The screens and mitigation, however, applied only to the first annual auction in which a planned generation resource was offered (regardless of whether it cleared). *See PJM*, 119 FERC ¶ 61,318 at P 166. *Cf. New Jersey*, 744 F.3d at 86 (explaining that, because existing resources have already incurred construction costs, and can thus afford to offer capacity at very low prices, they are permitted to bid at zero dollars, ensuring that they clear the auction and receive the clearing price).

This Court upheld the Commission's approval of the capacity market design in *Public Service Electric & Gas Co.*, 324 F. App'x 1. The Court later upheld orders that denied challenges to the results of capacity auctions held during the transitional period leading up to full implementation of the capacity market. *See Maryland*, 632 F.3d at 1284-85.[4] The Court noted there was substantial evidence that PJM's capacity market had spurred development of new capacity resources and improved reliability. *Id.* at 1285.

B. 2011: Revisions to the Minimum Offer Price Rule

In 2011, Power Providers filed a complaint under Federal Power Act section 206, 16 U.S.C. § 824e, against PJM, claiming that the Minimum Offer Price Rule was ineffective in deterring buyer market power. PJM subsequently submitted its own filing under FPA section 205, 16 U.S.C. § 824d, proposing revisions to its tariff to update and clarify the Minimum Offer Price Rule. The Commission largely accepted PJM's proposed revisions, subject to conditions. *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (2011) ("April 2011 Order"), *on reh'g and compliance*, 137 FERC ¶ 61,145 (2011) ("November 2011 Order"), *on reh'g*, 138 FERC ¶ 61,194 (2012) ("March 2012 Order"). (For simplicity, this

[4] Between April 2007 and May 2008, PJM conducted auctions for capacity to be delivered in each year from 2007-2008 through 2010-2011, and the first full three-year forward auction for delivery in 2011-2012. *See id.* at 1285.

Brief refers to that proceeding and the resulting series of orders as the 2011 Orders.)

Among other changes, the Commission accepted PJM's proposals to eliminate the exemption of state-mandated projects from the Minimum Offer Price Rule, to clarify that new generation designated as self-supply is subject to that rule, and to exempt wind and solar generation from mitigation. April 2011 Order PP 139, 152, 191. The Commission also accepted revisions to the level and methodology used to screen offers, including increasing the threshold price for combustion turbine and combined cycle resources from 80 to 90 percent of net new entry costs. *Id.* PP 43, 66, 86, 101. In addition, the Commission revised the Rule to apply to a new resource until that resource clears in one Auction (*id.* P 176), and declined to adopt an additional exemption (proposed by Power Providers) for resources that do not receive state subsidies (*id.* P 123).

The Commission rejected PJM's proposal to allow parties to seek review of mitigated sell offers directly from the Commission, and directed PJM to submit a proposal for a process and applicable criteria for the Independent Market Monitor and/or PJM to review parties' cost justifications. *Id.* PP 118-22. In subsequent orders, the Commission approved PJM's proposal for a unit-specific review process. *See* November 2011 Order PP 241-53; March 2012 Order PP 18-28. That process allows a seller whose offer fails the preliminary screen to show that its

offer at a price below the default floor would be consistent with the competitive, cost-based, net cost of new entry if it relies solely on revenues from PJM markets. *See* November 2011 Order PP 212-17. A seller can demonstrate to the Independent Market Monitor (subject to review by PJM) that it has lower costs or higher revenues than the screen's generic estimates, due to its business model, financial condition, tax status, or other relevant conditions. *See id.*

Several groups of petitioners, including Power Providers, filed petitions for review, which were consolidated before the Third Circuit. That court affirmed the 2011 Orders in *New Jersey*, 744 F.3d 74.

III. THE COMMISSION PROCEEDINGS AND ORDERS

A. Tariff Filing

The Minimum Offer Price Rule, as approved in the 2011 Orders, governed the annual capacity auctions held in 2011 and 2012. *See* PJM Transmittal Letter at 8, R. 1, JA 28, 35. In December 2012, PJM submitted further proposed revisions to that rule. *Id.* at 1, 15-33, JA 28, 42-60. PJM proposed further narrowing the types of resources subject to the rule, extending the mitigation period to three years, expanding region-wide application of the rule, and raising the benchmark for screening new capacity offers to 100 percent of the net cost of new entry. *Id.* at 15-16, JA 42-43.

PJM also proposed to eliminate the unit-specific review process and to adopt two categorical exemptions to the Rule, for self-supply for certain load-serving entities and for competitive entry projects that receive no out-of-market payments. *Id.* at 15, JA 42. PJM explained that the self-supply exemption would employ a definition of load-serving entities that "describes the universe of traditional, long-standing capacity self-supply business models." *Id.* at 18, JA 45 ("Pursuit by these types of [entities] of the types of bilateral contracts and other power supply arrangements on which they have relied for years generally should not raise concerns of possible price suppression, absent additional facts [about net positions or costs and revenues]"). Two further criteria would apply: detailed descriptions of "types of costs or revenues that do, or do not, give rise to price suppression concerns"; and thresholds for permissible net-short or net-long capacity positions, which "vary slightly" based on the size of the entity's load. *See id.* at 18-21, JA 45-48.

The exemption for competitive entry would exclude a resource from mitigation if the seller showed that it was not receiving out-of-market payments related to clearing a capacity auction or construction of new generation. *See id.* at 15, 21-24, JA 42, 48-51. State-sponsored generation also could be exempted upon a showing that the project was selected through a competitive and non-discriminatory process open to both new and existing resources. *See id.*

As to unit-specific review, PJM explained its position that any projects that would not qualify under the two new categorical exemptions would pose a high risk of price suppression and should be mitigated. *See id.* at 25, JA 52. "[W]hile PJM need not show, and does not argue, that the unit-specific exemption process is unjust and unreasonable" (*id.*), PJM explained that eliminating unit-specific review would improve the process of applying the Minimum Offer Price Rule, because the degree of flexibility and discretion, as well as the lack of transparency in the confidential review, raised disputes between PJM and the Independent Market Monitor as well as market participants. *See id.* at 15, 25-26, JA 42, 52-53.

On February 5, 2013, Commission Staff issued a deficiency letter requiring PJM to provide additional information, including support for the proposed self-supply exemption and an explanation whether it was reasonable for a resource that would not qualify for either of the categorical exemptions to be mitigated to the default offer price, even if its actual competitive costs were lower than the assumptions used for the net cost of new entry. R. 78, JA 546. PJM submitted its response to the deficiency letter on March 4, 2013 ("PJM Response"). R. 80, JA 549.

B. Tariff Order

On May 2, 2013, the Commission issued the Tariff Order, conditionally accepting PJM's filing in part, subject to a compliance filing, and rejecting it in

part. *See* Tariff Order P 3, JA 673. The Commission accepted the proposals to apply the Minimum Offer Price Rule to additional types of generation resources, to broaden the Rule to apply to the entire PJM region, and to increase the benchmark values to 100 percent of the net cost of new entry. *Id.* P 19, JA 678. As relevant to this appeal, the Commission conditionally accepted the proposed categorical exemptions for self-supply and competitive entry, subject to retention of the unit-specific review process. *Id.* P 26, JA 680. The Commission found that PJM had shown that the two new exemptions were reasonably designed to identify resources lacking incentives to exercise buyer-side market power, but that the categorical exemptions were not just and reasonable without a unit-specific review process to consider other offers that might be cost-justified. *Id.* PP 24-25, 53-62, 107-15, JA 679-80, 688-91, 706-09. The Commission also directed PJM to add tariff language obligating PJM to review and, if necessary, revise the net-short and net-long thresholds for the self-supply exemption on a periodic basis. *Id.* PP 25, 113, JA 680, 708. In addition, the Commission rejected PJM's proposal to extend the mitigation period from one to three years. *Id.* PP 19, 210-12, JA 678, 733-34.

On June 3, 2013, PJM submitted a compliance filing to reinstate the unit-specific review process and implement other tariff revisions. R. 112, JA 829.

C. Rehearing Order

PJM did not seek rehearing of the Tariff Order. Other parties, including the Suppliers, filed timely requests for rehearing. *See* R. 111 (Power Providers), JA 811; R. 107 (NRG), JA 744. On October 15, 2015, the Commission issued the Rehearing Order, denying rehearing on all issues and accepting PJM's compliance filing.

These appeals followed.

SUMMARY OF ARGUMENT

This case concerns the Commission's responsibility under the Federal Power Act to balance the various interests of all parties involved in a regional, auction-based capacity market. In the challenged orders, the Commission considered PJM's proposed revisions to its rules for mitigating uncompetitively low auction bids. Though the Commission found that the new exemptions, for self-supply and competitive entry, were appropriately designed to identify new entry that would lack incentives to suppress market prices, it concluded that the changes were not just and reasonable without retaining an option for economic offers that the categorical exemptions could miss. For that reason, the Commission conditionally accepted the proposed revisions, subject to retention of the existing unit-specific review process.

That determination was consistent with the Federal Power Act. The Commission found that PJM's proposal was not just and reasonable as filed, under section 205 of the Act, 16 U.S.C. § 824d. Allowing only categorical exemptions, without an opportunity for economic resources to demonstrate that their cost-based bids are competitive, would exclude generation offers that might also be just and reasonable. Therefore, the Commission conditioned its acceptance of the categorical exemptions on retaining a unit-specific review process as a backstop, appropriately balancing the need to mitigate buyer-side market power against the risk of over-mitigating competitive entry.

Such conditional acceptance is within the Commission's statutory authority and consistent with its longstanding practice and this Court's precedents. The Commission gave PJM the option to cure the deficiencies in its filing, which PJM accepted. PJM did not seek rehearing of the Commission's finding, nor seek to withdraw its filing, but submitted a compliance filing that retained unit-specific review with the new categorical exemptions. Moreover, the Commission did not impose a condition of its own making, but turned to the existing, previously-approved process. The Suppliers spend much of their Brief arguing that unit-specific review is unjust and unreasonable, based on auction results that both PJM and the Independent Market Monitor determined to be just and reasonable and on mischaracterizations of the Commission's own assessments. The Commission,

however, reasonably rejected the challenges to the existing rule. (Suppliers, of course, can challenge the continuing reasonableness of the existing process by filing a complaint under section 206 of the Federal Power Act, 16 U.S.C. § 824e.)

As to the categorical exemptions, the Commission found that PJM had shown that its proposed rules, including the net-short and net-long thresholds for self-supply and the criteria for competitive entry, would reasonably identify resources that lack incentives to suppress capacity market prices. The Commission's predictive judgments about market behaviors and its policy determinations are entitled to deference.

Finally, the Commission properly rejected PJM's proposal to extend mitigation to three annual auctions, for the same reasons that the Third Circuit upheld in *New Jersey*, 744 F.3d at 111-12. The Commission again found that continuing mitigation after a resource clears in a capacity auction would be unreasonable, both because the market has demonstrated its need for that resource and because the added risk could delay or even deter development of new generation resources. Here, again, this determination reflects the Commission's policy judgment that the goal of preventing artificial price suppression should be balanced against the risk of over-mitigation that could discourage economic entry.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The "scope of review under [that] standard is narrow." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (citation omitted). The relevant inquiry is whether the agency has "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 of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (finding reasoned decisionmaking where Commission "weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice").

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 Maryland*, 632 F.3d at 1286 ("[B]ecause issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at

the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is highly deferential.") (internal quotation marks and citation omitted). *See also Morgan Stanley*, 554 U.S. at 532 ("The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 951 (D.C. Cir. 2007) ("In reviewing FERC's orders, we are 'particularly deferential to the Commission's expertise' with respect to ratemaking issues.") (citation omitted).

The Commission's policy assessments also are afforded "great deference." *Transmission Access*, 225 F.3d at 702. *See also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014) ("the Commission must have considerable latitude in developing a methodology responsive to its regulatory challenge") (internal quotation marks and citations omitted); *New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283, 293 (D.C. Cir. 2014) (court "properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions") (internal quotation marks and citation omitted).

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *La. Pub. Serv. Comm'n v. FERC*, 522

F.3d 378, 395 (D.C. Cir. 2008) (citation omitted); *accord South Carolina*, 762 F.3d at 54. If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *accord Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("[W]e do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision.").

II. THE COMMISSION APPROPRIATELY APPROVED THE CATEGORICAL EXEMPTIONS WITH THE CONDITION THAT PJM MUST CONTINUE TO PROVIDE A UNIT-SPECIFIC REVIEW PROCESS

A. The Commission's Conditional Approval Was Reasonable

1. The Commission Determined That PJM's Proposed Revisions Were Not Just And Reasonable Absent A Mechanism To Allow Cost-Justified Offers

Suppliers claim that the Commission overstepped the bounds of Federal Power Act section 205, 16 U.S.C. § 824d, by deciding that "PJM's prior tariff was more reasonable." Br. 21. They ignore the Commission's actual holding. Though the Commission approved the design of the categorical exemptions that PJM proposed, *see infra* Part III, it concluded that those exemptions "are not just and reasonable standing alone." Tariff Order P 141, JA 716; *see also id.* P 143, JA 716 ("we are not persuaded that the exemptions put forward by PJM are just and reasonable without the retention of a unit-specific review process"); Rehearing

Order P 17, JA 855 ("the filing has not been shown to be just and reasonable as filed"); *id.* P 21, JA 857 ("PJM had not shown that these provisions, standing alone, were just and reasonable").

Providing *only* categorical exemptions, without opportunity for case-by-case cost-justification, could exclude offers that might also be just and reasonable. Rehearing Order P 21, JA 857 ("generation offers that did not fall within these exceptions might also be just and reasonable"); *see also id.* P 107, JA 886 ("some resources that do not qualify for a categorical exemption might still merit a unit-specific exemption"). Specifically, "there may be resources that have lower competitive costs than the default offer floor, and these resources should have the opportunity to demonstrate their competitive entry costs." Tariff Order P 141, JA 716; *see also id.* P 143, JA 716 ("The unit specific review process . . . recognizes that some resources, including those that would fail to qualify for PJM's proposed exemptions, may nonetheless have competitive costs that fall below the benchmark price"); Rehearing Order P 8, JA 852 (resources that would not qualify for exemptions might have project costs that are "competitive," i.e., at or below the net cost of new entry benchmark for a typical marginal capacity resource).

Unit-specific review allows for cost-based bidding below the default offer floor — not, as Suppliers claim (Br. 35), for bidding below the resource's actual

costs. The Commission found the risk of overlooking economic resources particularly salient because the benchmark itself "is only an estimate" that some parties, including the Independent Market Monitor, argued was too high. Tariff Order P 143, JA 716; *see also* Comments of the Independent Market Monitor for PJM (March 2013) at 4, R. 94, JA 653, 656. Therefore, the Commission determined that market rules that imposed a default offer floor with only categorical exemptions could be under-inclusive and thus over-mitigating.

While the purpose of the Minimum Offer Price Rule is to guard against price suppression, the Commission weighs that objective against concern that excessive mitigation measures could impede competition and deter new entry by economic resources. *See* Tariff Order P 26, JA 681 (finding that the Minimum Offer Price Rule, as modified, "appropriately balances the need for mitigation of buyer-side market power against the risk of over-mitigation"); *see also id.* P 212, JA 734 (citing concern about over-mitigation in rejecting proposal to extend mitigation period, *see infra* Part IV); *id.* P 217, JA 735 (finding that geographical expansion of Minimum Offer Price Rule to entire PJM region was "not likely to lead to over-mitigation"); March 2012 Order P 19 (answering arguments by some parties that the unit-specific review process was too broad and by others that it was too narrow, the Commission reaffirmed its findings that the process "appropriately balances the need to protect against uneconomic entry while also mitigating concerns about

placing an undue burden on resources"); Tariff Order P 195, JA 730 (same). *Cf. Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964 (D.C. Cir. 2005) ("[Mitigation] may well do some good by protecting consumers and utilities against . . . the exercise of market power. But the Commission gave no reason to suppose that it does not also wreak substantial harm" to the functioning of the market if over-applied), *quoted in* Tariff Order P 26 n.21, JA 681.

Concerns about over-mitigation and seeking the appropriate balance are policy judgments for the Commission to make, as this Court recognized in upholding the Commission's decision to adjust mitigation rules proposed for the New England regional capacity market: "Such a balancing function is precisely the role of expert agencies . . . ." *New Eng. Power Generators*, 757 F.3d at 298. *See also id.* at 297 ("we defer to FERC's expertise, as the agency is best equipped to manage competing policy rationales"); *id.* at 293 (Commission's decision was "a proper exercise of its role in balancing competing interests"); *see generally Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (deference appropriate where rate issue "involves both technical understanding and policy judgment"). Indeed, in affirming the 2011 Orders, the Third Circuit upheld the Commission's policy prerogative against arguments that the Commission had chosen the wrong balance: "[Power Providers] fail[] to explain *why* erring on the side of allowing more resources to avoid mitigation is not a permissible policy. Surely FERC is

permitted to weigh the danger of price suppression against the counter-danger of over-mitigation, and determine where it wishes to strike the balance." *New Jersey*, 744 F.3d at 109.

Here, the Commission concluded that the Minimum Offer Price Rule, as modified, would strike an appropriate balance between the need for mitigation of buyer-side market power and the risk of over-mitigation. Tariff Order P 26, JA 680-81. In the Commission's view, the Rule would function properly by targeting types of new capacity resources that are most likely to raise concerns about price suppression, with categorical exemptions for types of resources that do not pose a risk of suppression, and unit-specific review for other new resources that can justify an unmitigated bid based on actual costs. *See id.* For that reason, the Commission reasonably concluded that unit-specific review continued to play a necessary role in a just and reasonable Minimum Offer Price Rule. *Cf. Maryland*, 632 F.3d at 1286 (addressing PJM auction results) ("issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission").

2. The Commission Correctly Applied Section 205 Of The Federal Power Act

The Commission did not, as Suppliers claim (Br. 32), "reverse[]" the burdens under the Federal Power Act. The Commission considered whether PJM's proposal was just and reasonable under Federal Power Act section 205, 16 U.S.C.

§ 824d, and concluded that it was not, unless modified to retain the existing unit-specific review. The Commission did not suggest that any party had the burden (as under Federal Power Act section 206, 16 U.S.C. § 824e) to show that the existing process was *not* just and reasonable.

Rather, the Commission merely noted — in finding that the proposed rules were not just and reasonable absent modification — that the existing, previously-approved process remained valid. And, because the Commission appropriately takes into account PJM's experience in implementing the capacity auctions, it found relevant that PJM itself had not questioned the reasonableness of unit-specific review. Tariff Order P 142, JA 716; *see* PJM Transmittal Letter at 25, JA 52; *cf. New Eng. Power Generators*, 757 F.3d at 299 (giving particular attention to system operator's view). To the contrary, PJM confirmed that the process remained just and reasonable, even as it proposed to eliminate that process in favor of categorical exemptions that PJM preferred as a means to clarify and simplify the market rules. *See* Tariff Order P 130, JA 712 (PJM noted that both the existing process and the proposed revisions were reasonable approaches, both having advantages and disadvantages); PJM Response at 1, JA 553.

PJM did argue that the existing process was flawed and difficult to implement. *See* Tariff Order P 142, JA 716 (noting PJM's arguments that "perfect flexibility" was not possible and that an imperfect process risked lack of

confidence in auction price signals). PJM did not, however, contend that the asserted disadvantages rendered the process unjust and unreasonable. Furthermore, PJM considered the prices resulting from the 2012 auction — in which resources that the categorical exemptions would have missed were able to justify their specific cost-based offers — to be just and reasonable. *See id.* P 143, JA 716-17; PJM Response at 3, JA 555. Suppliers claim that PJM referred only to its "goal" of ensuring reasonable results. Br. 45 n.12. But, in fact, PJM never cast doubt on the auction results.

Thus, the Commission cited PJM's position on the reasonableness of unit-specific review, not to suggest that PJM would have to prove otherwise in order to replace it, but only to reinforce the Commission's own determination that the existing process should fill the gaps left by the categorical exemptions. Nevertheless, the Commission acknowledged PJM's concerns about implementation and encouraged PJM to propose ways to improve the process. *See* Tariff Order P 144, JA 717; *see also* Rehearing Order P 23, JA 858. *Cf. Elec. Consumers*, 407 F.3d at 1239 (court's deference to the Commission on complex market rate design "is based on the understanding that the Commission will monitor its experiment and review it accordingly").

3. The Commission Reasonably Rejected Other Parties' Challenges To The Unit-Specific Review Process

Unlike PJM, other parties did argue that unit-specific review was not just and reasonable (*see* Tariff Order P 135, JA 714), and Suppliers repeat that claim on appeal. *See* Br. 35-41. Though the proceeding before the Commission was whether to approve PJM's new proposal (under FPA section 205), rather than a challenge to the existing rules (under FPA section 206), the Commission considered the arguments and found that it could not conclude, based on the record before it, "that review of individual units' costs and revenues is an unjust and unreasonable method of determining rates." Rehearing Order P 23, JA 858. First, the process allows resources to justify their bids based on actual costs; cost-of-service analysis has long been "a fixture" in ratemaking. *Id.* n.35, JA 858 (citing *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944)). Moreover, as explained *supra*, the Commission found that, by providing a way for economic resources to justify low-cost offers, unit-specific review "yields benefits that warrant[]" its retention. Rehearing Order P 23, JA 859. Of course, Suppliers are free to file a complaint under Federal Power Act section 206, 16 U.S.C. § 824e, seeking to demonstrate that the process is not just and reasonable and proposing a just and reasonable replacement.

Suppliers also conflate several issues and misrepresent the Commission's views. Suppliers argue that the Commission itself has warned of price suppression

by uneconomic bids by state-supported resources. *See* Br. 37-38. That is true — and that is why the Commission eliminated the exemption for state-mandated resources. *See* November 2011 Order PP 89-91; *New Jersey*, 744 F.3d at 91, 97-101. In fact, the Commission's reference to "mounting evidence" of a risk of price suppression concerned resources that would have employed that categorical exemption — not the unit-specific review process. *See* April 2011 Order P 139; *New Jersey*, 744 F.3d at 91, 100.

Throughout their Brief, Suppliers wrongly claim that the Commission has "conceded" that uneconomic entry has occurred through unit-specific review. *See* Br. 13, 22, 25, 40, 45, 55. They also claim — also wrongly — that state-subsidized resources were able to bid into the capacity market with uneconomic offers through unit-specific review. *See* Br. 14, 36. In fact, the record evidence shows that some of the state-supported resources — unable to take advantage of the special exemption that the Commission had removed — were able to justify their bids *as economic* through unit-specific review, using their actual project costs and relying only on market revenues and not on out-of-market subsidies. *See, e.g.*, Comments of the Independent Market Monitor for PJM (December 2012) at 4, R. 58, JA 270, 273; Answer of Hess Corporation at 6, 9, R. 72, JA 535, 540, 543. The Commission also has not, as Suppliers imply, agreed that the unit-specific review process is "broken" (Br. 35). To the contrary, the Commission expressly

agreed with PJM and the Independent Market Monitor that the actual results of the 2012 auction, in which resources cleared with cost-justified bids, were just and reasonable. *See* Tariff Order P 143, JA 716-17; Comments of the Independent Market Monitor for PJM (December 2012) at 4, JA 273; *cf. New Eng. Power Generators*, 757 F.3d at 299 (noting that agreement of the system operator and its market monitor with the Commission's decision "underscores its reasonableness").

Nor did the Commission take an inconsistent position in the related litigation over preemption of certain state subsidies. *See* Br. 34, 37. In those cases, the Commission contended that state subsidies could affect market prices — but not through unit-specific review. Specifically, the Commission argued that a subsidized resource could affect the market price by bidding into the auction *at* the default offer floor — without triggering any mitigation or invoking any exemption or unit-specific review — even if its actual, unsubsidized costs would otherwise have been higher. *See* January 2016 Brief for the United States as Amicus Curiae at 25-26, *Hughes v. Talen Energy Mktg., LLC*, U.S. Nos. 14-614, *et al.*; Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae at 10, *PPL EnergyPlus, LLC v. Solomon*, 3d Cir. Nos. 13-4330, *et al.*[5] *Cf. Hughes*,

[5] The Commission's briefs are available at http://www.ferc.gov/legal/court-cases/briefs/2016/SCT-14-614and14-623WKevinHughes.pdf and http://www.ferc.gov/legal/court-cases/briefs/2014/3rdCirNos.13-4330etalPPLEnergyPlus.pdf.

136 S. Ct. at 1298 n.11 ("Even assuming that [eliminating the special exemption] has prevented Maryland's program from distorting the auction's price signals — a point the parties dispute — Maryland cannot regulate in a domain Congress assigned to FERC and then require FERC to accommodate Maryland's intrusion.").

B. The Commission Acted Within Its Federal Power Act Authority By Conditionally Approving PJM's Filing

Suppliers argue that the Commission improperly modified PJM's proposal without invoking its authority under section 206 of the Federal Power Act, 16 U.S.C. § 824e. Br. 26-31. In considering a rate proposal under FPA section 205, 16 U.S.C. § 824d, the Commission cannot impose "significant changes" without determining that the existing tariff provisions are unjust and unreasonable. Rehearing Order P 15, JA 854. But the Commission has "a long standing practice," where it finds that a proposal is not just and reasonable absent modifications, of giving the filing utility a choice to fix its proposal or to have the filing rejected and continue to operate under the existing tariff. *See id.* P 16, JA 855. The Commission adopted this approach because utility filings under the Federal Power Act and analogous provisions of the Natural Gas Act (*see* 15 U.S.C. § 717c) are often complex and may include numerous inter-related provisions. *Id.* "In these circumstances, a conditional acceptance serves the need for

administrative efficiency by avoiding the necessity of rejecting the filing in its entirety." *Id.*

As explained in the previous section, that was the Commission's conclusion here. The Commission found that PJM's filing had not been shown to be just and reasonable as filed (Rehearing Order P 17, JA 855) — the categorical exemptions standing alone could leave some economic resources without an opportunity to justify their cost-based offers, thereby failing to strike the proper balance between mitigation and over-mitigation. *See supra* Part II.A.1. Thus, PJM was free either to revise its proposal to make it just and reasonable, or to withdraw its filing and revert to the status quo ante, the existing mitigation rules approved in the 2011 Orders (and affirmed on judicial review).

This Court approved a similar approach in *City of Winnfield v. FERC*, 744 F.2d 871 (D.C. Cir. 1984), *discussed in* Rehearing Order P 17, JA 855. There, the Court upheld the Commission's decision to set a rate using the filing utility's previous methodology; the utility chose to accept the modification. On a challenge (by a customer) to the statutory basis for the revision, the Court concluded that "[t]he structure of the [Federal Power] Act is not 'undermined' or even threatened when, in a § 205 proceeding, the Commission declines to permit a new form of rate calculation but grants a rate increase under the form the utility had previously been using, which increase *the utility accepts*." 744 F.2d at 875. The Court found that

approach to be a "sensible procedure," allowing the utility — at its election — to cure the deficiencies in its filing, avoiding further delay and the "wasteful" initiation of a new proceeding. *Id.*

The Commission did not impose a "materially different" rate of its own making, as in *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1579 (D.C. Cir. 1993). There, the Commission had crafted a rate from scratch; a pipeline proposed new rates that "differed substantially" from its existing rates, and the Commission approved the forward-haul rate but set a backhaul rate that differed from both the proposal and the existing rate. *Id.* On an appeal by the pipeline itself, this Court held that the Commission could not create a new rate under section 4 of the Natural Gas Act (15 U.S.C. § 717c), which is similar to section 205 of the Federal Power Act — "at least without the pipeline's consent." 9 F.3d at 1579, *cited in* Rehearing Order P 17, JA 856.

In both cases, the filing utility's consent, or lack thereof, was pivotal. Here, the Commission found that PJM's proposed categorical exemptions were not just and reasonable without unit-specific review as a fallback option for economic resources. "The conditional acceptance pursuant to section 205 provided PJM with the opportunity to move forward with its two new categorical exemptions and the rest of its filing while retaining the just and reasonable unit-specific review process." Rehearing Order P 22, JA 858. PJM did not seek rehearing of the

Commission's finding; nor did it seek to withdraw its filing. *Id.* Rather, it submitted a compliance filing retaining unit-specific review, and has intervened to support affirmance of the Commission's orders in this appeal. Furthermore, in contrast to the backhaul rate in *Western Resources*, the Commission did not develop a new standard — it turned to the existing unit-specific review process, and encouraged PJM to develop and propose modifications to improve that process. *Cf. Winnfield*, 744 F.2d at 875-76 (Commission had set "a system of rates similar to that previously in effect").

That approach was consistent with Commission precedents. *See, e.g., ISO New England, Inc.*, 113 FERC ¶ 61,055 at P 27 (2005) (approving rate design that regional system operator had not proposed in its initial filing, where operator had agreed to accept any of several alternatives: "this rate design has not been imposed unwillingly on the utility"), *discussed in* Rehearing Order P 19, JA 856. The Commission routinely permits filing utilities to withdraw their filings and revert to their existing rates, rather than consent to the Commission's conditional acceptance. *See* Rehearing Order P 20 & n.31, JA 856-57 (citing cases under both Federal Power Act and Natural Gas Act); 18 C.F.R. § 35.17 (2016) ("Withdrawals and amendments of rate schedule, tariff or service agreement filings"). That longstanding procedural option was neither new nor unknown, notwithstanding Suppliers' claim (Br. 28) that the Commission's clarification in the Rehearing

Order came too late. As further confirmation of PJM's consent, the Commission provided another opportunity for PJM to elect to withdraw its filing, which PJM did not do. *See* Rehearing Order P 22, JA 858.

Suppliers also contend that PJM's proposed revisions were negotiated as a compromise package, and that the Commission should have approved or rejected the package as a whole. *See* Br. 33-34. While PJM did develop its proposed revisions through its stakeholder process, it did not submit its filing as a settlement. *See* PJM Transmittal Letter at 1-2, JA 28-29. More to the point, the Commission has a statutory obligation to make its own determinations as to justness and reasonableness. *See, e.g.*, *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990). In fact, when PJM made its original filing to establish its capacity market, in the form of an extensively-negotiated settlement, the Commission considered the proposal under ordinary just and reasonable review and approved it with modifications and conditions. *See* December 2006 Order PP 6-7, 52, 57-58, 100.

III. THE COMMISSION REASONABLY APPROVED PJM'S PROPOSED CATEGORICAL EXEMPTIONS

Suppliers also challenge the Commission's approval of the self-supply and competitive entry exemptions. Their arguments have no merit.

A. Assuming Jurisdiction, The Commission Properly Considered The Effect Of Providing Both Categorical Exemptions And Unit-Specific Review

Suppliers contend that the Commission failed to evaluate the "total effect" of adding the categorical exemptions to the unit-specific review process. Br. 22, 54; *id.* 46 ("FERC failed to address the risk created by piling new exemptions atop an old one"); *id.* at 51 ("FERC failed to offer a reasoned analysis of the cumulative risks of buyer-side manipulation" resulting from the "combination of exemptions" it approved).

First, this novel contention is not properly before the Court. Though it is now central to Suppliers' brief, neither the Power Providers nor NRG raised such an argument on rehearing before the Commission. Therefore, it is jurisdictionally barred: "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 to do so." FPA § 313(b), 16 U.S.C. § 825*l*(b); *see also, e.g.*, *Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002) (strictly construing jurisdictional requirement).

Further, the argument is misguided. The categorical exemptions and the unit-specific review process are not "piled" in layers. As discussed *infra*, the Commission agreed with PJM that both categorical exemptions were designed to

sort out resources that lack incentives to bid less than their actual costs. As discussed *supra*, unit-specific review provides a case-specific opportunity for a resource that does not qualify for an exemption to justify its cost-based offer. As such, these mechanisms are complementary, and both lead to the same result: new generation resources bidding their actual costs into the capacity market. That *is* the "total effect" of the Commission's orders. *See* Br. 54 (quoting *Hope Nat. Gas*, 320 U.S. at 602). The Commission fully explained its policy judgment that, together, these alternatives reasonably balance the twin goals of preventing price suppression while avoiding unwarranted mitigation of economic offers. *See supra* Part II.A.1; *see generally New Eng. Power Generators*, 757 F.3d at 298.

B. The Commission Reasonably Approved The Proposed Exemption For Self-Supply

Suppliers also challenge the categorical exemption for self-supply, arguing that the Commission ignored the long-term incentives for load-serving entities to suppress prices and the effect of guaranteed revenue streams in encouraging uneconomic entry. Br. 46-51.

But the Commission explained that, "as a general matter," an exemption for self-supply is reasonable because the concerns underlying buyer-side mitigation arise from suppression strategies that would be more effective in the short term but more costly and self-defeating in the long term. Tariff Order P 108, JA 706; *see also id.* P 110, JA 707. While a blanket exemption would leave too much

opportunity for exercise of market power (*see id.* P 109, JA 706), the Commission found that PJM's proposed net-short and net-long thresholds would, "in principle, adequately protect the market from the price effects attributable to uneconomic new self-supply." *Id.* P 107, JA 706; *see also id.* P 25, JA 680 (finding that the exemption would identify self-suppliers that lack the incentive to exercise buyer-side market power) ; *id.* P 112, JA 708 ("In cases in which those thresholds are not violated, the incentive to construct such capacity does not warrant the application of the [Minimum Offer Price Rule]."). *Cf.* Rehearing Order P 53, JA 870 (PJM's proposal was a "limited exemption," in contrast to the blanket exemption for self-supply that the Commission had rejected in the 2011 Orders).

The Commission found, based on substantial evidence, that PJM had supported those thresholds with its analysis of actual auction offers. Rehearing Order P 52, JA 869 ("PJM's analysis . . . reasonably identifies the threshold level at which a self-supply entity would not have the incentive to seek uneconomic entry"); Tariff Order P 113, JA 708 (finding that data from 2012 auction "adequately justifies PJM's proposed net-short and net-long thresholds"); *see* Affidavit of Andrew L. Ott (attached to PJM Response, R. 80), JA 564 (detailing his analysis using the results of the 2012 annual auction). Suppliers argue that the Commission "never explained why the chosen thresholds are properly calibrated." Br. 50. But the Commission reasonably relied on PJM's analysis, which explained

in considerable detail how the thresholds were derived, and why uneconomic entry at each of the thresholds would not lower the load-serving entity's total costs. *See* Ott Affidavit at 2-23, JA 565-86. Moreover, "because the market conditions and related assumptions underlying the[] thresholds are subject to change," the Commission required PJM to add tariff language providing for PJM to review and, if necessary, revise the thresholds periodically. Tariff Order P 25, JA 680.

As this disputed issue "involves both technical understanding and policy judgment," it is not enough that Suppliers disagree with PJM's analysis and the Commission's judgment. *Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("The Commission addressed that issue seriously and carefully . . . . It is not our job to render that [policy] judgment, on which reasonable minds can differ."); *Elec. Consumers*, 407 F.3d at 1239 (deferring to Commission's "predictive judgments and policy choices" in approving an experimental rate design).

C. The Commission Reasonably Approved The Proposed Exemption For Competitive Entry

NRG further argues that the competitive-entry exemption "creates a gaping hole" in the Minimum Offer Price Rule because developers may enter the capacity market with unrealistic bids. *See* Br. 52. The Commission, however, disagreed, based on its understanding of the economics of merchant resources: "Because a purely merchant generator places its own capital at risk when it invests in a new resource, any such resource will have a strong incentive to bid its true costs into

the auction, and it will clear the market only when it is cost effective." Tariff Order P 57, JA 689. For that reason, a merchant bid below the default offer floor (the net cost of new entry) "likely represents the economics of that resource, and if it does not, the resource will not be able to recover its costs." *Id.*; *see also id.* P 24, JA 679 (generators that do not receive out-of-market funding do not pose a risk to the market because they need to rely on capacity market revenues). Nowhere in NRG's array of speculation and hypotheticals about merchant generators' mistakes (Br. 51-54) does it explain why those resources could be expected to offer below their actual costs. Thus, in finding that competitive forces would sufficiently protect against uneconomic entry by generators, the Commission grounded its economic justification "in competitive market design principles where merchant, at-risk investment is disciplined by market forces." Rehearing Order P 32, JA 862. *Cf. Blumenthal v. FERC*, 552 F.3d 875, 885 (D.C. Cir. 2009) (deferring to Commission's reasonable approach, "particularly in light of a complaint based on little more than conjecture").

That determination was particularly within the Commission's purview, as courts give deference "to policy determinations invoking the Commission's expertise in evaluating complex market conditions." *New Eng. Power Generators*, 757 F.3d at 293 (internal quotation marks and citation omitted); *South Carolina*, 762 F.3d at 96 ("[I]t is within the scope of the agency's expertise to make . . . a

prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view.") (internal quotation marks and citations omitted); *Blumenthal*, 552 F.3d at 885 (electricity market "presents 'intensely practical difficulties' demanding a solution from FERC . . . and the Commission must be given the latitude to balance the competing considerations and decide on the best resolution") (citation omitted).

IV. THE COMMISSION APPROPRIATELY REJECTED PJM'S PROPOSAL TO EXTEND THE MITIGATION PERIOD

The Commission also appropriately rejected PJM's proposal to change the duration of mitigation under the Minimum Offer Price Rule. PJM proposed to require mitigated capacity resources to clear in three annual auctions, replacing its existing single-clearance, single-auction rule. *See* PJM Transmittal Letter at 28-29, JA 55-56.

The Commission, however, found that three-year mitigation was not just and reasonable. First, after a resource clears in the market at the offer floor price, the market has demonstrated its need for that resource; thus, "'there is no reasonable basis for continuing to apply the [floor].'" Tariff Order at P 211, JA 733 (quoting April 2011 Order P 175); *see also* November 2011 Order P 131 ("'clearing in one auction . . . and committing to provide capacity for a full year[] reasonably demonstrates that a new resource is needed by the market at a price near its full cost of entry'").

Moreover, the Commission has repeatedly found that continuing to mitigate a new resource after the first cleared auction would be unreasonable. Once a generator clears in a capacity auction, it becomes obligated to deliver capacity within three years. Rehearing Order P 77, JA 878. That typically means that the generator must begin construction shortly after clearing. *Id.* Because "competitive offers are based on going-forward costs, not sunk costs," the sunk costs of that construction will not be reflected in future competitive bids and will not affect the generator's future decisions. *See id.*; *see also* November 2011 Order P 132 ("[O]nce a new resource has cleared an auction and its construction is completed, construction costs become sunk. At that point, the incremental costs of taking on a capacity obligation become much smaller, often approximating zero . . . .").

Thus, imposing mitigated bids for three years would prevent a resource from bidding at its going-forward costs in the second and third auctions, creating the risk that it would fail to clear even though its actual going-forward costs are below the clearing price and lower than the going-forward costs of other, more costly resources. *See* Rehearing Order P 78, JA 878. That outcome "could deter legitimate entry by creating an extra risk that a resource may not clear at all in the second and third years, depriving it of any capacity revenue." *Id.* It also could delay the addition of new generation resources. *See* Tariff Order P 212, JA 734 ("no developer would reasonably commence construction without the certainty that

the project has been accepted as a new capacity resource in PJM's capacity auction"). And, even for already-built, commercially operational generators entering the capacity market, a three-year rule could "lead to over-mitigation" by requiring such resources to bid substantially higher than their going-forward costs. Tariff Order P 212, JA 734. *Cf. New Jersey*, 744 F.3d at 109 ("Surely, FERC is permitted to weigh the danger of price suppression against the counter-danger of over-mitigation, and determine where it wishes to strike the balance.").

Indeed, the Commission had rejected a similar proposal by PJM in 2011, for the same reasons, and was affirmed on appeal. *See* Tariff Order P 210, JA 733 (noting Commission's rejection in 2011 of PJM's three-year proposal as well as Power Providers' alternative proposal for a two-year clearance requirement). In that proceeding, the Commission had found that "applying the . . . offer floor to a resource already determined to be economic would be unreasonable and could inefficiently discourage the entry of new capacity that is economic." Tariff Order P 211, JA 733 (citing April 2011 Order P 175). *See generally* April 2011 Order P 175-76; November 2011 Order PP 130-33. The Third Circuit upheld that rationale, finding that the Commission had adequately explained its reasons and responded to parties' arguments, and deferring to the agency's policy determinations. *New Jersey*, 744 F.3d at 111-12.

Nor has the Commission "endorsed discriminatory subsidies." Br. 22; *see also* Br. 57. What the Commission did find — in accord with its previous determination, as affirmed on appeal — was that the first-year offer floor vitiates the effect of any such subsidy on the market price. That is, a subsidy would not suppress the capacity market price in the years immediately after a new resource has cleared its first annual auction with a mitigated bid: "Even if a generator has received a discriminatory subsidy, it is subject to the [Minimum Offer Price Rule] provisions that limit its ability to exercise buyer-side market power. The subsidy, therefore, would not artificially suppress the market price, if the generator clears the auction." Rehearing Order P 79, JA 879; *see also* April 2011 Order P 177 ("even if discriminatory subsidies are being received, if the resource is needed at the [mitigated] bid then it is a competitive resource and should be permitted to participate in the auction regardless of whether it also receives a subsidy").

Therefore, even a generator that has received a subsidy is permitted "to bid into the market at a competitive price determined by the default offer or its actual costs." Rehearing Order P 79, JA 879. If the resource clears at that mitigated level, it is shown to be needed by the market (*see supra* p. 44), its bid in the immediately subsequent years will reflect its going-forward costs (*see supra* p. 45), and therefore any subsidy will not affect the market-clearing price. *See* November 2011 Order P 133 ("Regardless of whether discriminatory subsidies are being

received, a resource that has cleared an . . . auction at a price above its offer floor is needed and considered a competitive resource and should be permitted to participate in the auction without an offer floor regardless of whether it also receives a subsidy."); *id.* P 132 (subsequent bids "would typically be very low, and often close to zero — regardless of whether the resource receives any out-of-market payments"); April 2011 Order P 175 (after clearing once with a mitigated offer, the resource "does not artificially suppress market prices, and there is no reasonable basis for continuing to apply [mitigation] to it"); *cf.* Tariff Order P 210 nn.97-100 (citing April 2011 and November 2011 Orders).

A three-year requirement "mitigates resources that should not be mitigated." April 2011 Order P 175. It would unreasonably apply the default offer floor to a an economic resource "and could therefore inefficiently discourage the entry of new capacity that is economic." *Id.* Therefore, as discussed *supra* in Part II.A.1, the Commission's policy judgment was "a proper exercise of its role in balancing competing interests . . . ." *New Eng. Power Generators,* 757 F.3d at 293.

CONCLUSION

For the reasons stated, the petitions should be denied, and the challenged FERC orders should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 2010, in 14-point Times New Roman) and contains 11,005 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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ADDENDUM
Statutes & Regulation

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TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

[1] See References in Text note below.

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

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

CODIFICATION

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

proposed to take effect. A copy of such notice to the Commission shall be duly posted. With such notice, each filing party shall submit a statement giving the reasons for the proposed cancellation or termination, and a list of the affected purchasers to whom the notice has been provided. For good cause shown, the Commission may by order provide that the notice of cancellation or termination shall be effective as of a date prior to the date of filing or prior to the date the filing would become effective in accordance with these rules.

(b) *Applicability*. (1) The provisions of paragraph (a) of this section shall apply to all contracts for unbundled transmission service and all power sale contracts:

(i) Executed prior to July 9, 1996; or

(ii) If unexecuted, filed with the Commission prior to July 9, 1996.

(2) Any power sales contract executed on or after July 9, 1996 that is to terminate by its own terms shall not be subject to the provisions of paragraph (a) of this section.

(c) *Notice*. Any public utility providing jurisdictional services under a power sales contract that is not subject to the provisions of paragraph (a) of this section shall notify the Commission of the date of the termination of such contract within 30 days after such termination takes place.

[Order 888, 61 FR 21692, May 10, 1996, as amended by Order 714, 73 FR 57532, Oct. 3, 2008]

§ 35.16 Notice of succession.

Whenever the name of a public utility is changed, or its operating control is transferred to another public utility in whole or in part, or a receiver or trustee is appointed to operate any public utility, the exact name of the public utility, receiver, or trustee which will operate the property thereafter shall be filed within 30 days thereafter with the Commission with a tariff consistent with the electronic filing requirements in § 35.7 of this part.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 714, 73 FR 57533, Oct. 3, 2008]

§ 35.17 Withdrawals and amendments of rate schedule, tariff or service agreement filings.

(a) *Withdrawals of rate schedule, tariff or service agreement filings prior to Commission action*. (1) A public utility may withdraw in its entirety a rate schedule, tariff or service agreement filing that has not become effective and upon which no Commission or delegated order has been issued by filing a withdrawal motion with the Commission. Upon the filing of such motion, the proposed rate schedule, tariff or service agreement sections will not become effective under section 205(d) of the Federal Power Act in the absence of Commission action making the rate schedule, tariff or service agreement filing effective.

(2) The withdrawal motion will become effective, and the rate schedule, tariff or service agreement filing will be deemed withdrawn, at the end of 15 days from the date of filing of the withdrawal motion, if no answer in opposition to the withdrawal motion is filed within that period and if no order disallowing the withdrawal is issued within that period. If an answer in opposition is filed within the 15 day period, the withdrawal is not effective until an order accepting the withdrawal is issued.

(b) *Amendments or modifications to rate schedule, tariff or service agreement sections prior to Commission action on the filing*. A public utility may file to amend or modify, and may file a settlement that would amend or modify, a rate schedule, tariff or service agreement section contained in a rate schedule, tariff or service agreement filing that has not become effective and upon which no Commission or delegated order has yet been issued. Such filing will toll the notice period in section 205(d) of the Federal Power Act for the original filing, and establish a new date on which the entire filing will become effective, in the absence of Commission action, no earlier than 61 days from the date of the filing of the amendment or modification.

(c) *Withdrawal of suspended rate schedules, tariffs, or service agreements, or parts thereof*. Where a rate schedule, tariff, or service agreement, or part thereof has been suspended by the

Commission, it may be withdrawn during the period of suspension only by special permission of the Commission granted upon application therefor and for good cause shown. If permitted to be withdrawn, any such rate schedule, tariff, or service agreement may be refiled with the Commission within a one-year period thereafter only with special permission of the Commission for good cause shown.

(d) *Changes in suspended rate schedules, tariffs, or service agreements, or parts thereof.* A public utility may not, within the period of suspension, file any change in a rate schedule, tariff, or service agreement, or part thereof, which has been suspended by order of the Commission except by special permission of the Commission granted upon application therefor and for good cause shown.

(e) *Changes in rate schedules or tariffs or parts thereof continued in effect and which were proposed to be changed by the suspended filing.* A public utility may not, within the period of suspension, file any change in a rate schedule or tariff or part thereof continued in effect by operation of an order of suspension and which was proposed to be changed by the suspended filing, except by special permission of the Commission granted upon application therefor and for good cause shown.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 714, 73 FR 57533, Oct. 3, 2008; 74 FR 55770, Oct. 29, 2009]

§ 35.18 Asset retirement obligations.

(a) A public utility that files a rate schedule, tariff or service agreement under § 35.12 or § 35.13 and has recorded an asset retirement obligation on its books must provide a schedule, as part of the supporting work papers, identifying all cost components related to the asset retirement obligations that are included in the book balances of all accounts reflected in the cost of service computation supporting the proposed rates. However, all cost components related to asset retirement obligations that would impact the calculation of rate base, such as electric plant and related accumulated depreciation and accumulated deferred income taxes, may not be reflected in rates and must be removed from the rate base calculation through a single adjustment.

(b) A public utility seeking to recover nonrate base costs related to asset retirement costs in rates must provide, with its filing under § 35.12 or § 35.13, a detailed study supporting the amounts proposed to be collected in rates.

(c) A public utility that has recorded asset retirement obligations on its books, but is not seeking recovery of the asset retirement costs in rates, must remove all asset-retirement-obligations-related cost components from the cost of service supporting its proposed rates.

[Order 631, 68 FR 19619, Apr. 21, 2003, as amended by Order 714, 73 FR 57533, Oct. 3, 2008]

§ 35.19 Submission of information by reference.

If all or any portion of the information called for in this part has already been submitted to the Commission, substantially in the form prescribed above, specific reference thereto may be made in lieu of re-submission in response to the requirements of this part.

§ 35.19a Refund requirements under suspension orders.

(a) *Refunds.* (1) The public utility whose proposed increased rates or charges were suspended shall refund at such time in such amounts and in such manner as required by final order of the Commission the portion of any increased rates or charges found by the Commission in that suspension proceeding not to be justified, together with interest as required in paragraph (a)(2) of this section.

(2) Interest shall be computed from the date of collection until the date refunds are made as follows:

(i) At a rate of seven percent simple interest per annum on all excessive rates or charges held prior to October 10, 1974;

(ii) At a rate of nine percent simple interest per annum on all excessive rates or charges held between October 10, 1974, and September 30, 1979; and

(iii)(A) At an average prime rate for each calendar quarter on all excessive rates or charges held (including all interest applicable to such rates or

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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 27th day of September, 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system:

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