ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

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No. 16-1003

NEXTERA DESERT CENTER BLYTHE, LLC,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: August 25, 2016

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

A. Parties:

To counsel's knowledge, all parties before this Court and the Federal Energy Regulatory Commission are listed in Petitioner's opening brief.

B. Rulings Under Review:

1. *NextEra Desert Center Blythe, LLC v. California Independent System Operator Corp.*, Docket No. EL 15-47-000, Order Denying Complaint, 151 FERC ¶ 61,198 (June 3, 2015) (Initial Order), JA 373; and

2. *NextEra Desert Center Blythe, LLC v. California Independent System Operator Corp.*, Docket No. EL 15-47-001, Order Denying Rehearing, 153 FERC ¶ 61,208 (November 19, 2015) (Rehearing Order), JA 410.

C. Related Cases:

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

/s/ *Ross R. Fulton*
Ross R. Fulton
Attorney

August 25, 2016

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GLOSSARY

California System Operator	California Independent System Operator Corporation
Commission or FERC	Federal Energy Regulatory Commission
Congestion Revenue Rights	Rights that permit the holder to avoid paying congestion costs that are priced into wholesale rates by the California System Operator
Edison	Southern California Edison Company
Interconnection Agreement or Agreement	NextEra's interconnection customer contract with the California System Operator and Edison
Interim Project	The Interim West of Devers Upgrade that permits NextEra to connect two generating facilities to the transmission grid before the completion of the permanent West of Devers Upgrades
Initial Order	*NextEra Desert Center Blythe, LLC v. California Independent System Operator Corp.*, Order Denying Complaint, 151 FERC ¶ 61,198 (June 3, 2015)
JA	Joint Appendix
NextEra	Petitioner NextEra Desert Center Blythe, LLC
Network Upgrade	Facilities and equipment constructed at or beyond the point of interconnection for accommodating a new generating facility for which a generator is eligible for a refund
P	Paragraph in a Commission Order
Petitioner Br.	Petitioner's Opening Brief
R.	Record on appeal
Rehearing Order	*NextEra Desert Center Blythe, LLC v. California Independent System Operator Corp.*, Order Denying Rehearing, 153 FERC ¶ 61,208 (November 19, 2015)
West of Devers Project	Transmission upgrades needed to connect two NextEra solar plants to the transmission grid
Tariff	California System Operator's Tariff

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STATEMENT OF THE ISSUE

Petitioner NextEra Desert Center Blythe, LLC (NextEra) is a developer of electric generating facilities. It wishes to sell electricity from two of its solar plants to Southern California Edison (Edison), the local utility. To do so, NextEra must interconnect its generating facilities with Edison's existing utility grid by making certain transmission upgrades. These upgrades are known as the Interim West of Devers Upgrades (the Interim Project).

This case concerns the cost of the Interim Project. It addresses whether (and how) NextEra can recover the upfront costs it incurs for that Project, either from Edison or from the California Independent System Operator Corporation (California System Operator) – the operator of the high-voltage transmission grid in California. NextEra requested that the Federal Energy Regulatory Commission (Commission or FERC) award NextEra the "Congestion Revenue Rights" associated with the Interim Project under the California System Operator's Tariff (Tariff). The issue presented for review is:

Whether the Commission reasonably concluded that NextEra's Interconnection Agreement with Edison and the California System Operator prevents NextEra from obtaining Congestion Revenue Rights for the Interim Project under the Tariff, because the Interconnection Agreement only permits NextEra such Congestion Revenue Rights in lieu of an available refund for a Network Upgrade – and there is no available refund for the Interim Project because it is not a Network Upgrade.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum. In addition, relevant contractual provisions are included.

STATEMENT OF THE FACTS

I. BACKGROUND

A. Statutory And Regulatory Background

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over the transmission and wholesale sale of electricity in interstate commerce. All rates for or in connection with jurisdictional sales and transmission service are subject to Commission review to assure that they are just and reasonable, and not unduly discriminatory or preferential. *See* Federal Power Act sections 205 and 206, 16 U.S.C. §§ 824d(e), 824e(a). Section 206(a) of the Federal Power Act also authorizes the Commission, on its own initiative or based on a third-party complaint, to investigate whether existing rates are just and reasonable and, if they are not, to establish a new rate. *Id.* § 824e(a).

B. Open Access And Interconnection Agreements

In recent decades, the Commission sought to transition from incumbent utilities operating much of the nation's electricity grid and exercising monopoly power, toward facilitating competition in wholesale power markets. *See South Carolina Pub. Serv. Auth. v. FERC,* 762 F.3d 41, 49-54 (D.C. Cir. 2014) (providing a history of the Commission's electric industry reforms); *ExxonMobil Corp. v. FERC*, 571 F.3d 1208, 1212 (D.C. Cir. 2009) (same). To achieve this goal, the Commission issued Order No. 888, a landmark rulemaking directing

utilities to provide open access to their transmission lines to any independent generator or electricity purchaser.[1]

To take advantage of open access opportunities, independent generators must be able to link their plants to the utilities' transmission systems. *ExxonMobil*, 571 F.3d at 1212. Physically connecting a generating plant to a transmission grid is called "interconnection." *Id.* (explaining that interconnection is an "indispensable component" of open access). In its Order No. 2003 rulemaking,[2] the Commission required all transmission providers to adopt a standard interconnection agreement providing terms for connecting with large generators. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1279 (D.C. Cir. 2007) (affirming Order No. 2003).

The Commission's efforts to enhance competition have resulted in large regional transmission operators. *See FERC v. Elec. Power Supply Ass'n*, 136 S.

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[1] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Pub. Utils. and Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, 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 sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd, New York v. FERC*, 535 U.S. 1 (2002).

[2] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *order on reh'g*, Order No. 106 FERC ¶ 61,220 (2004), *order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff'd, National Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

Ct. 760, 768 (2016). These regional entities manage the electricity grid on behalf of transmission-owning member utilities, "providing generators with access to transmission lines and ensuring that the network conducts electricity reliably." *Id.* The wholesale market operator provides this open access at rates established by a single tariff. *See NRG Power Mktg., LLC v. Maine Pub. Util. Comm'n*, 558 U.S. 165, 169 n.1 (2010) (quoting *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004)). A standard interconnection agreement for a region is generally included in the wholesale market operator's tariff. *See, e.g.*, *Old Dominion Elec. Corp. v. FERC*, 518 F.3d 43, 50 (D.C. Cir. 2008) (observing that the regional transmission organization's tariff provided for a standardized interconnection agreement).

C. Network Upgrade Refunds And Congestion Revenue Rights

At issue is NextEra's eligibility to receive two possible remedies resulting from the Commission's open access and regional markets policies. The first is Network Upgrade refunds.[3] These refunds result from the Commission's "at or beyond" rule encouraging generators to interconnect to the transmission grid. *See ExxonMobil*, 571 F.3d at 1212-13 (describing rule); *Nat'l Ass'n*, 475 F.3d at 1284 (same). The rule distinguishes between "interconnection facilities" and "Network

[3] This brief will retain consistency with the Commission's Rehearing Order and capitalize Network Upgrade as a term of art from the Interconnection Agreement. *See* Rehearing Order n.5, JA 412-13.

Upgrades." *ExxonMobil*, 571 F.3d at 1212. Interconnection facilities are located before the interconnection point and connect generators to the transmission grid. *Id.* Network Upgrades are "'facilities and equipment constructed *at or beyond* the Point of Interconnection for the purpose of accommodating the new Generating Facility.'" *Nat'l Ass'n*, 475 F.3d at 1284 (quoting Order No. 2003 P 676) (emphasis in original).

The generator is responsible for paying up front for both types of facilities. *ExxonMobil*, 571 F.3d at 1213. But while the generator bears the full cost for interconnection facilities – because such facilities only benefit the interconnecting generator – the utility is ultimately responsible for Network Upgrades because such Upgrades improve the network for all utility users. *Id.* at 1212-13. The utility includes this cost in its transmission rates so that users pay their fair share. *Id.* at 1213. It then refunds the amounts paid by the interconnecting generator for the Network Upgrade. *Id.*

The second type of remedy is Congestion Revenue Rights. Regional market operators like the California System Operator incorporate congestion costs into wholesale prices. *See Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 524-25 (D.C. Cir. 2010). This creates higher prices for transmission sent over congested lines. *Id.* The purpose of pricing in congestion is two-fold – to provide market

participants incentives to avoid congestion and to achieve economic efficiency by allocating scarce capacity to those most willing to pay for it. *Id.* at 525.

Congestion Revenue Rights allow a party to avoid paying congestion costs. *Id.* at 543 (detailing how Congestion Revenue Rights result in the net effect of the holder-paying zero for congestion). The California System Operator conducts an annual allocation process for available Congestion Revenue Rights, with Rights first going to entities entitled to those Rights. *See id.* at 527 (describing the California System Operator's Congestion Revenue Rights system).

D. NextEra's Interconnection Agreement For The West Of Devers Project

NextEra is an independent electricity generator operating two solar plants in Desert Center and Blythe, California. *See NextEra Desert Center Blythe, LLC v. Cal. Indep. System Operator Corp.*, 151 FERC ¶ 61,198 (2015) (Initial Order), Certified Index to Record No. (R.) 12, P 2, JA 373, *on reh'g*, 153 FERC ¶ 61,208 (2015) (Rehearing Order), R. 15, P 2, JA 410. To link its solar plants to utility Edison's transmission system, NextEra entered into the Interconnection Agreement with Edison and the California System Operator. Initial Order P 2, JA 374.

NextEra's Interconnection Agreement is based upon the standard interconnection agreement in the California System Operator's Tariff. *See* California System Operator's Tariff, Appendix CC, JA 436; *id.* Appendix Y, § 12.3.1, JA 434-35. While the Tariff applies to the entire region, the

Interconnection Agreement concerns NextEra's specific interconnection with Edison and the California System Operator. *See* Interconnection Agreement, Article 3.3, JA 85. If NextEra's rights and remedies are "specifically addressed by a provision" of the Interconnection Agreement, the Interconnection Agreement governs over the more general Tariff. *Id.* (unless an Interconnection Agreement provision is inconsistent with the Tariff).

Article 11.4.1 of the Interconnection Agreement provides that an interconnection customer (*i.e.* NextEra) "shall be entitled to a repayment . . . for the costs of Network Upgrades for which it is responsible." Interconnection Agreement Article 11.4.1, JA 118. But Article 11.4 allows an interconnection customer to "make a one-time election" to "receive Congestion Revenue Rights as defined in and as available under the Tariff . . . in lieu of a refund of the cost of Network Upgrades in accordance with Article 11.4.1." *Id.* Article 11.4, JA 118. Specifically, Section 36.11 of the California System Operator's Tariff provides that a qualifying party that does not otherwise recover the cost of its investment can receive Congestion Revenue Rights. Tariff, § 36.11, JA 427; *see* Initial Order P 6 n.12, JA 376.

The Interconnection Agreement identified certain high-voltage transmission upgrades – known as the West of Devers upgrades – needed to interconnect NextEra's two solar plants. Initial Order P 2, JA 374. But after executing the

Interconnection Agreement, NextEra became concerned that the permanent West of Devers upgrades would not be completed by the time NextEra was scheduled to sell power from those plants. *Id.* P 3, JA 374-75. This would result in NextEra defaulting on existing supply contracts. *Id.* So at the request of NextEra and other generators, Edison and the California System Operator proposed the Interim Project as a temporary solution. *Id.*; Rehearing Order P 2, JA 410-12. The Interim Project would provide NextEra delivery capability prior to the completion of the permanent upgrades. Initial Order P 2, JA 374; Rehearing Order P 2, JA 410-12.

NextEra agreed to the Interim Project proposal through a subsequent Letter Agreement with Edison. Initial Order P 4, JA 375; Rehearing Order P 2, JA 410-12. NextEra, Edison, and the California System Operator then amended Appendix A to the Interconnection Agreement, JA 151, to incorporate the Letter Agreement's terms for the Interim Project. Initial Order P 4, JA 375; Rehearing Order P 2, JA 410-12. NextEra was the only generator to accept the Interim Project. Initial Order P 3 n.7, JA 375.

Although the Interim Project was "at or beyond" the point of interconnection – and so would normally qualify as a Network Upgrade under the Interconnection Agreement – Edison and the California System Operator did not want Edison's customers bearing the Interim Project's costs. That is because the Interim Project could result in customers paying twice – both for the Interim Project, which was

temporary and would be uninstalled, and for the permanent West of Devers upgrades. *See* Edison's Motion to Intervene and Comments, R. 7, at 6, JA 247; Answer of the California System Operator, R. 8, at 7, JA 279.

So NextEra consented that the Interim Project "shall not be considered a Network Upgrade" and that payments for the Interim Project received from NextEra "shall not be subject to refund in accordance with Article 11.4.1" of the Interconnection Agreement. Interconnection Agreement, Appendix A, § 9(b), JA 176; *see* Initial Order P 4, JA 375; Rehearing Order P 2, JA 410-12. The parties further agreed that if any part of the Interim Project became permanent, those Interim Project elements would be identified as Network Upgrades and NextEra could receive repayment under Article 11.4.1. Interconnection Agreement, Appendix A, § 9(c), JA 176; *see* Initial Order P 4, JA 375; Rehearing Order P 2, JA 410-12.

E. The Commission Finds NextEra's Complaint For Congestion Revenue Rights Precluded By The Interconnection Agreement

In December 2014, the California System Operator informed NextEra that it planned to release incremental Congestion Revenue Rights created by the Interim Project into its annual allocation process. *See* Initial Order P 5, JA 375-76. In response, NextEra filed a complaint with the Commission, requesting the Commission either order the California System Operator to allocate those Congestion Revenue Rights to NextEra pursuant to Tariff Section 36.11, or require

the California System Operator to revise its Tariff to allow NextEra to receive those Rights. Initial Order P 1, JA 373; Rehearing Order P 3, JA 412. NextEra requested a one-time waiver of Tariff Section 36.11's application deadline. Initial Order P 10 & n.22, JA 378; Rehearing Order P 3, JA 412.

The Commission denied NextEra's complaint and its later request for rehearing. The Commission found that NextEra's request for Congestion Revenue Rights under the Tariff was precluded by the "clear and unambiguous" terms of NextEra's Interconnection Agreement. Rehearing Order P 12, JA 415-16; *accord* Initial Order P 19, JA 381. As the Commission observed, "when the terms of a contract are clear and unambiguous, the terms of the contract control." Rehearing Order P 13, JA 416.

Under Section 9(b) of Appendix A to the Interconnection Agreement, NextEra agreed that the Interim Project is not a Network Upgrade eligible for an Article 11.4.1 refund. Initial Order P 21 (quoting Interconnection Agreement, Appendix A, § 9(b), JA 176), JA 381-82; Rehearing Order P 13, JA 416. Article 11.4 provides that Congestion Revenue Rights under the Tariff are only available in lieu of a refund. Rehearing Order P 15, JA 417-18. "[B]ecause NextEra expressly agreed that the Interim Project would not be considered a Network Upgrade during the interim period," and could not receive a refund under Article 11.4.1, it "could not receive [Congestion Revenue Rights] in lieu of Network

Upgrade refunds" under Article 11.4 of the Interconnection Agreement. Rehearing Order P 16, JA 418; *see id.* P 15, JA 417-18; Initial Order PP 22-23, JA 382-83. Instead, NextEra would only receive refunds for the Interim Project if any part of the Project became permanent. *See* Rehearing Order P 20, JA 420.

As such, the Commission found Tariff Section 36.11 inapplicable. *See* Initial Order P 24, JA 383; Rehearing Order PP 14, 18, JA 416-17, 418-19. Instead, the parties "decided to forego section 36.11 of the [Tariff] and in fact expressly agreed that (1) the Interim Project is not a Network Upgrade; and (2) if, in the future, elements of the Interim Project are designated as Network Upgrades, NextEra would receive payments." Rehearing Order P 14, JA 416-17.

The Commission observed that if the parties were in fact silent on NextEra receiving Congestion Revenue Rights under the Tariff – as NextEra contended – then NextEra "would have had the ability to apply in a timely manner" for the available Congestion Revenue Rights. *Id.* P 18, JA 418-19. But "NextEra did not take those steps." *Id.* So the Commission found it unnecessary to determine whether NextEra qualified for Tariff Section 36.11 Congestion Revenue Rights, whether NextEra was entitled to a waiver of Section 36.11's application deadline, or whether the Tariff was unjust and unreasonable. Initial Order PP 24-26, JA 383; Rehearing Order PP 12, 22, JA 415-16, 420-21; *see* Initial Order PP 13-16 (citing Edison and the California System Operator's arguments for why NextEra did not

qualify for Congestion Revenue Rights under Section 36.11) (citing Edison Comments at 9-11, JA 250-252; California System Operator Answer at 9-12, JA 281-284), JA 379-80.

In the alternative, on rehearing, the Commission found that – even if the Interconnection Agreement's language were unclear – the Tariff supported the Commission's interpretation of the Interconnection Agreement. *See* Rehearing Order P 19, JA 419-20. Appendix DD to the Tariff provides that an interconnection customer can receive Congestion Revenue Rights under Tariff Section 36.11 only for "'Network Upgrades, for which the Interconnection Customer did not receive repayment.'" *Id.* P 19 (quoting Tariff Appendix DD, § 14.3.2.1, JA 445-46), JA 419-20. Appendix Y likewise provides that instead of direct repayment, an interconnection customer can elect to receive Congestion Revenue Rights "'in accordance with . . . Tariff Section 36.11 associated with the Network Upgrades.'" Rehearing Order P 19 (quoting Tariff Appendix Y, § 12.3.2.1, JA 434-35), JA 419-20.

The Commission concluded that "these [T]ariff provisions clarify that interconnection customers have the choice of direct payments or [Congestion Revenue Rights] for Network Upgrades." Rehearing Order P 20, JA 420. NextEra not only agreed that the Interim Project was not a Network Upgrade. *Id.* It also contracted for refunds – and not Congestion Revenue Rights – should the Interim

Project be later designated a Network Upgrade. *Id.* The "result of the bargain reached among the parties that the Interim Project is not being treated as a Network Upgrade at this time is that no incremental [Congestion Revenue Rights] will be allocated to any party, including NextEra." Initial Order P 24, JA 383. NextEra instead agreed to "accelerated delivery, for which it will receive full value." Rehearing Order P 20, JA 420.

SUMMARY OF ARGUMENT

The Commission found that the Interconnection Agreement prevents NextEra from obtaining Congestion Revenue Rights under the California System Operator's Tariff for the Interim Project. This finding results from a straightforward, syllogistic reading of the Interconnection Agreement.

- Under the Interconnection Agreement, NextEra is entitled to a refund for Network Upgrades;
- The Interconnection Agreement further provides that Congestion Revenue Rights under the Tariff are only available to NextEra as an alternative to a refund for Network Upgrades;
- Here, NextEra agreed that the Interim Project is not a Network Upgrade and not eligible for a refund;
- Because NextEra is not entitled to a refund, it cannot obtain Congestion Revenue Rights under the Tariff in lieu of a refund.

In other words, NextEra only gets A in lieu of B; NextEra contracted that it cannot receive B, so it cannot have A.

The Interconnection Agreement governs over the more general Tariff because the Agreement specifies NextEra's available remedies as an interconnection customer. NextEra argues that the Interconnection Agreement does not limit NextEra's right to Congestion Revenue Rights under the Tariff. NextEra emphasizes that Section 9(b) to Appendix A of the Interconnection Agreement is silent on Congestion Revenue Rights. NextEra asserts that – because that provision does not mention Congestion Revenue Rights – interpretive tools support Section 36.11 of the Tariff providing a separate basis for recovery apart from the Interconnection Agreement. But when the Interconnection Agreement is properly read as a whole, it expressly provides for when NextEra – as an interconnection customer – can receive Congestion Revenue Rights under the Tariff.

Article 11.4 of the Interconnection Agreement specifies that Congestion Revenue Rights under the Tariff are only available in lieu of receiving an available Article 11.4.1 refund for Network Upgrades. Appendix A, Section 9(b) of the Interconnection Agreement provides that the Interim Project is not a Network Upgrade and that NextEra cannot receive a refund for that Project under Article 11.4.1. Because NextEra is not eligible for a refund, it is not eligible for the alternative remedy of Congestion Revenue Rights, precluding NextEra's request.

Although the Commission found the Interconnection Agreement

unambiguous, as an alternative it considered relevant Tariff language in the event the Interconnection Agreement is ambiguous. And it concluded that the Tariff supported the Commission's reasonable reading of the Interconnection Agreement. Applicable Tariff provisions clarify that Section 36.11 Congestion Revenue Rights are only available to interconnection customer NextEra as an alternative to a refund for Network Upgrades.

There is no unfairness here. NextEra gave up the right to a Network Upgrade remedy – unless and until the Interim Project becomes permanent – in exchange for accelerated delivery so that it did not default on existing contracts. By contrast, NextEra's position could provide NextEra a double recovery. NextEra could obtain Congestion Revenue Rights created by the Interim Project **and** a subsequent refund should all or part of the Interim Project become permanent. Because the Commission, in the alternative, considered the Interconnection Agreement as if it were unclear, the Court need not remand even if it finds ambiguity.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews Commission actions under the Administrative Procedure Act's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow," and the Court

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

Commission contract or tariff interpretation is reviewed using a "two-step, *Chevron*-like analysis." *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 701 (D.C. Cir. 2010); *accord Ameren Servs. Co. v. FERC*, 330 F.3d 494, 498 (D.C. Cir. 2003) (same). The Court first considers "'*de novo* whether the [tariff or contract] unambiguously addresses the matter at issue. If so the language . . . controls for we must give effect to the unambiguously expressed intent of the parties.'" *Colo. Interstate Gas*, 599 F.3d at 701 (quoting *Ameren*, 330 F.3d at 498). But if the "language is ambiguous, we defer to the Commission's construction of the provision at issue so long as that construction is reasonable." *Colo. Interstate Gas*, 599 F.3d at 701 (quotation omitted); *cf. PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 209 (D.C. Cir. 2011) (if the Court finds ambiguity where the agency

only found unambiguity, the Court remands to the agency to exercise expert judgment to interpret the ambiguity).

The Court accords deference to the Commission's contract interpretation where the agency's construction is "influenced by [its] expertise in the technical language of that field and by its greater knowledge of industry conditions and practices." *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1570 (D.C. Cir. 1987); *see Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1198 (D.C. Cir. 2000) (upholding Commission's interpretation of settlement agreement under a deferential standard "[b]ecause Congress explicitly delegated to FERC broad powers over ratemaking, including the power to analyze relevant contracts, and because the Commission has greater technical expertise in this field than does the Court") (citation omitted).

II. THE INTERCONNECTION AGREEMENT'S TERMS PRECLUDE NEXTERA FROM OBTAINING CONGESTION REVENUE RIGHTS UNDER THE TARIFF

Contract interpretation begins with the agreement's text. *Wash. Metro. Area Transit Auth. v. Mergentime Corp.*, 626 F.2d 959, 961 (D.C. Cir. 1980) (citation omitted). An agreement's "plain and unambiguous meaning" is controlling. *Id.* The parties' intent is determined from the language used to express their agreement. *Id.*; *Ameren*, 330 F.3d at 499. A contract should be construed "'as a whole so as to give meaning to all of the contract's express terms.'" *Ameren*, 330

F.3d at 499 (upholding the Commission's finding that contract was unambiguous) (quoting *Mergentime*, 626 F.2d at 961); *see Iberdola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1303 (D.C. Cir. 2010) (upholding the Commission's finding that the parties' contract precluded Commission review of a natural gas pipeline's rate changes because the contract's unambiguous language indicated that the pipeline will "adjust the rate as its operating costs fluctuate" with "no mention" made of a role for FERC).

A contract is only ambiguous if it is "'reasonably susceptible of different constructions or interpretations.'" *Iberdola*, 597 F.3d at 1304 (quoting *Ameren*, 330 F.3d at 499). A "contract is not ambiguous merely because the parties later disagree on its meaning." *Bennett Enterprises, Inc. v. Domino's Pizza, Inc.*, 45 F.3d 493, 497 (D.C. Cir. 1995) (citations omitted).

A. The Interconnection Agreement Governs And Prevents NextEra From Obtaining Congestion Revenue Rights Under The Tariff Because NextEra Agreed That The Interim Project Is Not A Network Upgrade

At issue is the interaction between NextEra's Interconnection Agreement and the more general California System Operator's Tariff. When the Interconnection Agreement specifies NextEra's rights and remedies as an interconnection customer, it governs over the Tariff. Interconnection Agreement Article 3.3, JA 85; *see MCI Telecomm. Corp. v. FCC*, 712 F.2d 517, 530-31 (D.C. Cir. 1983) (applying contract over tariff because the "provisions of the tariff were

made subordinate to those of the contract itself"); *see also Nat'l Ass'n*, 475 F.3d at 1280 (interconnection agreement governs the relationship between parties with respect to electricity flowing between their facilities); *Southwest Elec. Coop., Inc. v. FERC*, 347 F.3d 975, 982 (D.C. Cir. 2003) (under canon of construction, the specific controls the general).

So the question is whether the Interconnection Agreement limits when NextEra may receive Congestion Revenue Rights under the Tariff. Next Era claims it does not. But the Commission found that the Interconnection Agreement does limit when NextEra can obtain Congestion Revenue Rights under the Tariff based upon a logical reading of three Interconnection Agreement provisions:

- Section 9(b) to Appendix A, JA 176;
- Article 11.4, JA 118; and
- Article 11.4.1, JA 118.

See Initial Order P 21, JA 381-82; *accord* Rehearing Order P 12 (reiterating that the Agreement's "language is clear and unambiguous"), JA 415-16. Under Article 11.4.1, an interconnection customer (*i.e.*, NextEra) "shall be entitled to repayment" for Network Upgrades. Interconnection Agreement Article 11.4.1, JA 118. Article 11.4 provides that an interconnection customer may elect "'to receive Congestion Revenue Rights as defined in and as available under the Tariff . . . in lieu of a refund of the cost of Network Upgrades in accordance with Article 11.4.1.'"

Rehearing Order P 15 (quoting Interconnection Agreement, Article 11.4, JA 118), JA 417-18.

But NextEra agreed in Section 9(b) to Appendix A of the Interconnection Agreement that the Interim Project "'shall not be considered a Network Upgrade'" eligible for an Article 11.4.1 refund. Initial Order P 21 (quoting Interconnection Agreement, Appendix A, § 9(b), JA 176), JA 381-82. Because Article 11.4 only allows NextEra to receive Congestion Revenue Rights under the Tariff in lieu of an available Article 11.4.1 refund for Network Upgrades, the Interconnection Agreement blocks NextEra from seeking Congestion Revenue Rights under the Tariff for the Interim Project. *See* Rehearing Order P 16, JA 418. NextEra cannot receive Congestion Revenue Rights under the Tariff in lieu of a refund that does not exist.

B. NextEra's Arguments Cannot Overcome The Interconnection Agreement's Terms

1. The Interconnection Agreement Expressly Prohibits NextEra From Receiving Congestion Revenue Rights When Read As A Whole

NextEra argues that Section 9(b) of Appendix A to the Interconnection Agreement is silent on the availability of Congestion Revenue Rights under the California System Operator's Tariff. *See* Petitioner Br. at 29. So NextEra invokes the concept of implied waiver and the canon *expressio unius est exclusio aterius* to assert that NextEra should be permitted to recover such Rights. *Id.* Yet the

Interconnection Agreement is not silent on Congestion Revenue Rights. Instead, the Commission found it unnecessary for the parties to reference Congestion Revenue Rights in Appendix A, Section 9(b) – once the Interconnection Agreement is properly read as a whole. *See* Rehearing Order P 16, JA 418.

Articles 11.4 and 11.4.1 of the Interconnection Agreement work in concert. Article 11.4 is dependent upon Article 11.4.1. Article 11.4 provides that Congestion Revenue Rights under the Tariff are only available in lieu of an available Article 11.4.1 refund for a Network Upgrade. NextEra agreed in its later Letter Agreement with Edison – reflected in Section 9(b) to Appendix A of the Interconnection Agreement – that it could not receive an Article 11.4.1 refund for the Interim Project because the Interim Project is not a Network Upgrade. *See* Initial Order P 22, JA 382; Rehearing Order P 16, JA 418. So NextEra also cannot receive the alternative remedy of Congestion Revenue Rights under the Tariff. *See* Rehearing Order P 16, JA 418. In so finding, the Commission correctly interpreted the contract to harmonize all provisions – rather than reviewing one provision in isolation. *See Colo. Interstate*, 599 F.3d at 703 (upholding Commission tariff interpretation that "gave effect to all of the tariff's provisions – yet another maxim of reasonable interpretation"); *see also Preston v. Ferrer*, 552 U.S. 346, 361 (2008) (applying contract interpretation based on harmonizing two provisions); *Ameren*, 330 F.3d at 499 (interpretation must provide meaning to all terms).

The interpretive tools referenced by NextEra are inapplicable. *See* Rehearing Order P 15 (finding that the interpretive principles cited by NextEra support the Commission abiding by the Interconnection Agreement's text), JA 417-18. As NextEra acknowledges, an agreement's language determines waiver. *See Gannett Rochester Newspapers v. NLRB*, 988 F.2d 198, 204 & n.2 (D.C. Cir. 1993) (collective bargaining case cited by NextEra, Petitioner Br. at 30, acknowledging that "clear and unmistakable waivers" arise from either a contract's language or structure). Likewise, courts apply the language rendering a text unambiguous over canons resulting in ambiguity. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) (rejecting a canon of construction that would render a statute ambiguous over a textual interpretation); *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 734 (D.C. Cir. 2005) ("No canon of construction justifies construing the actual language beyond what the terms can reasonably bear."); *see also* Rehearing Order P 15 (finding that contract interpretation principles require the Commission to first give effect to a contract's text), JA 417-18.

Nor do the Interconnection Agreement Articles cited by NextEra alter the Commission's interpretation. *See* Petitioner Br. at 31, 40. Section 9(a) to Appendix A only underscores that Articles 11.4 and 11.4.1 must be read in tandem. It supports that Congestion Revenue Rights are only available as an alternative to a refund for an interconnection customer-financed Network Upgrade. Since NextEra

agreed that the Interim Project is not a Network Upgrade it cannot receive such rights. *See* Rehearing Order P 16, JA 418.

Likewise, Article 11.4.3 of the Interconnection Agreement only applies to Network Upgrades. *See* Interconnection Agreement, Article 11.4.3, JA 121. Nothing in the Interconnection Agreement is causing NextEra to "relinquish[] or foreclose[] any rights" – other than NextEra's agreement that the Interim Project is not a Network Upgrade. *See* Initial Order P 24 (no Congestion Revenue Rights available because the Interim Project is not a Network Upgrade), JA 383. NextEra instead agreed that it would only receive a refund if elements of the Interim Project become permanent – demonstrating that the parties knew how to provide NextEra a remedy under the Interconnection Agreement and only chose to do so for permanent upgrades. *See id.* P 22, JA 382; Rehearing Order PP 12, 20 (finding that NextEra "agreed to a particular treatment of the Interim Project" under the Interconnection Agreement in order to gain the benefit of accelerated delivery), JA 415-16, 420.

2. NextEra's Ability To Elect Congestion Revenue Rights Is Governed By The Interconnection Agreement

NextEra asserts that its right to Congestion Revenue Rights under Section 36.11 of the California System Operator's Tariff is independent of the Interconnection Agreement. *See* Petitioner Br. at 38. But the Interconnection Agreement governs over the Tariff when the Interconnection Agreement provides

for NextEra's available remedies. Interconnection Agreement, Article 3.3, JA 85; *see* Rehearing Order P 13 (Interconnection Agreement sets forth the availability of a remedy for NextEra for the Interim Project), JA 416; *id.* P 15 n.22 (citing prior Commission order for the proposition that a general tariff does not take precedent over a specific contract, as such an interpretation would nullify the contract's terms) (citing *El Paso Nat'l Gas Co., LLC*, 148 FERC ¶ 61,043 P 49 (2014)). And although Section 36.11 does not mention Network Upgrades, as discussed, Article 11.4 of the Interconnection Agreement explicitly provides for when NextEra can receive Congestion Revenue Rights under the Tariff:

- Under Article 11.4, Congestion Revenue Rights are "available under the Tariff" in "lieu of a refund of the cost of Network Upgrades in accordance with Article 11.4.1;"
- NextEra agreed that the Interim Project was not eligible for an Article 11.4.1 refund;
- Because NextEra cannot obtain a refund, it cannot obtain the alternative remedy of Congestion Revenue Rights – including from Section 36.11 – under the Tariff.

See Rehearing Order P 15, JA 417-18. NextEra "decided to forego section 36.11" of the Tariff. *Id.* P 14, JA 416-17. It cannot receive the Congestion Revenue Rights created by the Interim Project upgrades because it agreed that the Interim Project was not a Network Upgrade. *Id.* P 16, JA 418.

And as the Commission found, if – as NextEra contends – the Letter Agreement is silent on Congestion Revenue Rights because they are permitted,

then NextEra was aware of the potential creation of Congestion Revenue Rights and could have timely applied for such Rights. *Id.* P 18, JA 418-19. But NextEra did not do so. *Id.*

Instead, NextEra contracted to a specific arrangement for the Interim Project. *Id.* P 12, JA 415. It would only receive a refund if Interim Project elements were later designated permanent. *Id.* P 14, JA 416-17. "Consequently, whether or not NextEra could be allocated [Congestion Revenue Rights] associated with the Interim Project under the [Tariff] at this time is not relevant because NextEra agreed to a particular treatment of the Interim Project in this case." Initial Order P 24, JA 383.

III. EVEN IF THE INTERCONNECTION AGREEMENT WERE AMBIGUOUS, THE COMMISSION REASONABLY CONCLUDED THAT THE TARIFF SUPPORTED ITS FINDING THAT THE INTERCONNECTION AGREEMENT PRECLUDES NEXTERA'S REQUEST FOR CONGESTION REVENUE RIGHTS

Although the Commission concluded that the Interconnection Agreement is "clear and unambiguous," Rehearing Order P 12, JA 415-16, the Commission alternatively considered relevant evidence from the California System Operator's Tariff to construe the "allegedly unclear language" of the Interconnection Agreement. *Id.* P 19, JA 419-20. Even where the Commission speaks of clarity, if it considers extra-contractual evidence it means that the Commission considered the possibility of contractual ambiguity, and reasonably exercised its discretion to

resolve any ambiguities. *See Old Dominion*, 518 F.3d at 48-49 (affording "substantial deference" to the Commission's interpretation because, even though the petitioner alleged the Commission found the documents unambiguous, "FERC considered policy concerns and extrinsic evidence proffered by Petitioners, demonstrating it recognized the [relevant contracts] were ambiguous and exercised its discretion to resolve the ambiguities"); *cf.* Initial Order P 13 ("To determine whether an agreement is ambiguous, the Commission looks within the four corners of the agreement and not to outside sources."), JA 379.

The Commission reasonably found that the Tariff supported the Commission's interpretation of the Interconnection Agreement as precluding interconnection customer NextEra's request for Section 36.11 Congestion Revenue Rights. Rehearing Order P 19, JA 419-20. Tariff Appendix DD provides that for "'Network Upgrades, for which the Interconnection Customer did not receive repayment, the Interconnection Customer will be eligible to receive [Congestion Revenue Rights] in accordance with Tariff Section 36.11.'" *Id.* (quoting Tariff Appendix DD, §14.3.2.1, JA 445-46). Appendix Y provides that an "'Interconnection Customer shall be entitled to a repayment for the Interconnection Customer's contribution to the cost of Network Upgrades.'" Rehearing Order P 19 (quoting Tariff Appendix Y, § 12.3.2.1, JA 434-35), JA 419-20. But "'instead of direct payments, the Interconnection Customer may elect to receive [Congestion

Revenue Rights] in accordance with Tariff Section 36.11 associated with the Network Upgrades. . . .'" Rehearing Order P 19 (quoting Tariff Appendix Y, § 12.3.2.1, JA 434-35), JA 419-20.

The two Tariff provisions – upon which the Interconnection Agreement is based – clarify that Tariff Section 36.11 Congestion Revenue Rights are only available to an interconnection customer as an alternative to a refund for Network Upgrades. *See* Rehearing Order P 20, JA 420. Yet if NextEra is correct and the Interconnection Agreement and Tariff provide separate bases for recovery, NextEra could be repaid twice for the Interim Project. It could receive Congestion Revenue Rights under Section 36.11 of the Tariff **and** repayment for Network Upgrades if some or all of the Interim Project is made permanent. *See id.* (NextEra opted for repayment if the Interim Project becomes permanent). Such a double recovery is inconsistent with the Interconnection Agreement. *See id.* (NextEra can only receive one remedy for Network Upgrades). Even NextEra concedes it cannot receive both. *See* Petitioner Br. at 44.

Contrary to NextEra's contention, *id.* at 40, this does not make the right to Congestion Revenue Rights under the Tariff narrower for interconnection customers than for others. To the contrary, it reflects the determination that interconnection customers should receive refunds for Network

Upgrades. *See* Rehearing Order P 20, JA 420. Congestion Revenue Rights simply function as an alternative. *Id.*

NextEra foreswore a refund for the Interim Project because it benefits from faster delivery. *Id.* The Interim Project prevents NextEra from defaulting on existing contracts. *See* Initial Order P 3, JA 374-75. Although NextEra cites the Commission's general policy for Network Upgrades, Petitioner Br. at 28, this policy is not applicable where the parties contracted that the Interim Project is not a Network Upgrade. The Commission saw little support, contractual or otherwise, for why NextEra should receive Congestion Revenue Rights for the Interim Project, its contracted-for refunds for any permanent Network Upgrades, **and** the benefit of accelerated delivery to meet supply contracts. *See* Rehearing Order P 20, JA 420. It is not unfair to hold NextEra to its bargain. *See Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 547 (2008) (Federal Power Act founded on respect for, and enforcement of, parties' settled contractual expectations).

Because the Commission considered relevant Tariff provisions to resolve any possible ambiguities with the Interconnection Agreement, remand to the Commission is not necessary if the Court finds the Interconnection Agreement ambiguous. *Compare PSEG*, 665 F.3d at 209 (remanding to the Commission to consider a tariff in light of the ambiguity found by the Court because the

Commission only considered the tariff as unambiguous). Instead, the Court should respect the Commission's reasonable interpretation that the Interconnection Agreement prevents NextEra from receiving Section 36.11 Congestion Revenue Rights under the Tariff. Such Rights are only available in lieu of a Network Upgrade refund. *See, e.g., Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (recognizing that courts play a "limited role" in reviewing FERC decisions in areas implicating FERC's technical expertise, such as electricity rate design).

CONCLUSION

For the foregoing reasons, NextEra's petition should be denied and the Commission's orders should be upheld.

Respectfully submitted,

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Final Brief: August 25, 2016

NextEra v. FERC **Docket No. EL15-47**
No. 16-1003

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(5), Fed. R. App. P. 32(a)(6), and Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Final Brief of Respondent Federal Energy Regulatory Commission contains 6,447 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum, and has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point, Times New Roman font.

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August 25, 2016

ADDENDUM
STATUTES AND
INTERCONNECTION AGREEMENT
PROVISIONS

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 703. Form and venue of proceeding

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

commission's regulatory responsibilities affecting the provision of electric service.

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

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

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

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

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

EFFECTIVE DATE OF 2005 AMENDMENT

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

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Section 214 of Pub. L. 95–617 provided that:

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

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

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

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

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

3.1 Filing. The Participating TO and the CAISO shall file this LGIA (and any amendment hereto) with the appropriate Governmental Authority(ies), if required. The Interconnection Customer may request that any information so provided be subject to the confidentiality provisions of Article 22. If the Interconnection Customer has executed this LGIA, or any amendment thereto, the Interconnection Customer shall reasonably cooperate with the Participating TO and CAISO with respect to such filing and to provide any information reasonably requested by the Participating TO or CAISO needed to comply with applicable regulatory requirements.

3.2 Agreement Subject to CAISO Tariff. The Interconnection Customer will comply with all applicable provisions of the CAISO Tariff, including the GIP.

3.3 Relationship Between this LGIA and the CAISO Tariff. With regard to rights and obligations between the Participating TO and the Interconnection Customer, if and to the extent a matter is specifically addressed by a provision of this LGIA (including any appendices, schedules or other attachments to this LGIA), the provisions of this LGIA shall govern. If and to the extent a provision of this LGIA is inconsistent with the CAISO Tariff and dictates rights and obligations between the CAISO and the Participating TO or the CAISO and the Interconnection Customer, the CAISO Tariff shall govern.

3.4 Relationship Between this LGIA and the QF PGA. With regard to the rights and obligations of a Qualifying Facility that has entered into a QF PGA with the CAISO and has entered into this LGIA, if and to the extent a matter is specifically addressed by a provision of the QF PGA that is inconsistent with this LGIA, the terms of the QF PGA shall govern.

ARTICLE 4. SCOPE OF SERVICE

4.1 Interconnection Service. Interconnection Service allows the Interconnection Customer to connect the Large Generating Facility to the Participating TO's Transmission System and be eligible to deliver the Large Generating Facility's output using the available capacity of the CAISO Controlled Grid. To the extent the Interconnection Customer wants to receive Interconnection Service, the Participating TO shall construct facilities identified in Appendices A and C that the Participating TO is responsible to construct.

Interconnection Service does not necessarily provide the Interconnection Customer with the capability to physically deliver the output of its Large Generating Facility to any particular load on the CAISO Controlled Grid without incurring congestion costs. In the event of transmission constraints on the CAISO Controlled Grid, the Interconnection Customer's Large Generating Facility shall be subject to the applicable congestion management procedures in the CAISO Tariff in the same manner as all other resources.

for the Participating TO's Interconnection Facilities, they shall be solely funded by the Interconnection Customer.

11.3 Network Upgrades and Distribution Upgrades. The Participating TO shall design, procure, construct, install, and own the Network Upgrades and Distribution Upgrades described in Appendix A. The Interconnection Customer shall be responsible for all costs related to Distribution Upgrades. Unless the Participating TO elects to fund the capital for the Distribution Upgrades and Network Upgrades, they shall be funded by the Interconnection Customer, which, for Interconnection Customers processed under Section 6 of the GIP (in Queue Clusters), shall be in an amount determined pursuant to the methodology set forth in Section 6.5 of the GIP. This specific amount is set forth in Appendix G to this LGIA.

11.4 Transmission Credits. No later than thirty (30) Calendar Days prior to the Commercial Operation Date, the Interconnection Customer may make a one-time election by written notice to the CAISO and the Participating TO to receive Congestion Revenue Rights as defined in and as available under the CAISO Tariff at the time of the election in accordance with the CAISO Tariff, in lieu of a refund of the cost of Network Upgrades in accordance with Article 11.4.1.

11.4.1 Repayment of Amounts Advanced for Network Upgrades. Upon the Commercial Operation Date, of a Generating Facility that is not a Phased Generating Facility, and the in-service date of the corresponding Network Upgrades, the Interconnection Customer shall be entitled to a repayment, equal to the total amount paid to the Participating TO for the costs of Network Upgrades for which it is responsible, as set forth in Appendix G. Such amount shall include any tax gross-up or other tax-related payments associated with Network Upgrades not refunded to the Interconnection Customer pursuant to Article 5.17.8 or otherwise, and shall be paid to the Interconnection Customer by the Participating TO on a dollar-for-dollar basis either through (1) direct payments made on a levelized basis over the five-year period commencing on the Commercial Operation Date; or (2) any alternative payment schedule that is mutually agreeable to the Interconnection Customer and Participating TO, provided that such amount is paid within five (5) years from the Commercial Operation Date. Notwithstanding the foregoing, if this LGIA terminates within five (5) years from the Commercial Operation Date, the Participating TO's obligation to pay refunds to the Interconnection Customer shall cease as of the date of termination.

11.4.1.2 Repayment of Amounts Advanced Regarding Phased Generating Facilities

Upon the Commercial Operation Date of each phase of a Phased Generating Facility, the Interconnection Customer shall be entitled to a

(b) Interconnection Customer understands and acknowledges that the Interim WOD Project is intended to be installed as a temporary solution which enables the Genesis McCoy Solar Project, and other generating facilities described in Section 8 of Appendix C, to attain Full Capacity Deliverability Status for an interim period until the Participating TO's Delivery Network Upgrades are constructed and placed in service. Interconnection Customer also understands and acknowledges that the Participating TO intends to physically remove the Interim WOD Project from its transmission system following the date on which the Participating TO's Delivery Network Upgrades are constructed and placed in service. Accordingly, the Parties agree that, subject to Section 9(c) below, the Interim WOD Project shall not be considered a Network Upgrade and the Interim WOD Project Payments received from Interconnection Customer shall not be subject to refund in accordance with Article 11.4.1 of the LGIA.

(c) If, following the date on which the Participating TO's Delivery Network Upgrades are constructed and placed in service, the Participating TO, in consultation with the CAISO, determines, in their sole discretion, that any elements of the Interim WOD Project are to remain in service and become part of the CAISO Controlled Grid, then the Parties agree to further amend this LGIA to identify and reclassify any such elements as Network Upgrades and payments received for such elements will be subject to refund as follows.

(i) In the event such re-classification occurs within fifteen (15) years of the Interim WOD Project Letter Agreement execution date, then Participating TO will refund to the Interconnection Customer its share of the estimated net book value of those facilities which are re-classified as Network Upgrades. The refund shall exclude interest between the time the Participating TO received payment for the re-classified facilities and the time FERC accepts or approves the amended LGIA re-classifying such facilities. Any such refund shall be paid to the Interconnection Customer by the Participating TO either through 1) direct payments made on a levelized basis over the five-year period commencing on the date FERC accepts or approves the amended LGIA re-classifying such facilities; or 2) any alternative payment schedule that is mutually agreeable to the Interconnection Customer and Participating TO, provided that such amount is paid within five (5) years from the date FERC accepts or approves the amended LGIA re-classifying such facilities. Notwithstanding the foregoing, if this LGIA terminates within five (5) years from the Commercial Operation Date, the Participating TO's obligation to pay refunds to the Interconnection Customer shall cease as of the date of termination.

10. Security Amount for the Distribution Upgrades, Participating TO's Interconnection Facilities, Network Upgrades, and Interim WOD Project:

(a) **Distribution Upgrades**: Pursuant to Article 11.5 and Appendix B of the LGIA, the Interconnection Customer shall provide Credit Support in the amount of $0 to cover the costs for constructing, procuring and installing the Participating TO's

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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 25th day of August 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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