

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

No. 16-1133

DUKE ENERGY CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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October 11, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

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

B. Rulings Under Review

1. *Duke Energy Corp., et al. v. PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,206 (June 9, 2015) (Initial Order), R.52, JA 1; and
2. *Duke Energy Corp., et al. v. PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,156 (Mar. 1, 2016) (Rehearing Order), R.94, JA 42.

C. Related Cases

This case has not been before this Court or any other court. Another case, *Old Dominion Electric Coop. v. FERC*, Case No. 16-1111 (filed April 11, 2016; briefing in progress), arises from similar facts, includes many of the same parties, and presents a related issue.

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October 11, 2016

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GLOSSARY

Answer or PJM Answer	Answer of PJM Interconnection, L.L.C. (May 27, 2014), R.33, JA 188
Complaint or Duke Complaint	Complaint of Duke Energy Corporation (May 5, 2014), R.2, JA 74
Duke	Petitioners Duke Energy Corporation; Dynegy Commercial Asset Management, LLC (formerly known as Duke Commercial Asset Management, LLC); and Dynegy Lee II, LLC (formerly known as Duke Energy Lee II, LLC)
Independent Market Monitor	Monitoring Analytics, LLC, the entity responsible for oversight of PJM’s energy markets
Initial Order	<i>Duke Energy Corp., et al. v. PJM Interconnection, L.L.C.</i> , 151 FERC ¶ 61,206 (June 9, 2015) (Initial Order), R.52, JA 1
JA	A page number in the Joint Appendix
Old Dominion	Old Dominion Electric Cooperative, petitioner in <i>Old Dominion Elec. Coop. v. FERC</i> , No. 16-1111
P	A paragraph number in a Commission order or other document
PJM	Intervenor PJM Interconnection, L.L.C., the regional transmission organization that operates the mid- Atlantic electricity grid and related energy markets
R.	An item in the administrative record
Rehearing Order	<i>Duke Energy Corp., et al. v. PJM Interconnection, L.L.C.</i> , 154 FERC ¶ 61,156 (Mar. 1, 2016) (Rehearing Order), R.94, JA 42

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**BRIEF OF RESPONDENT
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STATEMENT OF THE ISSUE

In January 2014, a southward shift in the polar vortex – a mass of Arctic air – produced unusually cold temperatures and record-high natural gas prices across the eastern United States. In the face of these severe conditions, regional grid operator PJM Interconnection, L.L.C. (PJM) implemented emergency measures to ensure system reliability. (“PJM” is not an acronym coined for this brief; rather, it takes its name from the home states – Pennsylvania, New Jersey, and Maryland – of the first mid-Atlantic utilities to pool their excess capacity.)

This is one of two companion cases before the Court relating to financial losses that generation owners incurred when they bought fuel for electric generation facilities at high prices during the polar vortex-related cold weather events, but were not called into operation by PJM. Duke seeks indemnification for its losses under Section 10.3 of PJM's electric transmission tariff. Duke does not pursue any equitable claims, although it sought alternative equitable relief (through waiver of other tariff provisions) in proceedings before the Commission. By contrast, in *Old Dominion Electric Cooperative v. FERC*, D.C. Cir. No. 16-1111, petitioner Old Dominion Electric Cooperative (Old Dominion) does not contend that it is entitled to relief under the PJM tariff, but pursues equitable relief only (through waiver) for its financial losses.

The issue presented on review is: Did the Commission properly interpret the indemnification provision of PJM's tariff (Section 10.3) to not apply to Duke's situation or otherwise relieve Duke of its economic loss?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Addendum to this brief.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. *See generally New York v. FERC*, 535 U.S. 1 (2002). All rates for or in connection with jurisdictional sales and transmission service are subject to FERC review to assure that they are just and reasonable, and not unduly discriminatory or preferential. *See* Federal Power Act section 205, 16 U.S.C. §§ 824d(a), (b), (e).

Section 206 of the Federal Power Act, 16 U.S.C. § 824e, authorizes the Commission to investigate, on its own motion or upon complaint, existing rates and terms of service. The entity instituting the section 206 investigation – either the Commission or a complaining party – bears the burden to show that the existing rate or term is unjust and unreasonable. 16 U.S.C. § 824e(b); *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009). If the Commission finds that an existing rate is “unjust, unreasonable, unduly discriminatory or preferential,” it must determine and set the just and reasonable rate. 16 U.S.C. § 824e(a); *see generally Md. Pub. Serv. Comm’n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011) (discussing Federal Power Act section 206 burden).

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

II. Factual Background

The Commission’s efforts to foster wholesale electricity competition over broader geographic areas in recent decades have led to the creation of independent system operators and regional transmission organizations. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536-37 (2008). These independent regional entities operate the transmission grid on behalf of transmission-owning member utilities and are required to maintain system reliability. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 558 U.S. 165, 169 & n.1 (2010) (explaining responsibilities of regional system operators). PJM operates a transmission system that spans all or part of thirteen mid-Atlantic and midwestern states, plus the District of Columbia. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1293 (2016).

These regional entities also run auction-based markets for electricity sales. *See Morgan Stanley*, 554 U.S. at 537. Such organized regional markets are subject to FERC rules that help mitigate the exercise of market power, and to oversight of market behavior and conditions by the Commission and by the regional entities' own market monitors. *See, e.g., Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Pub. Utils.*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, 119 FERC ¶ 61,295 at P 955 (2007), *on reh'g and clarification*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, 123 FERC ¶ 61,055 at P 395 (2008), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).¹ In PJM, Monitoring Analytics, LLC acts as the Independent Market Monitor. Comments of the Independent Market Monitor at 1, R.39, JA 246.

A. The PJM Capacity Market And Generation Capacity Resources

Energy “is the amount of electricity generators actually provide to the grid and is available to be used at any moment.” *Del. Dep't of Nat. Res. and Env'tl. Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015). PJM uses energy markets “to determine pricing and to schedule the transmission of electricity across the massive [PJM] territory” *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 233 (D.C.

¹ “P” refers to the internal paragraph number within a FERC order or other document. “R.” refers to a record item. “JA” refers to the Joint Appendix page number.

Cir. 2013). In PJM, most electricity is traded in the day-ahead energy market, which sets a market-clearing price based on sellers' and buyers' bids for price and quantity of energy to be delivered the following day. *Id.* In the real-time energy market, participants manage changes in their projected supply and demand by trading electricity within five-minute intervals. *Id.* In both energy markets, PJM calculates prices using locational marginal pricing, which includes costs of generation, transmission congestion, and transmission losses. *Id.* at 360-61.

“The capacity market is designed to ensure sufficient resources are available to maintain the reliability of” the electric grid. *Duke Energy Corp., et al. v. PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,206 at P 62 (2015) (Initial Order), R.52, JA 29-30. “‘Capacity’ is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties – generally, generators – who can either produce more or consume less when required.” *Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 478 (D.C. Cir. 2009); *see also NRG*, 558 U.S. at 168 (“In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself.”). Capacity may be sold years in advance, enabling generators to plan and build facilities to meet future demand. *See Hughes*, 136 S. Ct. at 1293; *Delaware*, 785 F.3d at 12.

Capacity payments provide revenues to maintain operations of existing generation resources and to encourage development of new resources. *See Delaware*, 785 F.3d at 12. “In exchange for capacity payments, for every day of the Delivery Year, a Generation Capacity Resource in PJM must offer all available capacity into the Day-Ahead Energy Market and must operate in accordance with PJM’s dispatch instructions if called upon to operate in real time.” Initial Order P 62, JA 29-30; *accord Duke Energy Corp., et al. v. PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,156 at PP 24-25 (2016) (Rehearing Order), R.94, JA 54; *Delaware*, 785 F.3d at 13 (generators selected in capacity markets “have a ‘must-offer requirement’ in accordance with which they provide energy into the grid whenever ‘called upon’”). *See also* PJM Operating Agreement, Schedule 1, § 1.7.20(b), JA 386 (market participants selling from generation resources must respond to PJM’s “directives to start, shutdown or change output levels of generation units”); Schedule 1, § 1.10.1A(d), JA 428 (owners of Generation Capacity Resources are subject to day-ahead energy market and real-time energy market “must-offer” requirements).

B. How Duke’s Lee Facility Complies With The “Must-Offer” Requirement

Duke’s Lee Facility is located in Dixon, Illinois, 90 miles west of Chicago. Initial Order P 3, JA 2. Its eight natural gas-fired combustion turbines are PJM-designated Generation Capacity Resources. *Id.* In light of the “must-offer”

requirement, Duke “should be prepared for the possibility that the Lee resources will be called on and need to be available to run for PJM every day. . . .” Answer of PJM Interconnection, L.L.C. at 10 (May 27, 2014) (PJM Answer), R.33, JA 197.

Under the PJM tariff, Duke is required to “operate in accordance with its Day-Ahead obligation.” Rehearing Order P 25, JA 54. But Duke can choose how it complies with its obligation to offer the Lee Facility into the day-ahead energy market every day. *See* Initial Order P 61, JA 29 (“Fulfilling its energy market commitments are among the risks the Generation Capacity Resource has assumed Duke’s decision as to how to buy fuel to satisfy those obligations is left to its discretion.”). Duke explains that on days when the Lee Facility units “clear” the day-ahead market, and are expected to make offers to run the following day, Duke varies the terms upon which it offers the units into the day-ahead energy market, in ways that reflect the price and availability of fuel for the units, or of replacement electricity. Br. 7-8.

C. The 2014 Cold Snap, And PJM’s And Duke’s Responses

In January 2014, extremely cold temperatures prevailed in the eastern United States. Initial Order P 4, JA 2-3. PJM broadcast an emergency procedures message to its members on the morning of Monday, January 27, 2014, indicating that for Tuesday, January 28, 2014, PJM anticipated peak demand of 141,000

megawatts, with estimated reserves of only 1,000 megawatts. *Id.* PJM asked “all generation owners to verify their maximum emergency values,” and to report updates as necessary. *Id.*

Duke initially decided not to buy natural gas for the Lee units that morning, drawing on its experience with similar weather and market conditions to project that PJM probably would not dispatch the units in real time. *Id.* P 5, JA 5-6. But seven minutes after PJM issued its emergency procedures alert, a Duke employee, Gregory H. Cecil, called PJM’s dispatch desk for additional guidance. *Id.* P 5, JA 5-6; Rehearing Order P 26, JA 54-55. Mr. Cecil stated that he was concerned about buying gas for the Lee units without knowing whether they would be dispatched that day. Initial Order P 5, JA 5-6; Rehearing Order P 27, JA 55. Duke hoped to avoid a situation it had encountered the previous week, in which it had purchased gas for the Lee units and then – when PJM did not call on the units to run as much as Duke projected – sold some of that gas at a loss. Complaint of Duke Energy Corporation (Duke Complaint), Exh. No. D-1 at P 20 (May 5, 2014), R.2, JA 132 (if Duke “purchased the gas for the Lee units, we needed them to be allowed to come online, as opposed to what had happened the previous week”); *see also id.* PP 15-18, JA 131-32 (explaining earlier events). Nathan Marr, the employee at PJM’s dispatch desk, told Mr. Cecil that “more than likely, your units

will be running,” but that PJM “can’t guarantee 100 percent that you will be on.”

Initial Order P 5, JA 3-4.

Mr. Cecil’s call to PJM did not change his mind about not buying natural gas for the Lee units immediately. Initial Order P 5, JA 3-4; Duke Complaint, Exh. No. D-1 at PP 21-22, JA 133. This was because the price of gas was too high, and the day-ahead price of electricity was too low, for Duke to recover the costs of gas for the Lee units.² Initial Order n.13, JA 4; Complaint, Exh. No. D-1 at P 21, JA 133. “The economics of buying the gas without running the plant simply made no sense – it would be a money-losing proposition.” Complaint at 5, JA 78. Moreover, Duke retained the option to buy gas for the Lee units later in the day if PJM dispatched them. Initial Order P 6, JA 4-5 (citing Complaint at 5 n.9, JA 78, and PJM Operating Agreement).

Three minutes later, Mr. Marr called Duke back to say that PJM wanted Duke’s units to be available. *Id.* P 7, JA 5. Mr. Marr stated that if Duke was “not

² PJM observed this type of mismatch between Generation Capacity Resources’ costs and expected revenues in its energy markets on January 21, 2014. *See PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,041 at P 2 (2014). PJM requested, and the Commission issued, two waivers of PJM’s tariff. The first allowed Generation Capacity Resources whose costs exceeded the applicable energy market clearing price to receive make-whole payments covering the difference. *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,041, *reh’g denied*, 149 FERC ¶ 61,059 (2014). The second waiver allowed Generation Capacity Resources to bid capacity into the PJM energy markets at prices above the tariff’s price cap. *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078 (2014), *reh’g dismissed*, 149 FERC ¶ 61,060 (2014). Ultimately, no resource was paid more than the amount of the offer cap as a result of the second waiver. 149 FERC ¶ 61,060 at P 7.

securing gas based on an economic decision – this is not an economic decision. This is a reliability issue, so all units must be available.” *See id.*; *see also* Duke Complaint, Exh. No. D-2 at 4, JA 143 (same). Mr. Marr stated that if there were “issues with that,” Duke’s Mr. Cecil could call back and speak with Mr. Marr or with his manager. Duke Complaint at 5, JA 78, *see also id.*, Exh. No. D-2 at 5, JA 144. Mr. Cecil did call PJM again, and confirmed that the system operator anticipated reliability issues. *Id.* Exh. D-2 at 7-8, JA 145-46.

Mr. Cecil also called Ken Jennings, another Duke employee, who had spoken to PJM about the possibility of being made whole for the purchase of natural gas necessary to comply with PJM instructions. *Id.* Exh. D-1 at P 25, JA 134. Mr. Jennings reported that PJM “could not tell [Duke] what to do and was not aware of anything in the PJM tariff that would permit Duke to be made whole. . . .” *Id.*

Duke bought two days’ worth of natural gas for the Lee units, *see* Duke Complaint at 14, JA 87, at a total cost of about \$12.45 million. Initial Order P 8, JA 5-6 (citing Complaint at 19, JA 92). But its initial projection as to whether the units would run turned out to be correct; PJM did not call the units to run in real time. *Id.* P 8, JA 5-6. Duke was able to mitigate its damages somewhat, but eventually incurred losses of about \$9.84 million. *Id.* Duke requested

indemnification from PJM pursuant to PJM tariff Section 10.3 – the provision that is at issue in this case – but PJM denied its request. *Id.* P 9, JA 6.

D. The Proceeding Under Review

1. Duke's Complaint And PJM's Answer

Duke filed a complaint against PJM under sections 206 and 306 of the Federal Power Act, 16 U.S.C. §§ 824e and 825e, and Rule 206 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206, seeking compensation for the losses it incurred after purchasing natural gas for the Lee units. Initial Order P 10, JA 7. Duke focused on the language of Section 10.3 of PJM's tariff, which provides for transmission customers to indemnify the owners of generation resources from third-party claims that arise out of the performance of their duties:

The Transmission Customer shall at all times indemnify, defend, and save each Transmission Owner, the Transmission Provider, PJMSettlement, and each Generation Owner acting in good faith to implement or comply with the directives of the Transmission Provider, . . . harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the Transmission Provider's, PJMSettlement's, a Transmission Owner's, or a Generation Owner's (acting in good faith to implement or comply with the directives of the Transmission Provider) performance of its obligations under this Tariff on behalf of the Transmission Customer[.]

PJM Tariff § 10.3, JA 372.

Duke, explaining the meaning of many individual terms in this paragraph, argued that it “unambiguously” required PJM (as the intermediary between generation owners such as Duke and the PJM transmission customers) to hold Duke harmless for purchasing gas for the Lee units on January 27, 2014. Complaint at 23, JA 98. Duke contended that PJM had ordered Duke to buy the gas, and that Duke had acted in good faith to implement PJM directives related to capacity resource obligations.³ Complaint at 23-33, JA 98-108; Initial Order PP 10-15, JA 7-9.

PJM (and, separately, its Independent Market Monitor) disagreed with Duke that any provision of the PJM tariff would enable Duke to recover its losses from January 27, 2014. *See* PJM Answer at 5, 11-45, JA 192, 198-232; Comments of the Independent Market Monitor at 8-18 (May 27, 2014), R.39, JA 253-63. Many other parties filed comments – both in support of Duke’s position, and in opposition to it – that addressed the interpretation of Section 10.3. *See* Initial Order PP 32-41, JA 17-21.

³ Duke also asked the Commission to waive several provisions of the PJM tariff that bar Duke from receiving make-whole payments. *See* Initial Order PP 16-18, JA 9-11. The Commission denied Duke’s request, *id.* PP 66-68, JA 33-34, and Duke has not pursued this issue on appeal. But the question whether waiver of the PJM tariff was appropriate to allow a Generation Capacity Resource to recover financial losses, under circumstances similar to those of this case, is pending before the Court in *Old Dominion Elec. Coop. v. FERC*, No. 16-1111 (filed April 11, 2016).

2. The Commission Orders

In an order addressing Duke's complaint, and again in an order on rehearing, the Commission interpreted Section 10.3 of the PJM tariff to bar Duke's claim for indemnification. *See* Initial Order PP 57-65, JA 27-33; Rehearing Order PP 23-33, JA 58-64. The agency noted that "the purpose of the indemnification provision is to allocate the risks of a transaction, and the costs associated with those risks, to the party on whose behalf the transaction has been conducted, the transmission customer." Initial Order P 60, JA 28 (internal quotation omitted); *see also* Rehearing Order P 23, JA 53-54 (provision is designed to protect generators from liability to third parties incurred as a result of serving customers).

First, the Commission found that "the PJM indemnification provision should not be interpreted to guarantee reimbursement of a generator's losses on gas purchases incurred in meeting its capacity resource obligations in PJM." *Id.* P 61, JA 29; Rehearing Order P 23, JA 53-54. It held that Generation Capacity Resources – generation owners like Duke with a preexisting capacity obligation to serve energy markets if called upon by PJM – assume the risks associated with fulfilling their energy market commitments when they choose to participate in the PJM energy markets, and they have discretion as to how to satisfy their obligations. Initial Order P 61, JA 29. Granting Duke indemnification "would improperly reallocate the risks related to fuel procurement, and the costs associated

with its choices as to when and how to procure fuel, from capacity resources like Duke to PJM customers.” *Id.*; Rehearing Order P 32, JA 58. In light of PJM’s tariff and the structure of its markets, the Commission found that it was not appropriate for PJM transmission customers to bear risks related to fuel procurement. Initial Order P 61, JA 29.

Second, the Commission reasoned that capacity resources like Duke have strict performance obligations, and economic considerations are irrelevant to determining whether a unit is physically available. Initial Order P 62, JA 29-30 (citing *New England Power Generators Ass’n, Inc.*, 144 FERC ¶ 61,157 at PP 47, 58 (2013)). When Duke bid the Lee units into the PJM capacity market, it assumed the risks and rewards associated with that performance obligation. *Id.*; Rehearing Order P 32, JA 58.

Third, the Commission disagreed with Duke’s argument that it was entitled to indemnification because it was acting in compliance with a PJM directive. Initial Order P 63, JA 30-31; Rehearing Order PP 25-31, JA 54-58. Because Generation Capacity Resources must be available to PJM without regard to economics, the Commission was not persuaded that PJM was ordering Duke to do anything that Duke was not already required to do when its dispatcher stated that all units needed to be available on January 28, 2014. Initial Order P 63, JA 30-31; Rehearing Order PP 28, 31, JA 55, 57-58.

Finally, the Commission held that compensating Generation Capacity Resources through the PJM indemnification provision, for costs incurred to fulfill their capacity obligations, would significantly expand the scope of that provision and “would render the cost recovery and energy and capacity payment provisions of the PJM governing documents meaningless.” Initial Order P 65, JA 32-33. The broad interpretation that Duke advances would also “be tantamount to permitting generators to circumvent the filed rate doctrine whenever, as occurred here, they fulfill a tariff obligation to operate and incur a market related loss for which the tariff does not elsewhere provide recovery.” Rehearing Order P 23, JA 53-54.

But the Commission was not unsympathetic to Duke’s plea. While it found that the PJM tariff did not offer relief in the circumstances Duke described, it nonetheless initiated an investigation of whether the tariff should be revised, prospectively, to afford generation owners such as Duke greater flexibility to make, and to update, offers to supply energy. *See* Initial Order PP 69-74, JA 35-37.

This appeal followed.

SUMMARY OF ARGUMENT

The case presents the single, narrow issue of whether the indemnification provision (Section 10.3) of PJM's tariff is properly read to cover Duke's gas purchasing losses during very cold weather. Duke argues that the tariff language is "clear" and "plain," and that it compels a reading of Section 10.3 that would entitle Duke to indemnification for a business decision that did not work out in its favor. Before the Commission, some parties agreed with Duke's reading, but others – including both PJM and its Independent Market Monitor – cautioned that this interpretation would broaden the scope of Section 10.3 beyond its intended purpose.

The Commission reasonably agreed with PJM's interpretation of its own tariff. The Commission considered Section 10.3 of the tariff alongside Duke's other tariff obligations – most critically, Duke's obligation as a Generation Capacity Resource to make its Lee units available to PJM every day of the year – and concluded that it is inappropriate and inconsistent with the intent of Section 10.3 to shift the risk of market losses to PJM transmission customers. This determination, which required the Commission to draw on its expert understanding of energy market operations and tariff administration, deserves substantial deference. Duke's preference for a different result does not make the Commission's conclusion unjust and unreasonable; nor does it undo the substantial

record evidence supporting that conclusion. *See FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782-84 (2016).

Duke argues that it only bought gas for the Lee units on January 27, 2014 because PJM directed it to do so. But PJM disputes this, explaining that its dispatchers' telephone statements are advisory only, not binding on market participants. Duke fails to identify a section of the PJM tariff under which a dispatcher can usurp Duke's own authority to purchase natural gas for its facilities, and offer them into the day-ahead energy market, on terms that Duke itself selects. And to the extent that the PJM tariff may have restricted Duke's flexibility – for example, because it does not allow Duke or other market participants to update their offers in real time, including during emergencies – the Commission sensibly ordered an investigation into whether the tariff should be revised.

ARGUMENT

I. Standard Of Review

This Court reviews Commission orders under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A); *see also, e.g., Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under this standard, the court may not substitute its judgment for the Commission's, but must uphold the agency's decision if the agency has examined the relevant considerations and given a satisfactory explanation for its action,

“including a rational connection between the facts found and the choice made.”

Elec. Power Supply Ass’n, 136 S.Ct. at 782 (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

This Court will uphold the Commission’s factual findings if they are supported by substantial evidence. *E.g.*, *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010). Substantial evidence “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *La. Pub. Serv. Comm’n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (internal quotation marks and citation omitted).

The Commission’s interpretation of tariffs is reviewed using “a variation of the now familiar ‘two-step’ first performed by the United States Supreme Court in *Chevron U.S.A. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984).” *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 498 (D.C. Cir. 2003); *see Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 74-75 (D.C. Cir. 1998) (same); *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1135-36 (D.C. Cir. 1991) (affording *Chevron* deference to Commission’s interpretation of a Commission-approved contract). 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 Co. v. FERC*, 599 F.3d 698, 701 (D.C. Cir. 2010) (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 provision is reasonable.” *Id.* at 701 (quotation omitted).

The Court affords “substantial deference” to the Commission’s interpretation of filed tariffs, ““even where the issue simply involves proper construction of language,”” in light of the broad range of adjudicative powers that Congress gave the agency. *Koch Gateway Pipeline Co.*, 136 F.3d at 814 (quoting *Nat’l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569 (D.C. Cir. 1987)); *see also Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1198 (D.C. Cir. 2000) (same). The Court also defers to the Commission’s 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 practice.” *Nat’l Fuel Gas Supply Corp.*, 811 F.2d at 1570.

II. Duke’s Appeal Is Limited To Its Request For Indemnification

Before the Commission, Duke argued that it was entitled to indemnification under the tariff Section 10.3 or, in the alternative, a waiver of other tariff provisions to provide Duke with additional make-whole payments. *See* Initial Order PP 10-18, JA 7-11. The Commission denied both requests, *id.* PP 57-74, JA 27-37, and denied Duke’s request for rehearing of its conclusions. Rehearing Order PP 23-33, 45-55, JA 12-18, 24-30.

On appeal, Duke pursues only its tariff-based indemnification claim. *See* Br. 2, 4, 42. Consequently, this case is not about any concern for equity or fairness that might have motivated the parties' positions, or the Commission's conclusion, on waiver; rather, it concerns the scope of Duke's rights and obligations under the PJM tariff. PJM – which Duke claims supports its request for relief “in some form,” Br. 15 – argued in favor of a tariff waiver, but not in favor of tariff indemnification in this situation. *See* PJM Answer at 5-6, JA 192-93. In fact, PJM argued that that the “purpose, history, and plain language of Section 10.3 indicate the section is inapplicable to Duke's recovery of its gas balancing losses.” Answer at 5, JA 192; *see also* Initial Order PP 60-61, JA 28-29 (same). PJM's Independent Market Monitor contended that Duke's interpretation of Section 10.3 rests, incorrectly, on its misunderstanding of other tariff provisions. Initial Order P 40, JA 21. And while Duke argues that Commissioner Moeller, in his dissent from the Initial Order, favored granting relief, Br. 2, Commissioner Moeller did not mention indemnification at all. *See* Initial Order (Moeller, Comm'r, dissenting), JA 39-41. He concluded, instead, that the “majority should have applied the Commission's waiver standards” and “can waive – and has waived – the prior notice requirement to ensure that resources are compensated for providing a reliability service.” *Id.* at 1-2, JA 39-40. These statements do not further Duke's argument that indemnification is appropriate under the plain language of the tariff.

III. The Commission Reasonably Found That The PJM Tariff Does Not Provide Indemnification Under The Circumstances Presented

A. Duke Incorrectly Claims That There Is Only One Reasonable Way To Read Section 10.3

Duke contends that Section 10.3 of the PJM tariff provides for indemnification of its losses because Duke lost money complying with a PJM directive to purchase natural gas. Initial Order P 10, JA 7; Br. 23-32. It argues that its viewpoint is correct because the language of the tariff provision is “clear,” Br. 2, 24, and “plainly written,” *id.* at 41. Duke also contends that the Commission “mangles the Tariff’s plain language” in ruling that Duke has not suffered a loss within the provision’s meaning. *Id.* at 18.

But the record of this case demonstrates that reasonable minds can differ as to what Section 10.3 means, and this suggests that the provision is not as unambiguous as Duke thinks it is. *See Ameren*, 330 F.3d at 499 (quoting *Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1544 (D.C. Cir. 1985) (“A contract is ambiguous if it is ‘reasonably susceptible of different constructions or interpretations.’”)). Before the Commission, PJM argued that Section 10.3 provides indemnification for losses suffered from specific claims brought by third parties, not losses due to market activity. Initial Order P 27, JA 14. Other commenters advanced a variety of interpretations of Section 10.3. *See* Initial Order PP 32-41, JA 17-21 (summarizing comments). Three parties supported

Duke’s request for indemnification, arguing that generators should be able to recover costs incurred at the direction of a regional transmission organization. Initial Order P 32, JA 17. One characterized this outcome as the result of a “natural reading” of Section 10.3. *Id.* Five commenters, including the Independent Market Monitor, disagreed, arguing variously that the indemnity provision is not meant to cover the circumstances of this case, that the harm to Duke originated with Duke’s own decision to buy fuel, and that PJM had not issued Duke a “directive” within the meaning of that term. *Id.* PP 35-40, JA 19-21. In the face of this broad range of opinions, the Commission logically attempted to interpret the disputed provision and settle its meaning.

Where, as here, the Commission is confronted with disputed tariff language, the Commission must “look to see if the language of the tariff is unambiguous – that is, if it reflects the clear intent of the parties to the agreement.” *Koch*, 136 F.3d at 814; *accord Ameren*, 330 F.3d at 498; *Cajun*, 924 F.2d at 1136. Following this responsibility, the Commission began its analysis by looking for such intent, using traditional tests of context and historical understanding. Initial Order PP 60-65, JA 28-33; *see also id.* P 60, JA 20 (“[W]e have examined the history of the provision as well as the types of claims it is designed to cover.”). The Commission did not find a lack of ambiguity, but “considered policy concerns and extrinsic evidence proffered by Petitioners, demonstrating that it recognized the Tariff . . .

[was] ambiguous and exercised its discretion to resolve the ambiguities.” *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48-49 (D.C. Cir. 2008) (affording “substantial deference” to FERC’s interpretation). The Commission concluded that Section 10.3 of the PJM tariff did not encompass Duke’s claim for indemnification. *See* Initial Order PP 60-65, JA 28-33.

B. The Commission Reasonably Interpreted Section 10.3 Of The PJM Tariff

“In addressing issues of statutory interpretation, the court must begin with the text, turning as need be to the structure, purpose, and context of the statute.” *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 56 (D.C. Cir. 2014). Similarly, in order to interpret disputed tariff provisions, the Commission and this Court have examined the context and the history of those provisions in order to discern their underlying intent. *See Koch*, 136 F.3d at 815 (Commission reasonably looked to language surrounding ambiguous tariff provision to support its reading); *Cajun*, 924 F.2d at 1136 (comparing amended tariff language with original language to discern parties’ intent).

The orders on review follow these traditional means of interpretation, and take a “reasoned path” to their conclusions as this Court requires. *See FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 449 (D.C. Cir. 2005). The Court defers to the Commission’s reasonable interpretation of an ambiguous tariff provision. *See Koch*, 136 F.3d at 815. The Commission’s conclusion may be

upheld even if the petitioner offers a possible reading, and even if the Court would have interpreted the disputed provision differently than the Commission did. *Id.*

1. History and Purpose Of Section 10.3

Section 10.3 of the PJM tariff derives from the *pro forma* (generic) tariff that the Commission developed in its Order No. 888 rulemaking. Initial Order P 60, JA 28-29 (citing *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,765 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *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 sub nom. New York v. FERC*, 535 U.S. 1 (2002)). The provision, in “essence, provides that when the transmission provider behaves in all respects properly, the customer will indemnify the transmission provider for claims of damage to third parties arising from the service provided under the tariff.” Initial Order P 60, JA 28 (quoting Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,301). The types of claims that the tariff refers to are “injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorney fees,” and other similar costs. Rehearing Order P 23, JA 53-54.

In PJM's tariff, the language of the Order No. 888 *pro forma* provision has been extended to indemnify against third-party claims the owners and operators of generation facilities acting in good faith to implement and comply with PJM directives. *See* Initial Order P 60, JA 28-29 (citing *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,264 at P 10 (2005)); Rehearing Order P 23, JA 53-54 (specifying types of liability that Section 10.3 envisions).

In light of the provision's history, and in keeping with its prior decisions, the Commission reasonably held that "the PJM indemnification provision should not be interpreted to guarantee reimbursement of a generator's losses on gas purchases incurred in meeting its capacity resource obligations in PJM." Initial Order P 61, JA 29. For this reason, Duke's uneconomic purchase of fuel for the Lee units is not a "loss" within the meaning of Section 10.3, as Duke contends that it is (Br. 23-26).

Drawing upon its technical understanding and policy judgment, the Commission adequately explained its interpretation. Its analysis constitutes reasoned decisionmaking because the Commission addressed the question of what Section 10.3 means "seriously and carefully," providing reasons in support of its position, and responding to alternatives. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("All of that together is enough. . . . It is not our job to render that judgment, on which reasonable minds can differ.").

2. Duke's Interpretation Of Section 10.3 Improperly Reallocates The Risk Of Fuel Procurement

Generation Capacity Resources such as the Lee units must “be prepared to have sufficient gas available to operate these resources 365 days a year.” Rehearing Order n.59, JA 58 (quoting PJM Answer at 43, JA 230). But they have “the freedom as to what costs to incur, and what risks to take, to fulfill this obligation.” Rehearing Order P 32, JA 58. “Fulfilling its energy market commitments are among the risks the Generation Capacity Resource has assumed” by participating in the capacity market. Initial Order P 61, JA 29.

“According to PJM, it is a common occurrence that PJM dispatchers indicate that units need to be available to run only to later find that due to changes in load conditions, PJM does not need to commit the particular unit.” Initial Order P 63, JA 30-31 (citing PJM Answer at 4, JA 191). Duke surely knew this, as it contemplated not buying gas on the morning of January 27 because it thought the Lee unit would not be dispatched. *See* Rehearing Order PP 26, 29-30, JA 54-57; Br. 12. Indeed, Duke notes that it has tariff rights to buy gas later in the day, or to buy replacement power, if PJM calls the Lee units into service. Br. 8, 14.

Generators do not have an automatic right to recover all of their costs if their units are not dispatched, and losses related to (ultimately) unnecessary fuel purchases reflect normal risk that generators assume in conducting their business. Initial Order n.149, JA 31 (citing PJM Answer at 4, JA 191); Rehearing Order

n.52, JA 56 (same). The parties to the related *Old Dominion* case (No. 16-1111) – which the Commission considered and decided at the same time it considered and decided the orders underlying Duke’s appeal – did not even attempt to argue that relief was available to them under the PJM tariff. *See Old Dominion Elec. Coop.*, 151 FERC ¶ 61,207 at P 7 (2015) (Old Dominion acknowledged, absent waiver of otherwise-applicable tariff provisions, generators’ inability to recover “legitimate, actual costs incurred to comply with a PJM dispatch instruction during emergency conditions”), *reh’g denied*, 154 FERC ¶ 61,155 (2016). Duke also acknowledges this rule. *See* Br. 9-10 (characterizing as a “costly lesson” Duke’s decision to buy fuel on a cold day earlier in January 2014, with the expectation that the Lee units could run at a profit, only to take a loss because PJM did not dispatch the units). Cost recovery is provided for in other sections of the PJM tariff. *See* Rehearing Order P 23 & n.44, JA 53-54.

Duke’s own statements demonstrate its understanding that, under the tariff, Duke assumed the risk of participating in the capacity market – including the risk that it would be unable to recover all of its costs. Yet it dismisses as “slippery-slope logic” the Commission’s finding that requiring transmission customers to indemnify Duke, under Section 10.3 of the tariff, for the cost of buying gas in an emergency would “significantly expand, and indeed, re-write” the provision. Br. 16 (quoting Initial Order P 65, JA 32-33), 38. Duke’s argument that there would

be no such expansion requires reading into the tariff exceptions to normal practice based on PJM allegedly having given Duke instructions that override Duke's commercial discretion – something Duke acknowledges in its brief. Br. 38-39 (“Duke advocates for this simple rule: when PJM overrides Duke's contractual discretion and orders it to act, and when Duke takes that action in good faith, any resulting losses fall within [Section] 10.3” of PJM's tariff.) If there were such a rule in the tariff, Duke would have no need to advocate for it now.

In sum, the Commission provided a “coherent and adequate” explanation for its determination that Section 10.3 of PJM's tariff should not be interpreted to guarantee reimbursement of a generator's losses on gas purchases incurred to meet its capacity resource obligations. *PSEG Energy Res. & Trade, LLC v. FERC*, 360 F.3d 200, 203 (D.C. Cir. 2004). Its interpretation of the tariff, informed by its technical understanding of, and familiarity with, PJM's tariff, deserves judicial respect. *See Nat'l Fuel Gas Supply Corp.*, 811 F.2d at 1570.

3. PJM Did Not Give Duke A Directive For Purposes Of Section 10.3

Duke asserts that it should be indemnified for its gas balancing losses because it bought gas for the Lee units at PJM's “directive,” and therefore was unable to exercise its usual commercial discretion. Br. 26-37. But the Commission reasonably found that the PJM dispatcher's statements to Duke's employee, Mr. Cecil, on the morning of January 27 “were not a specific order to

Duke to take action that went beyond Duke's pre-existing contractual requirements." Rehearing Order P 25, JA 13.

Before the Commission, Mr. Cecil stated that he contacted PJM in order to seek its appraisal of the emergency situation on the morning of January 27. *See id.* PP 26 & n.46, JA 54-55 (quoting Duke Complaint, Exh. No. D-1 at P 20, JA 132-33 ("So while it is not a normal practice for me to call PJM, I did so in this instance.")). Mr. Cecil took this unusual step because he was "evaluating the costs of purchasing gas to comply with" the Lee units' must-run obligation. *Id.* P 26, JA 54-55. He sought perspective as to whether PJM would run those units "precisely because he was contemplating *not* buying gas at that time." *Id.* PJM's dispatcher stated that he thought the Lee units would be needed for reliability, and "advised" Duke to secure gas for them, because "all units must be available." *Id.* P 28, JA 55.

Duke claims that it received a "clear instruction to act," Br. 32, but PJM specifically denied that it ordered Duke to buy gas. Rehearing Order P 31, JA 57 (citing PJM Answer at 4, JA 191). "The PJM dispatcher's comments merely advised Duke's operators that the reason PJM was expecting to call on the Duke resources on January 28, 2014 was for reliability, not economics." Answer at 8, JA 195. Duke cites no authority for its repeated allegation, *see* Br. 1, 13, that PJM's verbal representations about whether the Lee unit would run on January 28,

2014 overcame Duke's own discretion to decide whether to purchase gas. It argues that PJM has authority to control the system in an emergency, Br. 36-37, but it does not explain how that authority overcomes Duke's procurement discretion. *See* Initial Order P 63, JA 30-31 (PJM indicated only that it expected to call on Duke for reliability, not for economic reasons, and Duke was already obligated to make the Lee units available).

Upon review of the record, the Commission reasonably agreed with PJM that PJM had not instructed Duke to purchase gas. It noted, as discussed *supra*, that Duke was already obligated to make the Lee units available to PJM. *See* Rehearing Order P 25, JA 13 (because Generation Capacity Resources must be offered into the PJM markets every day, and operated whenever PJM dispatches them, "Duke is under an obligation to PJM to purchase or to have on hand sufficient fuel to run its unit when dispatched"). Duke conceded before the Commission that it cannot fail to meet this obligation. *Id.* P 24, JA 54. It also "agrees that it is not a 'directive' to tell someone to do something that they already must do." Br. 28. And moreover, PJM dispatcher Mr. Marr "said nothing about when to purchase natural gas, at what price to purchase the gas, how to bid into the market, or to take any action beyond that which Duke is otherwise obligated to take under the Tariff." Rehearing Order P 29, JA 56.

Next, the Commission found – and Duke does not dispute – that dispatchers’ statements on the telephone do not provide guarantees. *Id.* P 29, JA 56. They also do not sanction a generation unit’s determination not to honor a tariff commitment. *Id.* And “Mr. Marr’s statement that economics is not a factor merely reflects Duke’s tariff obligation to be prepared to run its units.” *Id.*

Duke argues that it is legally obligated to follow PJM’s instructions, particularly during emergencies; that refusing to do so would have violated the Tariff; that it is dangerous for the Commission to attribute no legal significance to a dispatcher’s statements during an emergency; and that PJM itself opposed such a result. Br. 36-37 (citing PJM Answer at 48, JA 235). But the portion of PJM’s Answer that Duke relies on for this argument is responding to Duke’s alternative request for a waiver of PJM’s tariff, not a request for indemnification under the tariff. *See* Answer at 45-49, JA 232-36. PJM did state that it needs to be able to rely on the owners and operators of generation facilities during an emergency, *id.* at 48, JA 235, and it supported making Duke whole for responding to the emergency situation, *id.* at 47-48, JA 234-35. But PJM supported making Duke whole via tariff waiver – something not at issue in this appeal (*see supra* pp. 20-21) – and opposed indemnifying Duke for its market activity losses under Section 10.3 of the tariff. *See* Answer at 11-44, JA 198-231; *see also id.* at 15, JA 202 (stating that none of the relevant PJM documents “contain[s] a provision that

clearly impose[s] an obligation . . . to compensate Duke for the type of losses it incurred under the relevant circumstances”).

In light of the record evidence, the Commission reasonably concluded that the PJM dispatch desk had not ordered Duke to purchase natural gas on the morning of January 27, and therefore that Duke was not following a directive from PJM. *See Elec. Power Supply Ass’n*, 136 S. Ct. at 784 (the Commission “met its duty of reasoned judgment” when it “took full account of the alternative policies proposed, and adequately supported and explained its decision.”).

C. The Commission Is Addressing Duke’s Equitable Concerns

Although the Commission did not find a proper basis to require PJM transmission customers to indemnify Duke under Section 10.3 of the tariff, or to waive provisions of the tariff in order to allow for make-whole payments to Duke, it has taken steps to address equitable concerns raised throughout this proceeding. *See* Initial Order PP 69-74, JA 35-37 (initiating investigation into PJM tariff). The Commission explained that it had examined PJM’s tariff and operating procedures, and “concluded that aspects of PJM’s current tariffs may be unjust and unreasonable” *Id.* P 69, JA 35.

The Commission observed that although Generation Capacity Resources, like Duke’s Lee units, must offer into the day-ahead energy market, must follow PJM’s instructions to start, shut down, or change operating levels, and must keep

supply offers open during the day, the PJM tariff and operating agreements did “not appear to allow appropriate cost recovery for fulfilling those obligations in all circumstances.” *Id.* By contrast, other regional transmission organization tariffs allow capacity generators to update their offers in real time. *Id.* P 70, JA 35 (citing *ISO New England, Inc. and New England Power Pool*, 145 FERC ¶ 61,104 (2013) (conditionally accepting energy market rule changes in another regional system that were intended to provide greater flexibility for market participants to structure and modify supply offers)). A recent technical conference on price formation in organized energy markets also had shown the importance of supply offer flexibility. *Id.* P 71, JA 35.

Citing “the circumstances that gave rise to this proceeding” and its technical conference, the Commission found that PJM’s tariff and operating agreement may be unjust and unreasonable because they “do not appear to allow market participants to submit day-ahead offers that vary by hour and do not appear to allow market participants to update their offers in real time, including during emergency situations.” *Id.* P 73, JA 37. The Commission therefore instituted an investigation into PJM’s tariff. *Id.*; *see also* Notice of Institution of Section 206 Proceeding and Refund Effective Date, Docket No. EL15-73-000 (June 10, 2015), R.54, JA 332 (referring to Initial Order for description of investigation). It set the refund effective date under Federal Power Act section 206(b), 16 U.S.C. § 824e(b),

at the earliest possible date, *i.e.*, the date of publication of the notice of investigation. Initial Order P 74, JA 37.

When PJM later submitted tariff revisions intended to increase generation offer flexibility, the Commission found that PJM's tariff was, indeed, unjust and unreasonable. *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,282 at P 32 (2016). The Commission did not accept the particular changes that PJM proposed, but ordered the regional organization to make further tariff revisions. *See id.* P 33. PJM submitted a compliance filing that proposed further revisions, and its proposals remain pending before the Commission. *See Compliance Filing Implementing Hourly Offers and Cost-Based Offer Requirements*, Docket No. ER16-372-000 (Aug. 16, 2016). It is entirely appropriate for the Commission to address issues such as these one step at a time, using procedures best suited to gathering information and resolving the underlying problem. *See Mobil Oil Explor. & Prod. Se. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991) (the Commission "enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures" and could "compile relevant data more effectively in a separate proceeding"); *S.C. Pub. Serv. Auth.*, 762 F.3d at 81 (same; approving Commission's decision to address broad policy issue in rulemaking proceeding, but application of that policy to specific utilities in later proceedings, on a case-by-case basis).

CONCLUSION

For the foregoing reasons, this Court should deny Duke's petition for review and affirm the orders on review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,441 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

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

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October 11, 2016

ADDENDUM

STATUTES AND REGULATIONS

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

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

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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

- Sec. 801. Congressional review.
- 802. Congressional disapproval procedure.
- 803. Special rule on statutory, regulatory, and judicial deadlines.

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 reservation. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(b) Alternative prescriptions

(1) Whenever the Secretary of the Interior or the Secretary of Commerce prescribes a fishway under section 811 of this title, the license applicant or any other party to the license proceeding may propose an alternative to such prescription to construct, maintain, or operate a fishway.

(2) Notwithstanding section 811 of this title, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall accept and prescribe, and the Commission shall require, the proposed alternative referred to in paragraph (1), if the Secretary of the appropriate department determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative—

(A) will be no less protective than the fishway initially prescribed by the Secretary; and

(B) will either, as compared to the fishway initially prescribed by the Secretary—

- (i) cost significantly less to implement; or
- (ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any prescription under section 811 of this title or alternative prescription it accepts under this section, a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824o-1, 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, 824o, 824o-1, 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, 824o, 824o-1, 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; Pub. L. 114-94, div. F, §61003(b), Dec. 4, 2015, 129 Stat. 1778.)

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

2015—Subsec. (b)(2). Pub. L. 114-94, §61003(b)(1), inserted "824o-1," after "824o," in two places.

Subsec. (e). Pub. L. 114-94, §61003(b)(2), inserted "824o-1," after "824o,".

2005—Subsec. (b)(2). Pub. L. 109-58, §1295(a)(1), substituted "Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 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, 824o, 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, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title" for "section 824i, 824j, or 824k of this title".

Subsec. (f). Pub. L. 109-58, §1291(c), which directed amendment of subsec. (f) by substituting "political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of

1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year,” for “political subdivision of a state,” was executed by making the substitution for “political subdivision of a State,” to reflect the probable intent of Congress.

Subsec. (g)(5). Pub. L. 109-58, §1277(b)(1), substituted “2005” for “1935”.

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

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

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

EFFECTIVE DATE OF 2005 AMENDMENT

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

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

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

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

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

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

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

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon 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 between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

(1) During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(2) With respect to an order issued under this subsection that may result in a conflict with a

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95-617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anti-competitive 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), in a proceeding commenced under this section involving two or more electric utility companies of a reg-

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by

the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100-473, § 4, Oct. 6, 1988, 102 Stat. 2300, provided that: "The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such

¹ See References in Text note below.

complaints may be withdrawn and refiled without prejudice.”

LIMITATION ON AUTHORITY PROVIDED

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

STUDY

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

§ 824f. Ordering furnishing of adequate service

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

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

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

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

(b) Request for inventory and cost statements

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

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

§ 824h. References to State boards by Commission

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

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

(b) Cooperation with State commissions

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

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

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may upon request from a State make available to such State as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement to the Commission by such State of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

pany, or any other organization primarily engaged in the business of providing financial services or credit, a mutual savings bank, or a savings and loan association;

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

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

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

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

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

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

(3) For purposes of this subsection—

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

(B) The terms “holding company”, “registered holding company”, and “holding company system” have the same meaning as when used in the Public Utility Holding Company Act of 1935.¹

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

EFFECTIVE DATE OF 1978 AMENDMENT

Pub. L. 95-617, title II, § 211(b), Nov. 9, 1978, 92 Stat. 3147, provided that: “No person shall be required to file a statement under section 305(c)(1) of the Federal

¹ See References in Text note below.

Power Act [subsec. (c)(1) of this section] before April 30 of the second calendar year which begins after the date of the enactment of this Act [Nov. 9, 1978] and no public utility shall be required to publish a list under section 305(c)(2) of such Act [subsec. (c)(2) of this section] before January 31 of such second calendar year.”

§ 825e. Complaints

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

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

AMENDMENTS

2005—Pub. L. 109-58 inserted “electric utility,” after “Any person,” and “, transmitting utility,” after “licensee” wherever appearing.

§ 825f. Investigations by Commission

(a) Scope

The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person, electric utility, transmitting utility, or other entity has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates, or in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce. The Commission may permit any person, electric utility, transmitting utility, or other entity to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

(b) Attendance of witnesses and production of documents

For the purpose of any investigation or any other proceeding under this chapter, any member of the Commission, or any officer designated

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each tariff or rate filing must include, as appropriate:

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

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

(3) The specific authorization or relief sought;

(4) The tariff or rate sheets or sections;

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

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

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

(8) Subscription or verification, if required;

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

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

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

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

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

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

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

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

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

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

§ 385.204 Applications (Rule 204).

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

§ 385.205 Tariff or rate filings (Rule 205).

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

(b) A tariff or rate filing must be made electronically in accordance with the requirements and formats for electronic filing listed in the instructions for electronic filings. A tariff or rate filing not made in accordance with these requirements and formats will not have a statutory action date and will not become effective should the Commission not act by the requested action date.

[Order 714-A, 79 FR 29077, May 21, 2014]

§ 385.206 Complaints (Rule 206).

(a) *General rule.* Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of

any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.

(b) *Contents.* A complaint must:

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

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

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

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

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

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

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

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

(9) State

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

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

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

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

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

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

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

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

(e) [Reserved]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 385.207 Petitions (Rule 207).

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

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

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

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

(4) A rule of general applicability; or

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

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

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

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

§ 385.208 [Reserved]

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

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

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

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

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 11th day of October 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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