

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 20-1388

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CALIFORNIA PUBLIC UTILITIES COMMISSION,  
*Petitioner,*

*v.*

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

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ON PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL ENERGY REGULATORY COMMISSION

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**BRIEF OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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MARCH 15, 2021

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## Certificate as to Parties, Rulings, and Related Cases

### A. Parties and Amici

The parties appearing before the Court are listed in the Brief of Petitioner California Public Utilities Commission.

### B. Rulings

1. *California Independent System Operator Corporation*, Order Accepting Tariff Revisions, 171 FERC ¶ 61,172 (May 29, 2020) (“2020 Tariff Order”), R.30, JA \_\_\_\_; and

2. *California Independent System Operator Corporation*, Notice of Denial of Rehearings by Operation of Law, 172 FERC ¶ 62,052 (July 30, 2020), R.33, JA \_\_\_\_.

### C. Related Cases

This case has not previously been before this Court or any other court. To counsel’s knowledge, there are no related cases elsewhere.

/s/Elizabeth E. Rylander  
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March 15, 2021

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## Glossary

2008 Tariff Order	<i>Cal. Indep. Sys. Operator Corp.</i> , 125 FERC ¶ 61,053 (2008)
2011 Tariff Order	<i>Cal. Indep. Sys. Operator Corp.</i> , 134 FERC ¶ 61,211 (2011)
2012 Settlement Order	<i>Cal. Indep. Sys. Operator Corp.</i> , 138 FERC ¶ 61,112 (2012)
2015 Tariff Order	<i>Cal. Indep. Sys. Operator Corp.</i> , 153 FERC ¶ 61,001 (2015)
2018 Tariff Order	<i>Cal. Indep. Sys. Operator Corp.</i> , 163 FERC ¶ 61,023 (2018)
2019 Tariff Order	<i>Cal. Indep. Sys. Operator Corp.</i> , 168 FERC ¶ 61,199 (2019)
2020 Tariff Order	<i>Cal. Indep. Sys. Operator Corp.</i> , 171 FERC ¶ 61,172 (2020), R.30, JA ____
Above-Cap Resources	Generators with Going-Forward Costs that exceed the soft offer cap
Amicus Br.	Brief of <i>Amicus Curiae</i> Calpine Corporation
California Commission	California Public Utilities Commission
Calpine	Calpine Corporation
Commission or FERC	Federal Energy Regulatory Commission

## Glossary

Going-Forward Costs	The costs that form the basis of a generator's request to be paid an amount greater than the soft offer cap, i.e., its fixed operations and maintenance costs, ad valorem taxes, and insurance costs
P	A paragraph in a FERC order
Pet. Br.	Brief of Petitioner California Public Utilities Commission
R	An item in the record of this proceeding
Soft offer cap	The maximum amount that California Independent System Operator has paid Capacity Procurement Mechanism resources since 2016, unless they can justify a greater amount: a fixed dollar amount based on the Going-Forward Costs of a reference unit, plus a 20 percent adder
System Operator	California Independent System Operator Corporation

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**BRIEF OF RESPONDENT  
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**Statement of the Issue**

California Independent System Operator Corporation (“System Operator”) administers California’s high-voltage electric transmission grid. Its many responsibilities include maintaining system reliability — something that requires ensuring that there is enough generation available to meet the demand for electricity in the quantities, and at the times and locations, when it is needed.

In the order on review, Respondent Federal Energy Regulatory Commission (“Commission” or “FERC”) approved System Operator’s proposal to refine “a never-used but philosophically divisive”<sup>1</sup> compensation formula that it maintains in its electric transmission tariff. The formula determines how much System Operator should pay certain high-cost generators (“Above-Cap Resources”) that agree to provide it with capacity — i.e., the ability to produce electricity — under its Capacity Procurement Mechanism authority.

The previous formula called for paying Above-Cap Resources their full cost of service, plus a return of and on capital. Under the new formula, System Operator will compensate Above-Cap Resources for a narrower set of costs: their fixed operations and maintenance costs, ad valorem taxes, and insurance costs (“Going-Forward Costs”), plus an adder of 20 percent. The Commission agreed with System Operator that the new formula was consistent with other compensation mechanisms in System Operator’s electric transmission tariff, and that

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<sup>1</sup> Comments of Middle River Power, LLC, at 2, R.21, JA \_\_\_\_.

it continued to provide an opportunity for generators to recover their costs and a return on capital.

On review, Petitioner California Public Utilities Commission (“California Commission”) contends that the new compensation formula — specifically, the 20 percent adder — is too generous, and that the Commission’s decision to accept it was not grounded in record evidence. Amicus curiae Calpine Corporation (“Calpine”) argues that the new formula does not pay enough to assure that generators (like itself) will recover their full fixed costs, but nonetheless urges the Court to affirm the order on review.

*The issue on review is:* Did the Commission reasonably find that the new compensation mechanism, which System Operator favored as a means of ensuring generator availability and system reliability, is “just and reasonable” within the meaning of the Federal Power Act?

### **Statutes and Regulations**

Pertinent statutes are reproduced in the Addendum to this brief.

## Background

### I. Statutory and regulatory background

#### A. The Federal Power Act

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. “Rates may be examined by the Commission, upon complaint or on its own initiative, when a new or altered tariff or contract is filed or after a rate goes into effect.” *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 558 U.S. 165, 171 (2010) (citing Federal Power Act sections 205 and 206, 16 U.S.C. §§ 824d(e), 825e(a)). 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* 16 U.S.C. §§ 824d(a), (b), (e); *see also, e.g., FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 767 (2016).

A utility that wants to change its rates must file the proposed changes with the Commission under Federal Power Act section 205, and demonstrate that its new rates are just and reasonable. 16 U.S.C.

§ 824d(a), (b), (e); *see also, e.g., Adv. Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017). When acting on a rate proposal, the Commission restricts itself to evaluating what is proposed. *Id.* at 662 (citing *City of Winnfield v. FERC*, 744 F.2d 871, 875-76 (D.C. Cir. 1984)). But because the Federal Power Act “has multiple purposes in addition to preventing ‘excessive rates,’ including protecting against ‘inadequate service’ and promoting the ‘orderly development of plentiful supplies of electricity,’” the Commission’s determinations may encompass many considerations, including the continued reliability of electric service. *Consol. Edison Co. of N.Y. v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) (quoting *Cities of Anaheim v. FERC*, 723 F.2d 656, 663 (9th Cir. 1984), and *Pub. Utils. Comm’n of Cal. v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004)).

**B. Capacity procurement within System Operator’s region**

Over the past 25 years, the Commission has encouraged transmission providers to establish regional transmission organizations — independent entities that have operational control over their transmission provider members’ grid facilities. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 535-37 (2008).

System Operator is the regional transmission organization that controls (but does not own) the transmission grid in California. *See generally Sac. Mun. Util. Dist. v. FERC*, 474 F.3d 797, 798-99 (D.C. Cir. 2007).

In addition to ensuring that there is enough supply of electricity to meet present-day demand in California, System Operator must also ensure that there will be sufficient generating resources in place to meet future electricity needs. This is accomplished through the supply and purchase of electric “capacity,” which “is not electricity itself but the ability to produce it when necessary.” *Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009). Generators provide capacity by promising to remain operational and capable of providing electricity when called upon.

System Operator works with the California Commission and other, local regulatory authorities to administer a resource adequacy program, designed to ensure that there is always enough electric generation capacity available to meet the demand in System Operator’s energy markets. *See, e.g., Cal. Indep. Sys. Operator Corp.*, 171 FERC ¶ 61,172, at P 2 (2020), R.30, JA \_\_\_\_ (“2020 Tariff Order”), *reh’g denied*, 172 FERC ¶ 62,052 (2020), R.33, JA \_\_\_\_\_. California Commission sets

annual and monthly resource adequacy requirements for the load-serving entities it regulates. California Commission, 2018 Resource Adequacy Report at 2, *available at* <https://tinyurl.com/n8vwdm5v>.

Local load-serving entities then must procure enough capacity share to meet their area's needs. *Id.*; 2020 Tariff Order P 2, JA \_\_\_\_\_. They typically do this by entering into bilateral agreements with generation resources. *See generally Cal. Indep. Sys. Operator Corp.*, 163 FERC ¶ 61,023, PP 44-45 (2018) ("2018 Tariff Order") (endorsing views of protestors, including California Commission, that bilateral procurement process takes precedence over other capacity procurement mechanisms). But there are limits to this, because a generator with costs higher than it reasonably expects to earn in the bilateral market will not want to enter into a bilateral contract. *See id.* P 44.

If System Operator needs more capacity than resources make available bilaterally, it may buy more on behalf of the system using two backstop mechanisms in its tariff. 2020 Tariff Order P 2, JA \_\_\_\_; *see also Sac. Mun. Util. Dist. v. FERC*, 616 F.3d 520, 539 (D.C. Cir. 2010) (describing, in context of a challenge to the resource adequacy

requirement, the limitations of contracting for capacity in a generation-constrained area).

First, the Capacity Procurement Mechanism allows System Operator to designate specific resources to provide additional capacity for one month to one year. 2020 Tariff Order at PP 3-4, JA \_\_\_-\_\_\_. The Capacity Procurement Mechanism is “designed to fill a gap between resource adequacy requirements and actual reliability needs.” *Cal. Indep. Sys. Operator Corp.*, 134 FERC ¶ 61,211, at P 189 (2011) (“2011 Tariff Order”). It is a “rarely used backstop procurement mechanism,” meant to address short-term, transitory events. *Cal. Indep. Sys. Operator Corp.*, 153 FERC ¶ 61,001, at P 15 (2015) (“2015 Tariff Order”). Entry into the process is voluntary, and available to any generator that does not have other capacity commitments. *See Cal. Indep. Sys. Operator Corp.*, 168 FERC ¶ 61,199, at P 32 (2019) (“2019 Tariff Order”).

When specific conditions occur, System Operator selects Capacity Procurement Mechanism resources from a pool of generators that enter a competitive solicitation process. 2015 Tariff Order P 10. (The selection process is tailored to addressing the particular reliability need

at hand, with an eye to minimizing costs. *Id.*) Generators chosen from the competitive solicitation are awarded a Capacity Procurement Mechanism contract. 2020 Tariff Order P 4, JA \_\_\_\_\_. System Operator also may offer a Capacity Procurement Mechanism contract to a resource that did not enter the competitive solicitation; if it does, that resource may accept or decline the designation. *See id.*

Second, System Operator may use exceptional dispatch to maintain reliability. Exceptional dispatch allows System Operator to manually commit or dispatch resources that are not cleared to run through its market software, and require them to run in order to support reliable grid operations. 2011 Tariff Order P 6, JA \_\_\_\_\_.

Separately, as “a measure of last resort,” System Operator may use its Reliability Must-Run authority to engage resources that do not have other resource adequacy contracts. 2019 Tariff Order P 29 (internal quotation omitted); *see also id.* PP 3-4 (describing the program). A resource that System Operator designates as a Reliability Must-Run resource must accept that designation, which gives System Operator the right to call upon it to provide energy or ancillary services as needed for reliability. *Id.* PP 3-4. The resource must provide its

rates to System Operator for negotiation, and then file them with the Commission. *See generally, e.g., EF Oxnard LLC*, 172 FERC ¶ 61,133, at PP 2-9 (2020) (describing sequence of events that led to a small generator forming a reliability must-run contract with System Operator, and filing those rates with FERC).

### **C. Compensation for Capacity Procurement Mechanism resources**

This case concerns compensation for Capacity Procurement Mechanism resources with relatively high costs — an issue that System Operator has revisited every few years since the Capacity Procurement Mechanism took effect in 2011. *See* 2018 Tariff Order PP 46-47; 2015 Tariff Order P 8; 2011 Tariff Order PP 16-59. Because the formula is interrelated with other capacity procurement mechanisms, it must — as both a legal and a practical matter — produce compensation that is neither too high nor too low. *See* 2018 Tariff Order PP 44-47. The former (high rates) risks undermining long-term forward contracting that forms the bulk of resource adequacy procurement in California. *Id.* P 44; *Cal. Indep. Sys. Operator Corp.*, 125 FERC ¶ 61,053, P 42 (2008) (“2008 Tariff Order”), *reh’g denied*, 134 FERC ¶ 61,132 (2011). The latter (low rates) may cause load-serving entities to forego long-term

agreements and to rely too heavily on the Capacity Procurement Mechanism. Answer of System Operator to Protests and Comments at 44, R.24, JA \_\_\_\_\_. It also may prompt generation resources to sit out of the competitive solicitation for Capacity Procurement Mechanism resources, or retire. *See Midcontinent Indep. Sys. Operator Corp.*, 148 FERC ¶ 61,057, at P 84 (2014) (discussing reverse scenario, in which Commission disallowed rates that did not cover the fixed costs of a generator that was required to participate in a mandatory resource adequacy program when it otherwise would have retired).

**1. The 2011 Tariff Order: Going-Forward Costs plus 10 percent cost adder**

At the inception of the Capacity Procurement Mechanism, System Operator proposed to pay Capacity Procurement Mechanism resources a minimum price of \$55/kilowatt-year. 2011 Tariff Order P 16. It derived this sum from the Going-Forward Costs of a reference unit, and incorporated a ten percent cost adder. *Id.* Units with costs above that level could make a cost justification filing with the Commission to obtain higher payments. *Id.* The compensation mechanism carried over from the previous, temporary capacity procurement program, which was called the Interim Capacity Procurement Mechanism. *Id.*

*See also* 2008 Tariff Order PP 10, 23, 41-42 (describing and accepting interim compensation mechanism, to be effective from June 2008 to December 2010, and noting System Operator’s intention to replace it with a more permanent mechanism).

The Commission found that System Operator had not shown that its proposal for paying Capacity Procurement Mechanism resources, including resources at risk of retirement, was just and reasonable. 2011 Tariff Order PP 55, 143. It expressed concern that fixed-price compensation did not account for market fluctuations over time, and that paying Going-Forward Costs could deny resources a reasonable opportunity to recover their costs. *Id.* PP 56-57. “To expeditiously explore issues related to the pricing of the [Capacity Procurement Mechanism] and to buttress the existing record,” *id.* P 55, and to seek information on compensation methodologies that would provide “a meaningful opportunity” for Capacity Procurement Mechanism resources to recover additional fixed costs, the Commission directed its staff to hold a technical conference on the subject. *Id.* P 59.

System Operator eventually filed, and the Commission accepted, a settlement that resolved all the issues raised in the 2011 Tariff Order

and at the technical conference. *See Cal. Indep. Sys. Operator Corp.*, 138 FERC ¶ 61,112 (2012) (“2012 Settlement Order”). The settlement provided for revised Capacity Procurement Mechanism rates for four years, based on the Going-Forward Costs of a reference unit plus a 10 percent adder. Offer of Settlement at Attachment A pp. 4-5, FERC Docket No. ER11-2256 (Dec. 23, 2011).

**2. The 2015 Tariff Order: Going-Forward Costs plus 20 percent cost adder**

At the end of the settlement’s term, System Operator submitted new tariff sheets that proposed revisions to the Capacity Procurement Mechanism it developed in a new settlement with its stakeholders. Tariff Amendment and Offer of Settlement Regarding Capacity Procurement Mechanism Revisions, Transmittal Letter at 1-2, Docket No. ER15-1783 (May 26, 2015) (“2015 Transmittal Letter”). California Commission and Calpine participated in the process and did not object to the settlement. *See id.* at 2 & n.3.

The revised tariff sheets implemented a competitive solicitation process for selecting Capacity Procurement Mechanism resources, and revised their compensation. 2015 Tariff Order P 8. Under the new compensation mechanism, System Operator would pay resources their

as-bid price, up to a “soft offer cap” of a fixed dollar amount based on the Going-Forward Costs of a reference unit, plus a 20 percent adder. *Id.* P 13. System Operator argued that the 20 percent adder would provide a “meaningful opportunity” for Capacity Procurement Mechanism resources to recover additional fixed costs and investment incentives, *id* P 13, and the Commission agreed. *Id.* P 29 (contrasting compensation methodology discussed in the 2011 Tariff Order).

If the soft offer cap would not allow a generator to recover its costs, the resource could make a filing with the Commission to justify a higher rate. *Id.* P 13. The cost justification would not be based on Going-Forward costs, but instead on the annual fixed revenue requirement that applies to Reliability Must-Run resources. *Id.*; *see also supra* pp. 9-10 (describing such resources). System Operator explained that it relied on the Reliability Must-Run formula because it “provides additional certainty that capacity receiving a [Capacity Procurement Mechanism] designation receives appropriate compensation and contribution toward fixed cost recovery and [is] thus responsive to” the 2011 Tariff Order. 2015 Transmittal Letter at 19; *see*

*also* 2019 Tariff Order PP 77-84 (approving continued use of existing compensation scheme for Reliability Must-Run resources).

System Operator proposed to conduct a stakeholder process at least every four years to review the soft offer cap and determine whether it should be updated. 2015 Tariff Order P 15.

## **II. The Commission proceeding on review**

### **A. System Operator's proposal to update the compensation scheme for Above-Cap Resources**

In 2018, System Operator and its stakeholders worked together to review the Capacity Procurement Mechanism, the Reliability Must-Run construct, and their interaction. 2018 Tariff Order PP 46-48. Noting the interrelationship among different compensation schemes for certain Capacity Procurement Mechanism resources, the Reliability Must-Run program, and resource adequacy in general, the Commission encouraged System Operator to adopt a holistic approach to its examination of the issues, and to propose a package of comprehensive reforms. *Id.* The tariff amendments at issue here arose out of this process. Tariff Amendment to Enhance the Capacity Procurement Mechanism, Transmittal Letter at 2, R.1, JA \_\_\_ (“Transmittal Letter”).

Some of System Operator's stakeholders felt that the 2015 rate for Capacity Procurement Mechanism resources with costs above the soft offer cap was too high. *Id.* at 13, JA \_\_ (noting that such resources were paid their full annual cost of service, plus all of their market revenues); System Operator Answer at 41 (noting concerns that 2015 rate mechanism permitted double recovery of costs). Accordingly, System Operator proposed further changes to the compensation scheme for generation resources that submit cost-based Capacity Procurement Mechanism offers above the soft offer cap. Transmittal Letter at 1-2, JA \_\_-\_\_.

System Operator submitted two alternative, mutually exclusive compensation proposals. *Id.* at 1, JA \_\_. Each allowed a resource owner with an accepted bid for costs above the soft offer cap to file a cost justification with the Commission, based on that resource's particular Going-Forward Costs. *Id.* at 3, JA \_\_. Option A — System Operator's preferred option — also included a 20 percent cost adder. *Id.* at 3-4, JA \_\_-\_\_. Option B — which System Operator asked the Commission to consider only if it found Option A unacceptable — did not include the 20 percent adder. *Id.* at 18, JA \_\_\_\_.

System Operator preferred Option A to Option B for four reasons.

*Id.* at 4, JA \_\_\_. It explained that the Option A pricing approach:

- is consistent with the current method for deriving the soft offer cap;
- reflects earlier Commission guidance that Capacity Procurement Mechanism compensation “should allow for some meaningful contribution to fixed cost recovery and provide incentives for resources to undertake necessary upgrades and long-term maintenance”;
- recognizes that Capacity Procurement Mechanism designations are voluntary; and
- reflects the tariff formula for above-cap compensation that was in effect before the 2015 Settlement.

*Id.*; System Operator Answer at 4, JA \_\_\_.

**B. The 2020 Tariff Order: Going-Forward Costs plus 20 percent adder for Above-Cap Resources**

In the order on review, the Commission accepted Option A, finding that it was just and reasonable and not unduly discriminatory or preferential, as required by the Federal Power Act. 2020 Tariff Order P 35, JA \_\_\_. It held that the 20 percent cost adder, plus a resource’s

Going-Forward Costs — the ratemaking option System Operator recommended — would allow participating resources “the opportunity for sufficient recovery of fixed costs plus a return on capital to facilitate incremental upgrades and improvements by the resources.” *Id.*

California Commission and other parties protested the inclusion of a 20 percent cost adder. *See id.* P 12, JA \_\_\_\_\_. California Commission argued that “in the context of a resource-specific, cost-justified rate, the resource owner should know what long-term upgrades, maintenance, and other capital investments should be expected in the coming year,” and that it is improper to pay a resource for costs that it does not incur. *Id.* In response, the Commission noted that the soft offer cap itself is based on the going-forward costs of a reference unit plus a 20 percent adder, and that the Commission had previously found that this compensation formula allowed a sufficient recovery to facilitate resources’ incremental upgrades and improvements. *Id.* (citing 2015 Order P 36), JA \_\_\_\_\_. The Commission added that it had previously found it just and reasonable, in the context of Capacity Procurement Mechanism compensation, to allow resources to recover costs beyond

their Going-Forward Costs, and that the 20 percent adder would be sufficient for this purpose. *Id.* (citing 2015 Tariff Order P 29).

Calpine, in contrast to California Commission, argued that Option A does not pay enough, because it does not allow resources to recover their full fixed costs. *See id.* P 15, JA \_\_\_\_\_. Calpine argued that System Operator’s proposal “is rooted in Commission precedent that requires full cost of service recovery when a backstop procurement mechanism is mandatory, but permits lesser compensation when the mechanism is voluntary.” *Id.* (citing Calpine Protest at 4, R.20, JA \_\_\_\_). In Calpine’s view, Capacity Procurement Mechanism is inseparable from exceptional dispatch, which is mandatory. *Id.* But noting its prior findings that the exceptional dispatch program is separate from the Capacity Procurement Mechanism, and that Capacity Procurement Mechanism designations are voluntary, the Commission disagreed. *Id.* P 39, JA \_\_\_\_\_ (citing 2019 Tariff Order PP 32, 38).

Commissioner (now Chairman) Glick dissented from the 2020 Tariff Order. Although he viewed both Option A and Option B as “likely an improvement over the *status quo*, which allows a resource to bid above the soft offer cap up to its full annual cost of service, including

a return on and of capital, and retain all market revenues,” he did not believe that System Operator had shown that the 20 percent cost adder was necessary. 2020 Tariff Order (Glick, Comm’r, dissenting at PP 3-4), JA \_\_\_-\_\_\_.

California Commission and Calpine each filed a request for agency rehearing of the 2020 Tariff Order. Thirty-one days later, the Commission issued a notice indicating that rehearing was denied by operation of law, without further discussion of the merits. *Cal. Indep. Sys. Operator Corp.*, 172 FERC ¶ 62,052 (2020), JA \_\_\_\_\_. California Commission then filed its petition for review. (Calpine chose instead to file an amicus curiae brief “in support of neither party.”)

### **Summary of Argument**

The specific components of the California electric capacity procurement mechanism, and how the rates offered in that program have changed over the years, are very complex. But the issue on judicial review reduces to the binary question whether the Commission reasonably chose one compensation method over another.

System Operator explained why it favored the higher-priced method — the one with a 20 percent rate adder — over the lower-priced

method. Presented with arguments favoring each of the two rate methods (as well as even-higher rate methods), the Commission reasonably approved the one that System Operator explained would best procure electric capacity to maintain reliable operation of the California electrical system.

As the Supreme Court explained in *FERC v. Electric Power Supply Association*, 136 S. Ct. 760 (2016), the Commission's choice between two ratemaking methods must be sustained on judicial review as long as it is based on record evidence and adequately explained – even if the competing, non-selected method has its own virtues and supporters. Here, the Commission reasonably chose the higher of System Operator's two proposed rates. The cost adder embedded in Option A is meant to ensure that Above-Cap Resources have an opportunity to recover some fixed costs, plus a return on capital, to facilitate system upgrades and improvements. Its use reflects Commission policy allowing resources in resource adequacy programs to recover such costs, at a level appropriate for resources that make voluntary commitments to provide capacity.

As is typically the case with the Commission's ratemaking decisions, the issue is one of balance. Capacity Procurement Mechanism rates should be neither so high that they attract resources away from the bilateral market for capacity, nor so low that resources' participation is uneconomic. System Operator's use of resource-specific Going-Forward Costs, plus 20 percent, properly accounts for agency precedent indicating that Going-Forward Costs plus ten percent may be too low to present appropriate long-term incentives, and that Going-Forward Costs plus 20 percent is appropriate for resources with offers lower than the offer cap. It further reflects market participants' sense that the previous rate for Above-Cap Resources, which was premised on a rate used for involuntary commitments, was too high.

Moreover, the tariff proposal includes two additional safeguards. First, any resource that files a cost justification with the Commission to support recovery of costs above the offer cap will have to show that its proposal is just and reasonable under Federal Power Act section 205. Second, System Operator's tariff requires it to review Capacity Procurement compensation every few years, even if it does not need to make formal changes each time.

That the California Commission would prefer a different approach does not mean that FERC's informed judgment, under the circumstances, lacked record support or was otherwise unreasonable.

## **Argument**

### **I. Standard of review**

The Commission's determination that the Option A ratemaking approach, as compared to the alternative Option B approach, is appropriate is reviewed under the "arbitrary and capricious" standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). Under that standard, the question is not "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. at 782. Rather, the Court must uphold the agency's determination "if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id.* (internal quotations omitted).

The Commission's decisions regarding rate issues are entitled to broad deference because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390

U.S. 747, 790 (1968); *see also Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1286 (D.C. Cir. 2011) (“[B]ecause issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is highly deferential.”) (internal citations and quotation marks omitted). As the Supreme Court has explained, “[t]he statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions.” *Morgan Stanley*, 554 U.S. at 532.

The Commission’s policy assessments also are afforded “great deference.” *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d*, *New York v. FERC*, 535 U.S. 1 (2002); *see also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014) (“the Commission must have considerable latitude in developing a methodology responsive to its regulatory challenge”) (internal quotation marks and citations omitted); *New England Power Generators Ass’n v. FERC*, 757 F.3d 283, 293 (D.C. Cir. 2014) (court “properly defers to policy determinations invoking the Commission’s expertise in

evaluating complex market conditions, where the Commission reflected on the competing interests at stake to explain why it struck the balance it did”) (internal quotation marks and citation omitted).

The Commission’s factual findings are conclusive if supported by substantial evidence. *See* 16 U.S.C. § 825l(b). The substantial evidence standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *La. Pub. Serv. Comm’n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (internal quotation omitted); *accord S.C. Pub. Serv. Auth.*, 762 F.3d at 54. If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency’s findings. *See Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) (“[W]e do not ask whether record evidence could support the petitioner’s view of the issue, but whether it supports the Commission’s ultimate decision.”).

**II. The Commission reasonably accepted the Option A rate approach (with the adder) over the Option B approach (without the adder).**

Parties commenting on System Operator’s proposed tariff amendment raised numerous issues that the Commission considered in the order on review. But on review the issues reduce to just one:

whether the Commission properly endorsed System Operator's use of the 20 percent cost adder, which was the only difference between System Operator's alternative Option A and Option B rate proposals. See 2020 Tariff Order PP 19-22, 29, 31-32, 39-41, JA \_\_\_-\_\_\_, \_\_\_, \_\_\_-\_\_\_, \_\_\_-\_\_\_ (describing and addressing other issues), and PP 35-38, JA \_\_\_-\_\_\_ (focusing on cost adder).

**A. The Commission took a reasonable approach to System Operator's presentation of alternative rate proposals.**

When it examines a rate filing to determine whether it is "just and reasonable" within the meaning of the Federal Power Act, "the Commission undertakes 'an essentially passive and reactive role' and restricts itself to evaluating the confined proposal." *Adv. Energy Mgmt. All.*, 860 F.3d at 662 (quoting *City of Winnfield*, 744 F.2d at 875-76). System Operator preferred Option A, and asked the Commission to evaluate that option first. Transmittal Letter at 1, JA \_\_\_; see 2020 Tariff Order PP 6-8, JA \_\_\_-\_\_\_. The Commission did so and, because it found Option A just and reasonable, did not proceed to Option B. See 2020 Tariff Order PP 35 & n.53, JA \_\_\_; see also *El Paso Nat. Gas Co. v. FERC*, 966 F.3d 842, 863-64 (D.C. Cir. 2020) (if filed proposal is just

and reasonable, FERC must accept it, in whole or in part, whether or not alternatives exist); *City of Bethany v. FERC*, 727 F.3d 1131, 1136 (D.C. Cir. 1984) (same).

The Commission was similarly required to choose between two competing rate approaches in the orders underlying the Supreme Court's *FERC v. Electric Power Supply Association* decision. There, the Commission had to determine the just and reasonable rate for demand response service (i.e., the agreement not to use electricity in response to a system operator's request). *See Elec. Power Supply Ass'n*, 136 S. Ct. at 767. In affirming the Commission's choice of one valuation method for demand response resources competing in FERC-regulated wholesale markets (full "locational marginal price") over a competing, lower-priced method without an adder ("LMP minus G," where G is the foregone retail rate for electricity), the Supreme Court noted that questions of this nature require "technical understanding and policy judgment" that are vested in the agency. *Id.* at 784. When the Commission must choose between alternatives, the Court is "not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives," but considers whether the Commission

satisfactorily explained its reasoning *Id.* at 782; *see also id.* at 784 (noting that the Commission, and not the courts, regulates electricity rates).

Just as the Commission successfully justified its choice of a rate design with the “G” adder in *FERC v. Electric Power Supply Association*, here it sufficiently explained its decision to approve the 20 percent cost adder. *See* 2020 Tariff Order PP 35-40, JA \_\_\_-\_\_\_. Its determination, like that in *Electric Power Supply Association*, involves “both technical understanding and policy judgment.” 136 S. Ct. at 784. And there, as here, “[t]he Commission addressed that issue seriously and carefully, providing reasons in support of its position and responding to the principal alternative advanced.” *Id.* Use of the adder “is consistent with Commission precedent” on Capacity Procurement Mechanism compensation, and “intended to facilitate recovery of additional fixed costs.” 2020 Tariff Order PP 36, 37, JA \_\_, \_\_\_-\_\_\_.

**B. Option A properly compensates Above-Cap Resources for their Going-Forward Costs and provides an opportunity for recovery of some fixed costs.**

The difference between the rate that the Commission approved, and the rate that California Commission prefers, reflects a policy

disagreement concerning the amount of costs that Capacity Procurement Mechanism resources should be allowed to recover. *See* Pet. Br. 26 (advocating no recovery past Going-Forward Costs). Petitioners bear the burden to show that the Commission's choice falls outside the zone of reasonableness. *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 260 (D.C. Cir. 2007). And the Court affords a high level of deference to the Commission's policy determinations, which "lie at the core of the regulatory mission." *Md. Pub. Serv. Comm'n*, 632 F.3d at 1286.

**1. Option A reflects Commission precedent that generators with resource adequacy commitments recover some fixed costs.**

Acknowledging that the soft offer cap "does not provide full fixed cost recovery, but instead limits cost recovery to defined costs of a reference unit," 2020 Tariff Order P 36, JA \_\_\_, the Commission found that paying resources a 20 percent adder "on top of their [Going-Forward Costs] will allow those resources the opportunity for sufficient recovery of fixed costs plus a return on capital to facilitate incremental upgrades and improvements by the resources." *Id.* This finding is in line with the Commission's longstanding policy in favor of allowing

resource adequacy resources to recover fixed costs. *See, e.g., Wis. Pub. Power*, 493 F.3d at 260 (“The premise is straightforward: If sellers are unable to recover fixed costs, they will have little reason to remain in the area or to invest in new capacity for the area.”); *Indep. Energy Producers Ass’n v. Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,069, at PP 36-37 (2006) (finding unjust and unreasonable a rate that did not assure generators dispatched under the “must-offer” obligation enough fixed cost recovery to remain in operation). It also accounts for the Commission’s 2011 finding that System Operator had not shown that a compensation proposal was just and reasonable because System Operator had not, among other things, explained how the proposed compensation would provide incentives for long-term maintenance and improvements. *See* 2011 Tariff Order PP 57-58.

In its review of System Operator’s various compensation proposals over the years (*see supra* pp. 11-15), the Commission also considered the expected duration of the program or tariff amendment at issue. Capacity procurement in a short-term program, like the Interim Capacity Procurement Mechanism, does “not provide sufficient long-term price signals to indicate the need to build new generation,” so 110

percent of Going-Forward Costs provides sufficient compensation. 2008 Tariff Order P 42. But for “a mechanism of indefinite duration,” like the Capacity Procurement Mechanism, the Commission wanted to ensure that “the use of going-forward costs” will spur resources “to perform long-term maintenance or make improvements that may be necessary to satisfy new environmental requirements or address reliability needs associated with renewable resource integration.” 2011 Tariff Order P 57; *see also* 2015 Tariff Order P 29 (120 percent of a reference resource’s Going-Forward Costs “should allow sufficient recovery of fixed costs plus return on capital” for below-cap resources “to facilitate incremental upgrades and improvements”).

System Operator’s tariff requires it to continue its practice of re-examining the soft offer cap every four years, but it does not require System Operator to propose changes each time. *See* 2020 Tariff Order P 5, JA \_\_\_; 2015 Tariff Order P 15. The indefinite duration of the Capacity Procurement Mechanism, and of the effective compensation formula, therefore argues in favor of compensation above Going-Forward Costs. *See* 2020 Tariff Order PP 5, 35-36, JA \_\_\_, \_\_\_; 2011 Tariff Order PP 55-57; 2015 Tariff Order P 29.

**2. Option A provides appropriate compensation for a voluntary resource adequacy commitment.**

Calpine argues that the Capacity Procurement Mechanism is essentially mandatory, and therefore warrants compensation at a level that will enable resources to recover their full fixed costs – i.e., a level *higher* than Going-Forward Costs plus 20 percent. Amicus Br. 16-18; 2020 Tariff Order P 15, JA \_\_\_\_\_. Calpine contends that Option A is likely to undercompensate some resources. Amicus Br. 15.

Calpine is correct that resources participating in mandatory Reliability Must-Run programs “should receive full cost-of-service compensation.” 2019 Tariff Order P 84 (citing *N.Y. Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,076, at P 84 (2016); *see also supra* pp. 9-11 (describing such resources). Units that are used mostly to support reliability tend to have high marginal costs. *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112, at P 37 (2004). Where a reliability designation prevents a resource from retiring, paying only going-forward costs “effectively denies” the resource a chance to recover its fixed costs. *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,057, at P 84; *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116, at P 17 (2015). For this reason, if a unit’s costs are more than it is

likely to earn in a competitive market, then it may prefer a program with resource-specific, cost-based compensation over a bilateral resource adequacy contract. *See* 2018 Tariff Order P 44.

But Calpine is “simply wrong” that the Capacity Procurement Mechanism is near-mandatory because a resource that turns down a Capacity Procurement Mechanism designation may later be ordered into service via exceptional dispatch. System Operator Answer at 40-41, JA \_\_\_ (System Operator “cannot simply target a resource that has declined a [Capacity Procurement Mechanism designation] with an Exceptional Dispatch.”); *see also* Amicus Br. 16. The Commission found here, as it has in the past, that resources are not required to participate in the Capacity Procurement Mechanism process, which is distinct from System Operator’s other resource adequacy programs. 2020 Tariff Order PP 4, 39, JA \_\_\_, \_\_\_; 2019 Tariff Order P 32 (mandatory Reliability Must-Run procurement is not redundant of Capacity Procurement Mechanism authority); 2011 Tariff Order P 190 (resources may decline Capacity Procurement Mechanism designations and pursue fixed cost recovery elsewhere).

Exceptional dispatch and the Capacity Procurement Mechanism are interrelated only in the sense that it is possible for Capacity Procurement Mechanism designations to arise in the context of exceptional dispatches. *Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,150, at PP 161-63 (2009) (describing Interim Capacity Procurement Mechanism). But even then, the resource retains its option to decline the Capacity Procurement Mechanism designation, and to be compensated for exceptional dispatch. *See id.* P 172; 2020 Tariff Order P 39 & n.58, JA \_\_\_ (noting compensation options).

The Commission has approved exceptional dispatch compensation that avoids financial incentives for resources to hold out for this compensation, and that encourages resources to participate instead in voluntary resource adequacy programs. *Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,150, at PP 187-88. Calpine's concern that this may not provide it with the full fixed cost recovery it prefers raises issues beyond the limited scope of System Operator's filing. *See Cal. Indep. Sys. Operator Corp.*, 134 FERC ¶ 61,132, at PP 33-38 (2011) (dismissing nearly identical arguments, raised on rehearing of 2008 Tariff Order, as beyond the scope of proposed Interim Capacity

Procurement Mechanism filing); Answer of System Operator to Protests and Comments at 7, R.24, JA \_\_\_ (citing same, and alleging that argument amounts to a collateral attack on exceptional dispatch compensation mechanism). The Commission may take limited steps in response to targeted filings or objectives. *See Mobil Oil Exploration & Producing Se. v. United Distribution Cos.*, 498 U.S. 211, 231 (1991) (Commission need not resolve all problems at once, but may proceed in an iterative manner) (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 543-44 (1978)); *see also* 2020 Tariff Order (Glick, Comm’r, dissenting at P 3 (characterizing either of System Operator’s tariff options as “likely an improvement over the *status quo*”)), JA \_\_\_.

Additionally, the voluntary nature of the Capacity Procurement Mechanism does not require restricting compensation to Going-Forward Costs, as California Commission would have it. Pet Br. 27. The order on which California Commission relies for this contention does not support its argument, but suggests that compensation to a generator in a voluntary program “must *at a minimum* allow for the recovery of a generator’s going-forward costs, with parties having the flexibility to

negotiate a cost-based rate up to the generator's full cost of service.”

*N.Y. Indep. Sys. Operator*, 150 FERC ¶ 61,116, at P 17 (emphasis added); *see also Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,057, at P 86 (unjust and unreasonable for system operator's tariff to prohibit paying Reliability Must-Run resources for fixed costs). This suggests that Going-Forward Costs are a beginning point for negotiations, and a higher level of compensation is more appropriate.

The voluntary aspect of the program does, however, justify reducing compensation for Above-Cap Resources below the level approved in 2015, which was based on payment to Reliability Must-Run resources. 2020 Tariff Order P 36, JA \_\_\_ (noting that Going-Forward Costs are more limited than the full fixed costs contemplated in the prior rate). The Commission's approval of Option A appropriately recognized both resources' choice of resource adequacy programs and compensation, and the need to send long-term price signals to those resources.

**C. Option A is consistent with the method used to calculate the soft offer cap, and with earlier rate approaches.**

The Option A approach, favored by System Operator, tracks the formula that System Operator, having worked with its stakeholders to achieve settlements, used to calculate compensation for the Capacity Procurement Mechanism (and the program immediately preceding it) from 2008 to 2015. *See* 2008 Tariff Order PP 23 (describing System Operator's proposal for a fixed level of compensation based on the Going-Forward Costs of a reference unit, plus a 10 percent cost adder); 2011 Tariff Order P 16 (same); Offer of Settlement at Attachment A pp. 4-5, FERC Docket No. ER11-2256 (Dec. 23, 2011) (same); 2015 Tariff Order PP 13 (soft offer cap based on the Going-Forward Costs of a reference unit, plus a 20 percent cost adder). The above-cap compensation that System Operator used from 2015 to 2019 represents a departure from historical practice, and System Operator never explained in detail the basis for its use. 2015 Transmittal Letter at 19.

Both the existing formula for compensation up to the soft offer cap and the newly-approved formula for compensation above the soft offer cap provide for a rate of Going-Forward Costs plus 20 percent. 2020

Tariff Order PP 36-37, JA \_\_\_-\_\_\_. The only difference between them is that the below-cap rate is derived using a reference unit, and the above-cap rate is based on a generator's own costs. *Id.* P 37, JA \_\_\_\_\_. The Commission specifically found that it is reasonable to calculate the offer caps for both groups of resources in the same manner, allowing for the higher cost of some resources. *Id.*

California Commission claimed that a flat 20 percent adder, applicable to all resources, is inappropriate in the context of unit-specific compensation, because Above-Cap Resources will receive larger sums of money than below-cap resources. Comments of the California Commission at 8, R.12, JA \_\_\_\_\_. The Commission responded in the order on review that the option to submit above-cap cost justifications appropriately recognized that some resources will have higher costs than the reference unit. 2020 Tariff Order P 37, JA \_\_\_-\_\_\_ (also noting approval of System Operator's choice of reference unit). This is consistent with other Commission rulings that have approved generic adders in order to account for uncertainty. *See PJM Interconnection, L.L.C.*, 167 FERC ¶ 61,029, at P 128 (2019) (allowing resources to add ten percent adder to cost-based offers to supply electricity), *reh'g denied*,

171 FERC ¶ 61,040 (2020), *appeal pending sub nom. Del. Div. of the Pub. Advocate v. FERC*, D.C. Cir. No. 20-1212 (briefing complete; oral argument scheduled for April 6, 2021); *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,289, at P 30 (2015) (approving 10 percent adder for certain cost-based offers for energy). An Above-Cap Resource is only required to demonstrate its Going-Forward Costs, not its fixed costs.

Transmittal Letter at 17, 18, JA \_\_\_, \_\_\_. Consequently, the 20 percent adder for these resources also reasonably accounts for an uncertain amount, i.e., “the opportunity for sufficient recovery of fixed costs plus a return on capital to facilitate” upgrades and capital improvements. 2020 Tariff Order P 35, JA \_\_\_.

The revised formula also properly accounts for prior Commission guidance. When it first considered the Capacity Procurement Mechanism as a permanent proposal in 2011, the Commission questioned whether a similar compensation mechanism would pay enough. *See* 2011 Tariff Order PP 16 (proposing compensation of Going-Forward Costs plus 10 percent), 55-57 (requiring further investigation in a technical conference); Offer of Settlement at Attachment A pp. 4-5, FERC Docket No. ER11-2256 (Dec. 23, 2011) (proposing settlement

rates for four years based on Going-Forward Costs of a reference unit plus a 10 percent adder); 2012 Settlement Order (approving settlement). The Commission allowed an even higher amount for above-cap resources in 2015. *See* 2015 Order PP 13, 29 (soft offer cap based on Going-Forward Costs plus 20 percent, plus with the opportunity to cost-justify an above-cap rate based on annual fixed costs, “should facilitate adequate cost recovery”); *see also supra* pp. 11-15 (describing historical context).

In light of the experience the Commission already had with Capacity Procurement Mechanism compensation — including units’ ability to keep their market revenues — its determination that Option A was consistent with past practice was responsive to parties’ concerns about whether 20 percent was an appropriate adder, and whether market revenues would unduly inflate generators’ return or compensate them for costs they did not actually incur. *See* Pet. Br. 32-33.

**D. If the above-cap rate is ever needed, the Commission must ensure that individual offers are just and reasonable.**

Over the years, System Operator has seldom needed to use the Capacity Procurement Mechanism. *See* Transmittal Letter n.36, JA \_\_\_\_

(no annual Capacity Procurement Mechanism designations in 2019 and 2020); 2015 Tariff Order P 7 (12 designations between 2011 and 2015, mostly for significant event or exceptional dispatch designations).

When it has, its designations have been made almost entirely to resources with costs below the soft offer cap. *See* Comments of Pac. Gas & Elec. Co. at 9 & App. A (compiling data on Capacity Procurement Mechanism designations since 2012), R.19, JA \_\_\_\_\_. No generator has ever made a filing with the Commission to justify payment above the soft offer cap. *See* 2015 Tariff Order n.16; Middle River Comments at 2, JA \_\_\_\_\_.

But should a generator ever do so, the Commission will have to ensure that its offer is just and reasonable, based on its unit-specific Going-Forward Costs. *See* 2020 Tariff Order PP 7, 37, JA \_\_\_\_\_, \_\_\_\_\_. Transmittal Letter at 18 (discussing Option B). Any such filing would be subject to public notice, and interested parties would have an opportunity to make comments. And before the Commission approved an above-cap filing, it would have to find that the affected resource had carried the burden to demonstrate the level of its costs. 16 U.S.C. § 824d.

Moreover, the discipline attendant to System Operator's regular reviews of above-cap compensation helps it ensure that if compensation is too high or too low going forward, it will not remain so for long. *See Wis. Pub. Power*, 493 F.3d at 264 (approving Commission's decision to accept certain untested market power mitigation authority for only one year, and thereby provide an opportunity to re-evaluate the authority in light of operational experience); System Operator Answer at 13-14, JA \_\_\_\_ (noting that tariff requires the next review in 2023, but that it could begin as early as 2022).

## Conclusion

For the foregoing reasons, the Court should deny California Commission's petition for review.

Respectfully submitted,

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## Certificate of Compliance

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation established in the Court's November 10, 2020 order because this brief contains 7,667 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the type-face 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 Century Schoolbook 14-point font using Microsoft Word for Office 360.

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March 15, 2021

# **ADDENDUM**

## **Statutes**

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**§ 703. Form and venue of proceeding**

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

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

HISTORICAL AND REVISION NOTES

<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

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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.
804.	Definitions.
805.	Judicial review.
806.	Applicability; severability.
807.	Exemption for monetary policy.
808.	Effective date of certain rules.

##### § 801. Congressional review

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

- (i) a copy of the rule;
- (ii) a concise general statement relating to the rule, including whether it is a major rule; and
- (iii) the proposed effective date of the rule.

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

- (i) a complete copy of the cost-benefit analysis of the rule, if any;
- (ii) the agency’s actions relevant to sections 603, 604, 605, 607, and 609;
- (iii) the agency’s actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and
- (iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

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

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

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

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

- (A) the later of the date occurring 60 days after the date on which—
  - (i) the Congress receives the report submitted under paragraph (1); or

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

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

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

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

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

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

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

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

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

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

(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—

- (A) necessary because of an imminent threat to health or safety or other emergency;
- (B) necessary for the enforcement of criminal laws;
- (C) necessary for national security; or
- (D) issued pursuant to any statute implementing an international trade agreement.

(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

- (A) in the case of the Senate, 60 session days, or
- (B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same

conducted over the term of the existing license; and

(B) were not expressly considered by the Commission as contributing to the length of the existing license term in any order establishing or extending the existing license term.

**(c) Commission determination**

At the request of the licensee, the Commission shall make a determination as to whether any planned, ongoing, or completed investment meets the criteria under subsection (b)(2). Any determination under this subsection shall be issued within 60 days following receipt of the licensee's request. When issuing its determination under this subsection, the Commission shall not assess the incremental number of years that the investment may add to the new license term. All such assessment shall occur only as provided in subsection (a).

(June 10, 1920, ch. 285, pt. I, §36, as added Pub. L. 115-270, title III, §3005, Oct. 23, 2018, 132 Stat. 3867.)

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),<sup>1</sup> 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 com-

<sup>1</sup>So in original. Section 824e of this title does not contain a subsec. (f).

pany or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

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

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

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

(4) Nothing in this section shall—

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

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

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

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

**§ 824c. Issuance of securities; assumption of liabilities**

**(a) Authorization by Commission**

No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after August 26, 1935.

**(b) Application approval or modification; supplemental orders**

The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

**(c) Compliance with order of Commission**

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

**(d) Authorization of capitalization not to exceed amount paid**

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

**(e) Notes or drafts maturing less than one year after issuance**

Subsection (a) shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not

more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

**(f) Public utility securities regulated by State not affected**

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

**(g) Guarantee or obligation on part of United States**

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

**(h) Filing duplicate reports with the Securities and Exchange Commission**

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78l, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

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

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

**(a) Just and reasonable rates**

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

**(b) Preference or advantage unlawful**

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

**(c) Schedules**

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

**(d) Notice required for rate changes**

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

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

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

require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

**(g) Inaction of Commissioners**

**(1) In general**

With respect to a change described in subsection (d), if the Commission permits the 60-

day period established therein to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum—

(A) the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 825(a) of this title; and

(B) each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.

**(2) Appeal**

If, pursuant to this subsection, a person seeks a rehearing under section 825(a) of this title, and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum, such person may appeal under section 825(b) of this title.

(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; Pub. L. 115-270, title III, §3006, Oct. 23, 2018, 132 Stat. 3868.)

AMENDMENTS

2018—Subsec. (g). Pub. L. 115-270 added subsec. (g).  
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 re-

**(c) Statement of prior positions; definitions**

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

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

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

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

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

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

(E) any entity referred to in subsection (b); 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.<sup>1</sup>

(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.)

<sup>1</sup> See References in Text note below.

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 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 re-

Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

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

**§ 825k. Publication and sale of reports**

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

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

ed Pub. L. 113-235, div. H, title I, §1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

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

CHANGE OF NAME

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

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

**§ 825l. Review of orders**

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

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

**(b) Judicial review**

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided

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

**(c) Stay of Commission’s order**

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

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

CODIFICATION

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

AMENDMENTS

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

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

Subsec. (b). Pub. L. 85-791, §16(b), in second sentence, substituted “transmitted by the clerk of the court to” for “served upon”, substituted “file with the court” for

“certify and file with the court a transcript of”, and inserted “as provided in section 2112 of title 28”, and in third sentence, substituted “jurisdiction, which upon the filing of the record with it shall be exclusive” for “exclusive jurisdiction”.

CHANGE OF NAME

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

**§ 825m. Enforcement provisions**

**(a) Enjoining and restraining violations**

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

**(b) Writs of mandamus**

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

**(c) Employment of attorneys**

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

**(d) Prohibitions on violators**

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

- (1) acting as an officer or director of an electric utility; or
- (2) engaging in the business of purchasing or selling—
  - (A) electric energy; or
  - (B) transmission services subject to the jurisdiction of 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 15th day of March, 2021, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

/s/ Elizabeth E. Rylander  
Elizabeth E. Rylander

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