In the United States Court of Appeals for the Ninth Circuit

Nos. 01-71934, *et al.*
FERC California Energy Crisis Appeals
MMCP/Fuel Allowance/Cost Offset Cases

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Federal Power Act

GLOSSARY

Amendment No. 23 Order	*Cal. Power Exch. Corp.*, 105 FERC ¶ 61,273 (2003)
Amendment No. 51 Order	*Cal. Indep. Sys. Operator Corp.*, 105 FERC ¶ 61,203 (2003)
Cal-ISO	California Independent System Operator Corporation
CalPX	California Power Exchange
Commission	Federal Energy Regulatory Commission
February 3, 2012 Order I	*San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 138 FERC ¶ 61,091 (2012)
February 3, 2012 Order II	*San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 138 FERC ¶ 61,092 (2012)
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
July 15, 2011 Order	*San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 136 FERC ¶ 61,036 (2011)
July 25, 2001 Order	*San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120 (2001)
May 12, 2006 Order	*San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 115 FERC ¶ 61,171 (2006)

November 20, 2008 Order	*San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 125 FERC ¶ 61,214 (2008)
October 16, 2003 Order	*San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 105 FERC ¶ 61,066 (2003)
October 19, 2007 Order	*San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 121 FERC ¶ 61,067 (2007)

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

This California energy crisis proceeding involves the Federal Energy Regulatory Commission's ("FERC" or "Commission") determinations regarding two ratemaking/remedy matters: (1) the time period over which sales and purchases should be netted to determine an entity's refunds; and (2) how to allocate a $5 million shortfall in the California Power Exchange ("CalPX") account

from which refunds will be paid.[1] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 121 FERC ¶ 61,067 (2007) ("October 19, 2007 Order") (CPER 391), *on reh'g*, 125 FERC ¶ 61,214 (2008) ("November 20, 2008 Order") (CPER 292), *on reh'g*, 138 FERC ¶ 61,091 (2012) ("February 3, 2012 Order I") (CPER 1); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 136 FERC ¶ 61,036 (2011) ("July 15, 2011 Order") (CPER 31), *on reh'g*, 138 FERC ¶ 61,092 (2012) ("February 3, 2012 Order II") (CPER 17).

The issues on appeal are:

1. Whether the Commission reasonably determined that an entity's sales and purchases should be netted hourly to determine its refunds; and

2. Whether the Commission reasonably determined that a $5 million shortfall in the CalPX account from which refunds will be paid should be allocated to entities that will receive refunds.[2]

[1] CalPX was a centralized wholesale auction market for trading electricity in California. *See Public Utilities Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1037-38 (9th Cir. 2006) ("*Cal. PUC*").

[2] This appeal originally involved a third issue, regarding refund cost offsets. On October 12, 2016, however, the Court granted the Commission's motion for partial voluntary remand so that, in light of this Court's and the Commission's rulings since the challenged cost offset determinations were made, the Commission could reconsider that issue.

STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions are contained in the Addendum.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Federal Power Act ("FPA") section 313(b), 16 U.S.C. § 825*l*(b).

STATEMENT OF FACTS

This Court is very familiar with the California energy crisis of 2000-2001. *See MPS Merchant Servs. v. FERC*, No. 15-73803, 2016 WL 4698302 (9th Cir. Sept. 8, 2016); *Cal. ex rel. Harris v. FERC*, 809 F.3d 491 (9th Cir. 2015); *Cal. PUC*, 462 F.3d at 1036-44; *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1008 (9th Cir. 2004); *see also Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, *Wash.*, 554 U.S. 527, 538-41 (2008) (discussing California electric restructuring and consequences). In response to the energy crisis, the Commission initiated a series of proceedings to settle and reform markets going forward and, where appropriate, to provide ratepayer relief for completed transactions.

The proceedings here involve two Commission Refund Period (October 2, 2000 through June 20, 2001) remedy/ratemaking determinations: (1) that refunds should be calculated by netting an entity's sales and purchases hourly; and (2) that

a $5 million shortfall in the CalPX account from which refunds will be paid should be allocated among all net refund recipients in proportion to their final refund positions.

I. Governmental Entities And Refunds

A. The Court Rejected The Commission's 2001 Determination That Refund Period Sales By Governmental Entities Were Subject To Refund

In 2001, the Commission determined that sales by both public utilities[3] and nonpublic utilities (i.e., governmental entities) made into the CalPX and California Independent System Operator Corporation ("Cal-ISO") markets during the Refund Period were subject to refund. *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 910, 913 (9th Cir. 2005) (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120 at 61,499 (2001) ("July 25, 2001 Order")). The Commission reasoned that, while governmental entities were not subject to its direct Federal Power Act jurisdiction,[4] all sellers in the centralized Cal-ISO and

[3] Federal Power Act section 201(e), 16 U.S.C. § 824(e), defines a "public utility" as a "person who owns or operates facilities subject to the jurisdiction of the Commission." The term "person" is defined as an "individual or corporation" (FPA § 3(4), 16 U.S.C. § 796(4)), and the statutory definition of "corporation" specifically excludes "municipalities" (FPA § 3(3), 16 U.S.C. § 796(3)), which include any "city, county, . . . or other political subdivision or agency of a State" (FPA § 3(7), 16 U.S.C. § 796(7)). *See Bonneville*, 422 F.3d at 917.

[4] In August 2005, Congress passed legislation to extend the Commission's Federal Power Act section 206 refund authority to governmental entities that make voluntary, short term sales of electricity through an organized market in violation

CalPX spot markets agreed to accept the same clearing price for any given sale and, therefore, were on notice that those clearing prices were subject to change if found unjust and unreasonable. *Id.* (citing July 25, 2001 Order, 96 FERC ¶ 61,120 at 61,511-12).

On appeal, this Court found that the Federal Power Act, as it existed during the Refund Period, unambiguously excluded governmental entities from the Commission's refund authority. *Id.* at 914-21. The Court further found that "FERC's order does more than simply reset the market-clearing price for power in the FERC-jurisdictional [Cal-ISO] and CalPX markets. FERC specifically ordered governmental entities/non-public utilities to pay refunds, an action that lies outside Congress's clearly expressed intent that FERC's § 206 refund authority should apply only to public utilities." *Id.* at 919-20. While "not unmindful of the impact [its] decision may have on the overall refunds claimed by California ratepayers," the Court noted that it was "not [its] task to second guess Congress's judgment as to the breadth of FERC's refund authority." *Id.* at 911. The Court also pointed out that a remedy might lie in a contract claim in court. *Id.* at 925.

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of the Commission's rules or tariffs. *Bonneville*, 422 F.3d at 921 n.10 (citing Energy Policy Act of 2005 § 1286, 119 Stat. 981 (2005) (16 U.S.C. § 824e(e)(2)); *see also* October 19, 2007 Order at CPER 404 n.47.

B. The Commission's Orders On Remand From *Bonneville*

On remand, in compliance with *Bonneville*, the Commission vacated its California energy crisis orders to the extent they directed governmental entities to pay refunds. October 19, 2007 Order at CPER 403-04 P 36. Like this Court, the Commission noted that its inability to direct governmental entities to pay refunds did not preclude parties from pursuing contract claims in appropriate courts. *Id.* at CPER 404 P 37 (citing *Bonneville*, 422 F.3d at 925); *id.* at CPER 413 P 59, CPER 418 P 68; February 3, 2012 Order II at CPER 14 P 34.[5]

The Commission determined that the refund shortfall caused by removing governmental entity refund obligations from Cal-ISO's and CalPX's refund calculations should be allocated to refund recipients as a pro rata reduction based on their final net refund positions in relation to total net refunds. October 19, 2007

[5] The California Parties' filings below state that they initiated civil action against the governmental entities in federal and state courts. *See* October 19, 2007 Order at CPER 397 P 18, CPER 420 P 76. On October 3, 2016, the Court of Appeals for the Federal Circuit determined that the California Parties lacked standing to sue two federal agencies, the Western Area Power Administration and the Bonneville Power Administration, for breach of contract during the Refund Period. *Pacific Gas and Elec. Co. v. United States*, No. 2015-5082, 2016 WL 5746365, at *1, (Fed. Cir. Oct. 3, 2016). The court found that there was no privity of contract between the California Parties and the governmental entities because the purchase and sales contracts were between the CalPX or Cal-ISO and the governmental entities. *Id.* at *5-*10. The court noted, however, that "the absence of an agreement between consumers and producers hardly suggests the lack of a remedy. It may well be that the producers of electric power would have been liable to the exchanges for any overcharges, and that the exchanges in turn would have been liable to the appellant consumers." *Id.* at *11.

Order at CPER 404-05 P 39. The California Parties asked the Commission to clarify that the refund shortfall would be calculated by netting governmental entities' sales and purchases over the entire nine-month Refund Period. *See id.* at CPER 296-97 PP 13-14.

In response, the Commission addressed, for the first time, the time period over which an entity's sales and purchases should be netted to determine its refunds. November 20, 2008 Order at CPER 298-99 PP 16-19; February 3, 2012 Order I at CPER 8-9 PP 17-21; July 15, 2011 Order at CPER 46 P 40; February 3, 2012 Order II at CPER 25-27 PP 18-23.

While the Commission agreed with the California Parties that sales and purchases should be netted, it found netting over the entire Refund Period would be contrary to the Cal-ISO and CalPX Tariffs, and could have the indirect effect of requiring governmental entities to pay refunds. November 20, 2008 Order at CPER 298-99 PP 16-19; February 3, 2012 Order I at CPER 8-9 PP 17-18, 20; July 15, 2011 Order at CPER 46 P 40; February 3, 2012 Order II at CPER 25-27 PP 18-20, 22. Instead, the Commission determined that, since the Cal-ISO and CalPX Tariff provisions applicable to purchases and sales during the Refund Period provided for hourly netting, purchases and sales should be netted hourly. November 20, 2008 Order at CPER 298-99 PP 16-19; February 3, 2012 Order I at

CPER 8 P 17; July 15, 2011 Order at CPER 46 P 40; February 3, 2012 Order II at CPER 23-26 PP 14, 18-20.

II. CalPX's $5 Million Shortfall

In a May 4, 2010 filing to comply with the November 20, 2008 Order, CalPX sought guidance from the Commission as to how it should allocate a $5 million shortfall in its settlement clearing account, the account from which refunds will be paid. CPER 675-76. CalPX explained that it had recently discovered that, in 2001, it mistakenly transferred $5 million from its settlement clearing account to its operating account and spent the $5 million on operating expenses. *See* July 15, 2011 Order at CPER 33, 37, 51 PP 5, 13, 52.

The Commission determined that, consistent with its prior determinations regarding other shortfalls, this refund shortfall should be allocated among all net refund recipients in proportion to their final refund positions. *Id.* at CPER 54 P 59 (citing October 19, 2007 Order, CPER 404-05 P 39 (allocating governmental entity refund shortfall), and *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 110 FERC ¶ 61,336 PP 25, 41, 56, *on reh'g*, 112 FERC ¶ 61,226 PP 8 & n.5 (2005) (allocating interest shortfall)); February 3, 2012 Order II at CPER 20-23 PP 9-13.

SUMMARY OF ARGUMENT

At issue here are two Commission remedy/ratemaking determinations. The Commission determinations were reasonable, are due substantial deference, and should be upheld.

Hourly Netting

The Commission reasonably concluded that entities' net refund positions should be determined hourly. As the Commission found, both Cal-ISO's and CalPX's tariffs provided for hourly netting of an entity's purchases and sales.

California Parties' arguments that the tariffs provided for Refund Period-wide netting of sales and purchases to determine refunds have no merit. While the Cal-ISO tariff provided for netting in certain situations over a period shorter than an hour and provided for the summing of hourly netted amounts over the day and then the month to generate monthly invoices, this did not indicate that the netting interval should be nine months long. In addition, neither Cal-ISO Tariff Amendment No. 51 nor CalPX Tariff Amendment No. 23, cited by the California Parties, addressed how net refunds should be calculated.

The Commission also reasonably found that it had not previously determined that refunds should be calculated by netting a participant's purchases and sales period-wide. The Commission orders California Parties cite simply did

not address the time period over which purchases and sales should be netted for refund purposes.

Allocation Of The $5 Million Shortfall

The Commission reasonably determined that, consistent with its prior shortfall allocation determinations, the $5 million shortfall in the CalPX account from which refunds will be paid should be allocated to the entities that will receive refunds.

This allocation is not like that in *Pacific Gas and Electric Co. v. FERC*, 373 F.3d 1315 (D.C. Cir. 2004), which the California Parties cite. Unlike that case, the allocation here does not impose an additional charge on CalPX customers. Rather, it simply allocates a refund shortfall to refund recipients. Moreover, unlike in *Pacific Gas and Electric*, the refund shortfall and entities' final net refund positions are correlated.

There also is no merit to California Parties' assertion that the Commission should have applied the allocation methodology set out in CalPX tariff section 5.3 in the circumstances here. As the Commission has explained, that chargeback allocation mechanism was added to the credit portion of CalPX's tariff to provide CalPX a means of recovering a defaulting debtor's uncollected receivables from the remaining CalPX market participants. Since the shortfall here was caused by a

CalPX accounting error, and not by a defaulting debtor, tariff section 5.3's chargeback allocation mechanism did not apply.

ARGUMENT

I. Standard Of Review

The Commission's determinations are reviewed under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Review under this standard is narrow. *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016); *see also Cal. Trout v. FERC*, 572 F.3d 1003, 1012 (9th Cir. 2009) (arbitrary and capricious review is "highly deferential"). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Elec. Power Supply Ass'n*, 136 S.Ct. at 782. "Rather, the court must uphold a rule if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)) (alterations by Court). The Court "may reverse under the arbitrary and capricious standard if the agency relied on factors that Congress did not intend it to consider, or offered an explanation for its decision that runs counter to the evidence or is so implausible that it could not be ascribed

to a difference in view or the product of agency expertise." *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008).

"'The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.'" *Id.* (quoting FPA § 313(b), 16 U.S.C. § 825*l*(b)). "'Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *MPS Merchant Servs.*, 2016 WL 4698302 at *4 (quoting *Cal. PUC*, 462 F.3d at 1045). "If the evidence is susceptible of more than one rational interpretation, [the Court] must uphold FERC's findings." *Cal. PUC*, 462 F.3d at 1045.

"FERC's discretion 'is at its zenith when . . . fashioning . . . remedies and sanctions[.]'" *MPS Merchant Servs.*, 2016 WL 4698302 at *5 (quoting *Cal. PUC*, 462 F.3d at 1053) (alteration and omissions by Court). Courts "'afford great deference to the Commission in its rate decisions.'" *Elec. Power Supply Ass'n*, 136 S.Ct. at 782 (quoting *Morgan Stanley*, 554 U.S. at 532); *see also Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 916, 918 (9th Cir. 2011) (same).

Moreover, "[r]ecognizing that Congress explicitly delegated to FERC broad powers over ratemaking, including the power to analyze relevant contracts," courts "give substantial deference to the Commission's interpretation of filed tariffs." *Williams Nat. Gas Co. v. FERC*, 90 F.3d 531, 533 (D.C. Cir. 1996) (internal quotation omitted). *See also MPS Merchant Servs.*, 2016 WL 4698302 at *5 (the

Court "review[s] FERC's interpretation of a tariff with a 'two-step *Chevron*-like analysis'") (quoting *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011) (internal quotation marks omitted)); *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008) (courts "generally give[] substantial deference to [FERC's] interpretation of filed tariffs, even where the issue simply involves the proper construction of language") (internal quotation omitted). Likewise, the Court "must give deference to the Commission's interpretation of its own orders." *Cal. Trout*, 572 F.3d at 1013 (citing *Cal. Dep't of Water Res. v. FERC*, 489 F.3d 1029, 1036 (9th Cir. 2007)).

II. The Commission Reasonably Determined That Entities' Net Refund Positions Should Be Determined Hourly

The challenged orders addressed, for the first time, the time period over which an entity's sales and purchases should be netted to determine its refunds. November 20, 2008 Order at CPER 298-99 PP 16-19; February 3, 2012 Order I at CPER 8-9 PP 17-21; July 15, 2011 Order at CPER 46 P 40; February 3, 2012 Order II at CPER 25-27 PP 18-23.

For Cal-ISO transactions, the Commission found that section 3.2.1 of Cal-ISO's Settlement and Billing Protocols Tariff, which addressed netting of purchases and sales during the Refund Period, required hourly netting of sales and purchases. November 20, 2008 Order at CPER 298-99 PP 16-19; February 3, 2012 Order I at CPER 5-6, 8 PP 10-11, 17; February 3, 2012 Order II at CPER 23, 25

PP 14, 18. Section 3.2.1 required that Cal-ISO "calculate for each charge the amounts payable by the relevant Scheduling Coordinator . . . for each Settlement Period of the trading day, and the amounts payable to that Scheduling Coordinator for each charge for each Settlement Period of the trading day and shall arrive at a net amount payable for each charge by or to that Scheduling Coordinator for each charge for that trading day." *See* November 20, 2008 Order at CPER 298 P 17 (quoting provision). "Settlement Period" was defined as "beginning at the start of the hour, and ending at the end of the hour." *See id.* at P 18 & n.36 (quoting Cal-ISO's Master Tariff section 11.6).

For CalPX transactions, the Commission found that section 6.7.2 of CalPX's tariff likewise required hourly netting for CalPX sales and purchases. July 15, 2011 Order at CPER 46-47 P 40; February 3, 2012 Order II at CPER 23-25 PP 14, 18. Section 6.7.2 provided that "[t]he billing and payment process for Energy and Ancillary services traded in the Hour-Ahead Market and the Day-Ahead Market shall be based on the issuance of Preliminary and Final Settlement Statements for each hourly Settlement Period in each Trading Day." *See* July 15, 2011 Order at CPER 46-47 P 40 & n.47 (quoting provision).

Despite this, the California Parties contend that the Cal-ISO and CalPX "tariffs unambiguously require the ISO and PX to net for the entire Refund Period . . . ." Br. at 47. In support of this, they assert that the Cal-ISO tariff

provides for some netting to occur at ten minute intervals and that initially-netted figures are again netted daily and then monthly. Br. at 47-50. [6] As the Commission explained, however, "[t]he fact that the [Cal-ISO] tariff provides for netting in certain situations over an interval shorter than an hour or that charges are first netted for the hour and are later summed over the day and over the entire month to generate the monthly invoice offers no support for the California Parties' claim that the netting interval period should be nine months long." February 3, 2012 Order I at CPER 8 P 18; *see also* February 3, 2012 Order II at CPER 26 P 19 (same).

The California Parties also mistakenly assert that Cal-ISO Tariff Amendment No. 51 and CalPX Tariff Amendment No. 23 "clarify that period wide netting is required for the Refund Period." Br. at 48. (citing *Cal. Power Exch. Corp.*, 105 FERC ¶ 61,273 (2003) ("Amendment No. 23 Order"), and *Cal. Indep. Sys. Operator Corp.*, 105 FERC ¶ 61,203 at PP 1, 3, 6, 37 (2003) ("Amendment No. 51 Order"). As the Commission found, these tariff amendments did not address how net refunds should be calculated. February 3, 2012 Order II at CPER 26 P 20.

[6] The California Parties also note that "some charges are levied on periods longer than an hour, like the Grid Management Charge, which is monthly." Br. at 50 (citing CPER 629, Cal-ISO Tariff § 8.3). That provision, which addresses allocation of grid management costs, does not address netting.

Amendment No. 51 simply permitted Cal-ISO to segregate Refund Period transactions from current transactions so that Cal-ISO would be able to conduct the settlement reruns and invoice adjustments necessary to calculate final refunds. *Id.* at CPER 26 P 20; *see also* Amendment No. 51 Order, 105 FERC ¶ 61,203 at P 3 (noting that, through Amendment No. 51, Cal-ISO "sought approval to have the invoicing and Settlement process for the preparatory adjustments and re-runs completely separated (i.e., 'walled off') from the invoicing and settlement process that it was using to clear its market. Currently in the [Cal-ISO] tariff, charges and adjustments for past Trade Dates are added to current trade month Settlement Statements and invoices."); *id.* at P 37 ("accept[ing] the tariff provisions that allow for the separation of invoices (walling-off) of the re-run from the monthly market activities . . . will protect current market participants from the financial consequences of events that occurred during periods when they were not active in the [Cal-ISO] market.").

CalPX's Amendment No. 23 does not help the California Parties either. That amendment simply extended the time period to file disputes regarding Cal-ISO preparatory adjustment and rerun settlement statements. Amendment No. 23 Order, 105 FERC ¶ 61,273 at P 3.

The Commission's reasonable interpretation of these tariff provisions and the orders approving them, not California Parties' contrary interpretation, deserves

judicial respect and should be upheld. *See Cal. Trout*, 572 F.3d at 1013; *Old Dominion*, 518 F.3d at 48; *Williams*, 90 F.3d at 533.

There also is no merit to California Parties' claim that the Commission previously determined that refunds were to be calculated by netting each market participant's purchases and sales period-wide. Br. at 51-54 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 115 FERC ¶ 61,171 at PP 3, 34, 45 (2006) ("May 12, 2006 Order"); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 105 FERC ¶ 61,066 at P 180 (2003) ("October 16, 2003 Order"); Amendment No. 51 Order, 105 FERC ¶ 61,203; Amendment No. 23 Order, 105 FERC ¶ 61,273 at PP 1, 3, 6, 37). Interpreting its own orders, the Commission reasonably found otherwise. February 3, 2012 Order I at CPER 9 P 19; February 3, 2012 Order II at CPER 26 P 21.

As the Commission explained, "[t]he May 12, 2006 Order simply does not address the time period over which the refunds should be netted." February 3, 2012 Order I at CPER 9 P 19; February 3, 2012 Order II at CPER 26 P 21. Instead, that cost offsets order merely "noted that the refunds were 'calculated on a net dollar basis, netting each market participant's refund obligation (amount of energy sold at prices above the [mitigated market clearing price]) with its refund receipt (amount of energy purchased at prices above the [mitigated market clearing price].'" February 3, 2012 Order I at CPER 9 P 19 (quoting May 12, 2006 Order

at P 34); February 3, 2012 Order II at CPER 26 P 21 (same). While the May 12, 2006 Order determined that cost offset allocations should follow cost offset calculations and, therefore, should be period-wide, *see* Br. at 52 (citing May 12, 2006 Order at P 45), it did not additionally determine that period-wide netting would apply to the different issue here -- the period over which purchases and sales should be netted for refund purposes. February 3, 2012 Order I at CPER 9 P 19; February 3, 2012 Order II at CPER 26 P 21.

Likewise, the October 16, 2003 Order "merely affirmed that amounts owed to sellers would be netted out against refunds owed to buyers before refunds would be paid out." February 3, 2012 Order II at CPER 26 P 21. It "did not specify an interval [over] which refunds should be netted." *Id.* Moreover, as just discussed, neither Amendment No. 51 nor Amendment No. 23 addressed netting or the interval over which it should occur. February 3, 2012 Order II at CPER 26 P 20. Again, the Commission's reasonable interpretation of its own orders deserves deference and should be upheld. *See Cal. Trout*, 572 F.3d at 1013.

The California Parties' undue discrimination claim (Br. at 54-56) fails as well. In California Parties' view, the Commission directed period-wide netting in the just-discussed orders, and then, in the orders challenged here, directed hourly netting only for governmental entities. As just explained, however, the challenged orders were the first time the Commission addressed the time period for netting to

determine refunds. *See* February 3, 2012 Order I at CPER 9 P 19; February 3, 2012 Order II at CPER 26 P 21.

After reviewing and interpreting Cal-ISO's and CalPX's tariffs, the Commission determined that they provide for hourly netting of entities' sales and purchases. November 20, 2008 Order at CPER 298-99 PP 16-19; February 3, 2012 Order I at CPER 5-6, 8 PP 10-11, 17; February 3, 2012 Order II at CPER 23-25 PP 14, 18; July 15, 2011 Order at CPER 46-47 P 40. That determination was not limited to governmental entities' sales and purchases. November 20, 2008 Order at CPER 298-99 PP 16-19 (finding that netting refunds over the entire Refund Period would be contrary to the Cal-ISO tariff, and directing that Cal-ISO calculate refunds amounts using hourly netting); February 3, 2012 Order I at CPER 5-6, 8, 9 PP 10-11, 17, 20 (same); July 15, 2011 Order at CPER 46-47 P 40 (finding that netting refunds over the entire Refund Period would be contrary to the CalPX tariff, and directing that Cal-PX calculate refunds amounts using hourly netting); February 3, 2012 Order II at CPER 23-24 P 14 (same).

Even if the Commission had determined that hourly netting applied only to governmental entities, that determination would not have been unduly discriminatory. Governmental entities were not "exactly the same as all other market participants," as California Parties assert (Br. at 55). Rather, unlike other market participants, governmental entities were excluded from the Commission's

refund authority during the Refund Period. *Bonneville Power Admin.*, 422 F.3d at 914-21. Accordingly, the Commission appropriately was concerned that netting refunds over the entire Refund Period was not only contrary to the tariffs, but also improperly "could have the indirect effect of requiring governmental entities and other non-public utilities to pay refunds." November 20, 2008 Order at CPER 298 P 16.

Finally on this issue, California Parties assert that governmental entities "will now receive millions of dollars of refunds on their gross purchases so long as their sales and purchases happened to occur on different sides of an hour-long interval." Br. at 55. As the Commission found, California Parties provided no data or documentation to support this assertion. February 3, 2012 Order I at CPER 9 P 20; February 3, 2012 Order II at CPER 26-27 P 22. In fact, their own witness testimony showed that "there were many hours in which a Governmental Entity both bought and sold power." Request for Rehearing of October 19, 2007 Order at CPER 871 (citing Dr. Berry's testimony).

The Commission's determination that, consistent with Cal-ISO's and CalPX's tariffs, an entity's refunds should be determined by netting its purchases and sales hourly was reasonable, deserves deference, and should be upheld.

III. The Commission Reasonably Determined That CalPX's $5 Million Shortfall Should Be Allocated To All Net Refund Recipients In Proportion To Their Final Refund Positions

CalPX discovered there was a $5 million shortfall in the account from which refunds will be paid because, in 2001, it mistakenly transferred those funds to its operating account and spent them. CalPX then sought the Commission's guidance as to how to allocate the shortfall. CPER 675-76. CalPX suggested that perhaps the shortfall could be allocated as going-forward (as opposed to historical) costs under a 2005 Settlement approved by the Commission in *California Power Exchange Corp.*, 113 FERC ¶ 61,017 (2005). *Id.* at CPER 676.

The Commission found that the 2005 Settlement did not apply here. February 3, 2012 Order II at CPER 22-23 P 13. Section 15 of that settlement stated that it did not apply to issues arising from the instant refund proceeding or to billing disputes arising from the refund rerun process. *Id.* Moreover, the Commission found, since the erroneous transfer was not discovered until years after it occurred, there was no way to determine how the transferred funds were spent and, therefore, whether they would be allocated as historical or going-forward costs under that settlement. July 15, 2011 Order at CPER 53-54 P 59.

Consistent with its prior determinations regarding governmental entity and interest refund shortfalls, the Commission determined that this refund shortfall should be allocated among all net refund recipients in proportion to their final

refund positions. *Id.* at CPER 54 P 59 (citing October 19, 2007 Order, CPER 404-05 P 39 (allocating governmental entity refund shortfall based on net refund recipients' pro rata share of total net refunds), and *San Diego Gas & Elec. Co.*, 110 FERC ¶ 61,336 PP 25, 41, 56, *on reh'g*, 112 FERC ¶ 61,226 PP 8 & n.5 (allocating interest shortfall (i.e., the difference between the interest rate required by the Commission's regulations and the interest rate actually earned by the CalPX on money held in the trust settlement account) based on the final net interest position for each participant in relation to the total amount of the interest shortfall)); February 3, 2012 Order II at CPER 20-23 PP 9-13.

California Parties argue that allocating the refund shortfall to net refund recipients is "nearly identical" to the allocation rejected in *Pacific Gas and Elec.*, 373 F.3d 1315. Br. at 57-59. California Parties' argument is mistaken. *See* February 3, 2012 Order II at CPER 21-22 PP 11-12.

Pacific Gas and Electric involved allocation of costs incurred in winding-up CalPX's business affairs. 373 F.3d at 1316, 1317-18. The Commission approved CalPX's proposal that any party with an outstanding CalPX balance would pay a percentage of CalPX's wind-up costs equal to its percentage of the total outstanding account balances. *Id.* at 1318. The Court found that this allocation would impose additional charges on CalPX customers based on their prior purchases without reflecting any new jurisdictional services in violation of the filed

rate doctrine or rule against retroactive ratemaking. *Id.* at 1320. The Court further found that there was no "correlation between the size of an account balance and the magnitude of the relevant former CalPX customer's likely benefit from, or stake in, CalPX's wind-up activities." *Id.* at 1321.

At issue here, by contrast, is allocation of a shortfall in refund funds available in CalPX's settlement clearing account. February 3, 2012 Order II at CPER 19-22 PP 6, 9-12; July 15, 2011 Order at CPER 51, 53-54 PP 52, 59. As with the refund shortfall caused by the Commission's inability to direct governmental entities to pay refunds, the Commission appropriately determined that this refund shortfall should be allocated to entities that will receive refunds, i.e., net refund recipients. February 3, 2012 Order II at CPER 19-22 PP 6, 9-12; July 15, 2011 Order at CPER 53-54 P 59.

Neither of the concerns present in *Pacific Gas and Electric* are present here. Allocating the refund shortfall to net refund recipients does not impose additional charges on CalPX customers. February 3, 2012 Order II at CPER 22 P 12; *see also, e.g., San Diego Gas & Elec.*, 110 FERC ¶ 61,336 at P 32 (explaining that allocating the interest shortfall was not a new charge, but the result of CalPX's failure to earn the interest rate required by the Commission's regulations), cited in July 15, 2011 Order at CPER 54 P 59. Instead, it allocates a refund shortfall to those who will receive refunds. In addition, while there was no correlation

between the size of an account balance and the magnitude of a former customer's likely benefit from, or stake in, CalPX's wind-up activities, the refund shortfall at issue here and an entity's final net refund position are correlated. *See* February 3, 2012 Order II at CPER 22 P 12 (finding allocation of the refund shortfall to net refund recipients based on their final net refund positions to be the most equitable allocation).

California Parties also argue that the Commission should have applied the allocation methodology set out in CalPX tariff section 5.3, CPER 645. Br. at 58. But that provision does not apply in the circumstances here. As the Commission has explained, CalPX tariff section 5.3's "chargeback is an allocation mechanism intended to allow [CalPX] to recover the uncollected receivables of a defaulting [CalPX] debtor from the remaining participants in the [CalPX] market." *Pacific Gas and Elec. Co. v. Cal. Power Exchange Corp.*, 109 FERC ¶ 61,027 at P 3 (2004); *see also Cal. Power Exchange Corp.*, 92 FERC ¶ 61,096 at 61,376-77 (2000) (explaining that CalPX proposed tariff § 5.3 to address "allocation of losses caused by default"). The shortfall here was not caused by a defaulting CalPX debtor, but by a CalPX accounting error. February 3, 2012 Order II at CPER 19-22 PP 6, 9, 11, 12; July 15, 2011 Order at CPER 53-54 P 59. Not surprisingly, therefore, CalPX did not propose using § 5.3's chargeback allocation here.

CONCLUSION

FERC's remedy/rate determinations here involve both technical understanding and policy judgment, and should be upheld. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 784; *MPS Merchant Servs.*, 2016 WL 4698302 at *5; *Mont. Consumer Counsel*, 659 F.3d at 916, 918. The petitions for review should be denied.

STATEMENT OF RELATED CASES

Per Circuit Rule 28-2.6, the governmental entities portion of this case is on remand from *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 910, 913 (9th Cir. 2005). Other than those stated in Petitioners' Statement of Related Cases, no additional cases are related to this one.

Respectfully submitted,

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October 31, 2016

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C) and 9th Cir. R. 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points, and contains 5,773 words, not including the tables of contents and authorities, the glossary, the certificate of counsel, and the addendum.

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October 31, 2016

ADDENDUM
Statutes

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dicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

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

(i) a copy of the rule;

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

(iii) the proposed effective date of the rule.

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

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

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

The commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding) as are necessary to execute its functions. Expenditures by the commission shall be allowed and paid upon the presentation of itemized vouchers therefor, approved by the chairman of the commission or by such other member or officer as may be authorized by the commission for that purpose subject to applicable regulations under chapters 1 to 11 of title 40 and division C (except sections 3302, 3306(f), 3307(e), 3501(b), 3509, 3906, 4104, 4710, and 4711) of subtitle I of title 41.

(June 10, 1920, ch. 285, pt. I, §2, 41 Stat. 1063; June 23, 1930, ch. 572, §1, 46 Stat. 798; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, §212, 49 Stat. 847; Oct. 28, 1949, ch. 782, title XI, §1106(a), 63 Stat. 972; Oct. 31, 1951, ch. 654, §2(14), 65 Stat. 707.)

CODIFICATION

All appointments referred to in the first sentence are subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, §1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

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

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

In text, ''chapters 1 to 11 of title 40 and division C (except sections 3302, 3306(f), 3307(e), 3501(b), 3509, 3906, 4104, 4710, and 4711) of subtitle I of title 41'' substituted for ''the Federal Property and Administrative Services Act of 1949, as amended'' on authority of Pub. L. 107–217, § 5(c), Aug. 21, 2002, 116 Stat. 1303, which Act enacted Title 40, Public Buildings, Property, and Works, and Pub. L. 111–350, § 6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts.

AMENDMENTS

1951—Act Oct. 31, 1951, inserted reference to applicable regulations of the Federal Property and Administrative Services Act of 1949, as amended, at end of section.

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

1930—Act June 23, 1930, substituted provisions permitting the commission to appoint, prescribe the duties, and fix the salaries of, a secretary, a chief engineer, a general counsel, a solicitor, and a chief accountant, and to appoint such other officers and employees as are necessary in the execution of its functions and fix their salaries, and authorizing the detail of officers from the Corps of Engineers, or other branches of the United States Army, to serve the commission as engineer officers, or in any other capacity, in field work outside the seat of government, and the detail, assignment or transfer to the commission of engineers in or under the Departments of the Interior or Agriculture for work outside the seat of government for provisions which required the commission to appoint an executive secretary at a salary of $5,000 per year and prescribe his duties, and which permitted the detail of an officer from the United States Engineer Corps to serve the commission as engineer officer; and inserted provisions permitting the commission to make certain expendi-tures necessary in the execution of its functions, and allowing the payment of expenditures upon the presen-tation of itemized vouchers approved by authorized persons.

REPEALS

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

§ 793a. Repealed. Pub. L. 87–367, title I, § 103(5), Oct. 4, 1961, 75 Stat. 787

Section, Pub. L. 86–626, title I, §101, July 12, 1960, 74 Stat. 430, authorized the Federal Power Commission to place four additional positions in grade 18, one in grade 17 and one in grade 16 of the General Schedule of the Classification Act of 1949.

§§ 794, 795. Omitted

CODIFICATION

Section 794, which required the work of the commission to be performed by and through the Departments of War, Interior, and Agriculture and their personnel, consisted of the second paragraph of section 2 of act June10, 1920, ch. 285, 41 Stat. 1063, which was omitted in the revision of said section 2 by act June 23, 1930, ch. 572, §1, 46 Stat. 798. The first and third paragraphs of said section 2 were formerly classified to sections 793 and 795 of this title.

Section 795, which related to expenses of the commission generally, consisted of the third paragraph of section2 of act June 10, 1920, ch. 285, 41 Stat. 1063. Such section 2 was amended generally by act June 23, 1930, ch. 572, §1, 46 Stat. 798, and is classified to section 793 of this title. The first and second paragraphs of said section 2 were formerly classified to sections 793 and 794 of this title.

§ 796. Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

(1) ''public lands'' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include ''reservations'', as hereinafter defined;

(2) ''reservations'' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) ''corporation'' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include ''municipalities'' as hereinafter defined;

(4) ''person'' means an individual or a corporation;

(5) ''licensee'' means any person, State, or municipality licensed under the provisions of section 797 of this title, and any assignee or successor in interest thereof;

(6) ''State'' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) ''municipality'' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

(8) ''navigable waters'' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

(9) ''municipal purposes'' means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) ''Government dam'' means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) ''project'' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) ''project works'' means the physical structures of a project;

(13) ''net investment'' in a project means the actual legitimate original cost thereof as defined and interpreted in the ''classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission'', plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term ''cost'' shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

(14) ''Commission'' and ''Commissioner'' means the Federal Power Commission, and a member thereof, respectively;

(15) ''State commission'' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;

(16) ''security'' means any note, stock, treasury stock, bond, debenture, or other evidence of interest in or indebtedness of a corporation subject to the provisions of this chapter;

(17)(A) ''small power production facility'' means a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which—

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and

(ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) ''primary energy source'' means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy—

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and

(ii) the minimum amounts of fuel required to alleviate or prevent—

(I) unanticipated equipment outages, and

(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) ''qualifying small power production facility'' means a small power production facility that the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe;

(D) ''qualifying small power producer'' means the owner or operator of a qualifying small power production facility;

(E) ''eligible solar, wind, waste or geothermal facility'' means a facility which pro-

duces electric energy solely by the use, as a primary energy source, of solar energy, wind energy, waste resources or geothermal resources; but only if—

(i) either of the following is submitted to the Commission not later than December 31, 1994:

(I) an application for certification of the facility as a qualifying small power production facility; or

(II) notice that the facility meets the requirements for qualification; and

(ii) construction of such facility commences not later than December 31, 1999, or, if not, reasonable diligence is exercised toward the completion of such facility taking into account all factors relevant to construction of the facility.[1]

(18)(A) ''cogeneration facility'' means a facility which produces—

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) ''qualifying cogeneration facility'' means a cogeneration facility that the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe;

(C) ''qualifying cogenerator'' means the owner or operator of a qualifying cogeneration facility;

(19) ''Federal power marketing agency'' means any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy;

(20) ''evidentiary hearings'' and ''evidentiary proceeding'' mean a proceeding conducted as provided in sections 554, 556, and 557 of title 5;

(21) ''State regulatory authority'' has the same meaning as the term ''State commission'', except that in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority (as defined in section 2602 of this title), such term means the Tennessee Valley Authority;

(22) ELECTRIC UTILITY.—(A) The term ''electric utility'' means a person or Federal or State agency (including an entity described in section 824(f) of this title) that sells electric energy.[1]

(B) The term ''electric utility'' includes the Tennessee Valley Authority and each Federal power marketing administration.[1]

(23) TRANSMITTING UTILITY.—The term ''transmitting utility'' means an entity (in-cluding an entity described in section 824(f) of this title) that owns, operates, or controls fa-cilities used for the transmission of electric energy—

(A) in interstate commerce;

(B) for the sale of electric energy at wholesale.[1]

(24) WHOLESALE TRANSMISSION SERVICES. — The term ''wholesale transmission services'' means the transmission of electric energy sold, or to be sold, at wholesale in interstate commerce.[1]

(25) EXEMPT WHOLESALE GENERATOR.—The term ''exempt wholesale generator'' shall have the meaning provided by section 79z–5a[2] of title 15.[1]

(26) ELECTRIC COOPERATIVE.—The term ''elec-tric cooperative'' means a cooperatively owned electric utility.[1]

(27) RTO.—The term ''Regional Transmission Organization'' or ''RTO'' means an entity of sufficient regional scope approved by the Commission—

(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

(B) to ensure nondiscriminatory access to the facilities.[1]

(28) ISO.—The term ''Independent System Operator'' or ''ISO'' means an entity approved by the Commission—

(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

(B) to ensure nondiscriminatory access to the facilities.[3]

(29) TRANSMISSION ORGANIZATION.—The term ''Transmission Organization'' means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

(June 10, 1920, ch. 285, pt. I, §3, 41 Stat. 1063; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§201, 212, 49 Stat. 838, 847; Pub. L. 95–617, title II, §201, Nov. 9, 1978, 92 Stat. 3134; Pub. L. 96–294, title VI, §643(a)(1), June 30, 1980, 94 Stat. 770; Pub. L. 101–575, §3, Nov. 15, 1990, 104 Stat. 2834; Pub. L. 102–46, May 17, 1991, 105 Stat. 249; Pub. L. 102–486, title VII, §726, Oct. 24, 1992, 106 Stat. 2921; Pub. L. 109–58, title XII, §§1253(b), 1291(b), Aug. 8, 2005, 119 Stat. 970, 984.)

REFERENCES IN TEXT

Section 79z–5a of title 15, referred to in par. (25), was repealed by Pub. L. 109–58, title XII, §1263, Aug. 8, 2005, 119 Stat. 974.

AMENDMENTS

2005—Par. (17)(C). Pub. L. 109–58, §1253(b)(1), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: '' 'qualifying small power production facility' means a small power production facility—

''(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

''(ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);''. Par. (18)(B). Pub. L. 109–58, §1253(b)(2), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: '' 'qualifying cogeneration facility' means a cogeneration facility which—

''(i) the Commission determines, by rule, meets such requirements (including requirements respect-

[1] So in original. The period probably should be a semicolon.

[2] See References in Text note below.

[3] So in original. The period probably should be ''; and''.

ing minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

''(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);''.

Pars. (22), (23). Pub. L. 109–58, §1291(b)(1), added pars. (22) and (23) and struck out former pars. (22) and (23) which read as follows:

''(22) 'electric utility' means any person or State agency (including any municipality) which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.

''(23) TRANSMITTING UTILITY.—The term 'transmitting utility' means any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale.''

Pars. (26) to (29). Pub. L. 109–58, §1291(b)(2), added pars. (26) to (29).

1992—Par. (22). Pub. L. 102–486, §726(b), inserted ''(including any municipality)'' after ''State agency''.

Pars. (23) to (25). Pub. L. 102–486, §726(a), added pars. (23) to (25).

1991—Par. (17)(E). Pub. L. 102–46 struck out '', and which would otherwise not qualify as a small power production facility because of the power production capacity limitation contained in subparagraph (A)(ii)'' after ''geothermal resources'' in introductory provisions.

1990—Par. (17)(A). Pub. L. 101–575, §3(a), inserted ''a facility which is an eligible solar, wind, waste, or geothermal facility, or''.

Par. (17)(E). Pub. L. 101–575, §3(b), added subpar. (E).

1980—Par. (17)(A)(i). Pub. L. 96–294 added applicability to geothermal resources.

1978—Pars. (17) to (22). Pub. L. 95–617 added pars. (17) to (22).

1935—Act Aug. 26, 1935, §201, amended definitions of ''reservations'' and ''corporations'', and inserted definitions of ''person'', ''licensee'', ''commission'', ''commissioner'', ''State commission'' and ''security''.

FERC REGULATIONS

Pub. L. 101–575, §4, Nov. 15, 1990, 104 Stat. 2834, provided that: ''Unless the Federal Energy Regulatory Commission otherwise specifies, by rule after enactment of this Act [Nov. 15, 1990], any eligible solar, wind, waste, or geothermal facility (as defined in section 3(17)(E) of the Federal Power Act as amended by this Act [16 U.S.C. 796(17)(E)]), which is a qualifying small power production facility (as defined in subparagraph (C) of section 3(17) of the Federal Power Act as amend-ed by this Act)—

''(1) shall be considered a qualifying small power production facility for purposes of part 292 of title 18, Code of Federal Regulations, notwithstanding any size limitations contained in such part, and

''(2) shall not be subject to the size limitation contained in section 292.601(b) of such part.''

STATE AUTHORITIES; CONSTRUCTION

Pub. L. 102–486, title VII, §731, Oct. 24, 1992, 106 Stat. 2921, provided that: ''Nothing in this title [enacting sec-tions 824*l*, 824m, and 825*o*–1 of this title and former sec-tions 79z–5a and 79z–5b of Title 15, Commerce and Trade, and amending this section, sections 824, 824j, 824k, 825n, 825*o*, and 2621 of this title, and provisions formerly set out as a note under former section 79k of Title 15] or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protec-tion or the siting of facilities.''

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of Title 49, Transportation, and section 101 of Pub. L. 104–88, set out as a note under section 701 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of Title 49.

§ 797. General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licensees in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished Commission

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission, to

as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

Subsec. (e). Pub. L. 109–58, § 1295(a)(2), substituted ''section 824e(e), 824e(f), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''sec-tion 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 pro-vided 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 Commis-sion [Federal Energy Regulatory Commission] before the date of the enactment of this Act [Nov. 9, 1978].

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

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

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

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

[1] See References in Text note below.

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

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–473, § 4, Oct. 6, 1988, 102 Stat. 2300, provided that: ''The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such complaints may be withdrawn and refiled without prejudice.''

LIMITATION ON AUTHORITY PROVIDED

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

STUDY

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

§ 824f. Ordering furnishing of adequate service

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

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

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

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

(b) Request for inventory and cost statements

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

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

§ 824h. References to State boards by Commission

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

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

(b) Cooperation with State commissions

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

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

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient

ation, 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 Public Printer 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 Printing 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.)

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.

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

(June 10, 1920, ch. 285, pt. III, § 314, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 109–58, title XII, § 1288, Aug. 8, 2005, 119 Stat. 982.)

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in

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FERC Docket No. EL00-95*, et al.*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 31, 2016. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid to the following non-CM/ECF participants:

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