ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 11-1122

CALPINE CORPORATION, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

MICHAEL A. BARDEE
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

ROBERT M. KENNEDY
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426
(202) 502-8904

FINAL BRIEF: February 9, 2012

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties, intervenors, and amici appearing before the Commission and this Court are identified in the Brief for Petitioners.

B. Rulings Under Review

1. *Duke Energy Moss Landing LLC v. California Independent System Operator Corp*., 132 FERC ¶ 61,183 (2010) ("Remand Order"), JA 1; and

2. *Duke Energy Moss Landing LLC v. California Independent System Operator Corp*., 134 FERC ¶ 61,151 (2011) ("Remand Rehearing Order"), JA 7.

C. Related Cases

The Commission issued the orders under review in response to this Court's remand in *Southern California Edison Co. v. FERC*, 603 F.3d 996 (D.C. Cir. 2010), which considered a challenge to the Commission's station power policies as implemented in California.

In *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006), and *Consol. Edison Co. of N.Y., Inc. v. FERC*, No. 05-1372, 2008 U.S. App. LEXIS 21926 (D.C. Cir. May 6, 2008), this Court considered challenges to the Commission's station power policies as implemented in New York.

/s/ Robert M. Kennedy
Robert M. Kennedy
Attorney

February 9, 2012

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GLOSSARY

Associations	collectively, Intervenors Electric Power Supply Association, Cogeneration Association of California, and the Energy Producers and Users Coalition
Assoc. Br.	Brief of Intervenors
Br.	Brief of Petitioners
California ISO	California Independent System Operator Corporation
Calpine	collectively, Petitioners Calpine Corporation, Dynegy Moss Landing, LLC, GenOn California North, LLC, GenOn Delta LLC, GenOn Potrero, LLC, High Desert Power Project, LLC, Cabrillo Power I LLC, Cabrillo Power II LLC, El Segundo Power, LLC, Long Beach Generation LLC, and NRG Power Marketing LLC
Commission or FERC	Federal Energy Regulatory Commission
Complaint Order	*Duke Energy Moss Landing LLC v. California Independent System Operator Corp.*, 109 FERC ¶ 61,170 (2004), JA 19
Complaint Rehearing Order	*Duke Energy Moss Landing LLC v. California Independent System Operator Corp.*, 111 FERC ¶ 61,451 (2005), JA 147
Edison	Southern California Edison Company
Remand Order	*Duke Energy Moss Landing LLC v. California Independent System Operator Corp.*, 132 FERC ¶ 61,183 (2010), JA 1

Remand Rehearing Order	*Duke Energy Moss Landing LLC v. California Independent System Operator Corp.*, 134 FERC ¶ 61,151 (2011), JA 7
Tariff	California Independent System Operator Corporation FERC Electric Tariff
Tariff Order	*California Independent System Operator Corp.*, 111 FERC ¶ 61,452 (2005), JA 160
Tariff Rehearing Order	*California Independent System Operator Corp.*, 125 FERC ¶ 61,072 (2008), JA 254

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") complied with the Court's mandate in *Southern California Edison Co. v. FERC*, 603 F.3d 996 (D.C. Cir. 2010), holding that the Commission lacks statutory authority to require California electric utilities to use the same netting method for determining retail and distribution charges associated with the procurement of station power as that used by the Commission to determine transmission charges for that station power.

STATUTORY PROVISIONS

The relevant statutory provisions are contained in the Addendum.

INTRODUCTION

This case concerns the scope of the Commission's authority under the Federal Power Act with respect to the supply of "station power" – the electrical energy used by generators to operate their facilities – in California. Before the unbundling of electric energy markets, vertically-integrated utilities would not charge themselves for station power. Station power was simply treated as "negative generation" and netted against the output of the utilities' generators. That changed when vertically-integrated utilities began selling their generating assets to merchant generators in response to technological, competitive, and regulatory developments. These merchant generators – which lack transmission and distribution facilities and retail customers of their own – sought to obtain and account for station power with the same netting procedure employed by vertically-integrated utilities.

Beginning in 2000, the Commission established policies designed to treat merchant generators and traditional utilities the same with respect to the procurement and delivery of station power. The policies – which, among other things, deemed a generator to have self-supplied its station power if the generator's output exceeded its usage over a reasonable netting interval – were ultimately

adopted by independent regional transmission organizations in the Northeast, the Mid-Atlantic, and the Midwest.

This case has its genesis in the Commission's effort to apply those policies to the California market through the Open Access Transmission Tariff ("Tariff") administered by the California Independent System Operator Corporation ("California ISO"). After determining the California ISO's then-current Tariff failed to conform to the Commission's station power policies, the Commission accepted revised tariff provisions establishing a one-month netting interval for determining whether a generator has self-supplied its station power or procured it through a third-party sale, and the transmission charges associated with that station power. The Commission also declared that self-supplying generators could not be assessed state retail charges for station power, as there are no retail services associated with such self-supply.

Southern California Edison Company ("Edison") and others argued that the Commission lacks statutory authority to require utilities to employ a netting method for the calculation of retail charges arising from the procurement of station power that is identical to that used by the California ISO for calculating the transmission charges associated with that supply. In *Southern California Edison Co. v. FERC*, 603 F.3d 996 (D.C. Cir. 2010), this Court agreed. The Court described the Commission's use of a netting interval to assess whether the supply

of station power involves a state-regulated retail transaction as an "arbitrary and unprincipled" jurisdictional standard, *id*. at 1000, and one that "does not just sideswipe state jurisdiction," but "attacks it frontally." *Id*. at 1001. The Court therefore vacated the Commission's orders, and remanded the case "for further proceedings consistent with this opinion." *Id*. at 1002.

In the orders on review, the Commission explained that, in light of *Southern California Edison*, "states need not use the same methodology the Commission uses to determine the amount of station power that is transmitted in interstate commerce to determine the amount of station power that is sold at retail." *Duke Energy Moss Landing LLC v. Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,183, at P 2 (2010) (R. 18) ("Remand Order"), JA 2. The Commission recognized that differing state and federal netting intervals could require merchant generators to purchase station power at retail when they otherwise would be entitled to self-supply under the federal tariff, but believed that this was "a consequence of the Court's determination" in *Southern California Edison*. *Duke Energy Moss Landing LLC v. Cal. Indep. Sys. Operator Corp*., 134 FERC ¶ 61,151, at P 28 (2011) (R. 26) ("Remand Rehearing Order"), JA 17.[1]

[1] "R" refers to the items numbered in the certified index to the record. Citations to "Br." refer to Petitioners' opening brief. "Ass'n Br." refers to Intervenors' opening brief. "P" refers to the internal paragraph number within a FERC order, and "JA" refers to the joint appendix.

Petitioners Calpine Corporation, Dynegy Moss Landing, LLC, GenOn California North, LLC, GenOn Delta, LLC, GenOn Potrero, LLC, High Desert Power Project, LLC, Cabrillo Power I LLC, Cabrillo Power II LLC, El Segundo Power, LLC, Long Beach Generation LLC, and NRG Power Marketing LLC (collectively, "Calpine"), with the support of Intervenors Electric Power Supply Association, Cogeneration Association of California, and the Energy Producers and Users Coalition (collectively, "Associations") appealed that determination.

STATEMENT OF FACTS

I. STATUTORY FRAMEWORK

The Federal Power Act delineates federal and state regulation over electricity markets and services. Section 201(b) of the Act grants the Commission jurisdiction over the "transmission of electric energy in interstate commerce," the "sale of electric energy at wholesale in interstate commerce," and "all facilities for such transmission or sale." 16 U.S.C. § 824(b)(1). *See New York v. FERC*, 535 U.S. 1, 19-20 (2002) (the Federal Power Act "unambiguously authorizes FERC to assert jurisdiction over two separate activities – transmitting and selling"). The States retain jurisdiction over "any other sale of electric energy" and "facilities used in local distribution" of electricity. 16 U.S.C. § 824(b)(1). *See also Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006) ("Jurisdiction over this sale and delivery of electricity is split between the federal government

and the states on the basis of the type of service being provided and the nature of the energy sale."); *Southern California Edison*, 603 F.3d at 997 (same).

With respect to any transmissions or sales within its jurisdiction, the Commission is empowered under Sections 205 and 206 of the Federal Power Act to correct any rates or practices that are unreasonable or unduly discriminatory. 16 U.S.C. §§ 824d(b), 824e(a). *See, e.g.*, *New York*, 535 U.S. at 7.

II. BACKGROUND

A. Restructuring Of Electricity Markets

"Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities and selling these services as a 'bundled' package to wholesale and retail customers in a limited geographical service area." *Pub. Util. Dist. No. 1 of Snohomish Cnty. v. FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001). This began to change in 1996 when the Commission adopted Order No. 888, which required the unbundling of services offered by public utilities subject to FERC's jurisdiction.[2] To implement this directive, public utilities were required to

[2] *See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

offer service to all customers (including their own affiliates) on an equal basis through open access tariffs that offered separate rates for wholesale generation, transmission, and ancillary services. *See New York*, 535 U.S. at 11.

At the same time FERC was developing its open access reforms, the California legislature restructured the California power industry through the passage of Assembly Bill 1890. The bill transferred operational control of the transmission facilities of the State's three largest investor-owned utilities – San Diego Gas & Electric Company, Pacific Gas & Electric Company, and Edison – to the non-profit California ISO, which now operates the wholesale transmission network in California. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty*., 554 U.S. 527, 539 (2008). The utilities were also required to divest most of their generation assets. *Id*. The merchant generators that purchased these generation facilities have no retail service obligations and sell wholesale power at market-based rates under FERC-approved tariffs. *See, e.g.*, *PJM Interconnection, LLC,* 94 FERC ¶ 61,251, at 61,883 n.12 (2001) (defining "merchant generator" as a "non-vertically integrated owner of generating facilities").

B. Treatment Of Station Power

Station power is "the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's

site, and for operating the electric equipment" at the site. *California Indep. Sys. Operator Corp*., 125 FERC ¶ 61,072, at P 2 (2008) (R. 83) ("Tariff Rehearing Order"), JA 256. A generating facility may "self-supply" its station power by (a) redirecting some of its outbound generated electricity for its station power needs (*i.e*., "on-site" self-supply), or (b) obtaining station power from an affiliated, off-site generating facility (*i.e*., "remote" self-supply). *Id*. But when a generating facility is incapable of self-supplying station power either on-site or remotely, it must look to a third-party provider for its station power needs (*i.e*., "third-party" supply). *Id*.

1. The Commission's station power policies

Vertically-integrated utilities had a longstanding practice of treating station power as "negative generation" and netting station power from the generator's output. *Id*. P 3, JA 256. As a result, they did not charge themselves, their affiliates, or their fellow utilities for station power, even for periods when the generating unit was not operating. *Id*. The treatment of station power became a disputed issue, however, when merchant generators entered the market and sought to obtain and account for station power service in the same manner as traditional utilities. *Id*. P 4, JA 257.

In a series of orders involving the Pennsylvania-New Jersey-Maryland Interconnection,[3] New York Independent System Operator,[4] and Midwest Independent Transmission System Operator,[5] the Commission established its policies relating to the procurement and delivery of station power. Under those policies, if a generator's net output (*i.e.*, total output to the grid minus station power draws from the grid) was positive over a reasonable netting interval, the generator was deemed to have self-supplied its station power. For example, under an hourly netting interval, a generator that withdrew energy from the grid sufficient to meet its station power needs for fifty minutes, but then injected a greater amount of energy during the next ten minutes, would be "net positive" over the netting interval. This methodology comported with "the traditional accounting for station

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[3] *PJM Interconnection, LLC*, 93 FERC ¶ 61,061 (2000) ("*PJM I*"), *order on pet. for dec. order*, 94 FERC ¶ 61,251 ("*PJM II*"), *order on reh'g*, 95 FERC ¶ 61,333 ("*PJM III*"), *order on rate change app.*, 95 FERC ¶ 61,470 (2001) ("*PJM IV*").

[4] *KeySpan-Ravenswood, Inc. v. N.Y. Indep. Sys. Operator Inc.*, 99 FERC ¶ 61,167 (2002) ("*KeySpan I*"), *order on reh'g*, 100 FERC ¶ 61,201 (2001) ("*KeySpan II*"), *order on compliance filing*, 101 FERC ¶ 61,230 (2002) ("*KeySpan III*"), *reh'g denied*, 107 FERC ¶ 61,142 ("*KeySpan IV*"), *clarified* 108 FERC ¶ 61,164 (2004), *aff'd sub nom. Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006); *N.Y. Power Auth. v. Consol. Edison Co. of N.Y., Inc.*, 112 FERC ¶ 61,304 (2005), *clarified and reh'g denied*, 116 FERC ¶ 61,240 (2006), *aff'd sub. nom Consol. Edison Co. of N.Y. v. FERC*, No. 05-1372 (D.C. Cir. May 6, 2008) (unpublished).

[5] *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,073 (2004), *order on reh'g*, 110 FERC ¶ 61,383 (2005).

power as negative generation, that is, calculating the output of a particular generating facility net of station power requirements, rather than as gross output." *KeySpan IV*, 107 FERC ¶ 61,142, at P 38.

The Commission determined that, because the self-supply of station power only requires use of the generator's own facilities, it does not constitute a wholesale sale, defined by the Federal Power Act as "a sale of electric energy to any person for resale," 16 U.S.C. § 824(b)(1), nor a retail sale (*i.e.*, a sale for end use). *See, e.g.*, *PJM II*, 94 FERC ¶ 61,251, at 61,889-91 (discussing state and federal regulatory regime applicable to station power). Accordingly, the Commission believed that neither state nor federal regulation attaches to the procurement of station power by net positive generators. But if a generator is net negative over the netting interval – *i.e.*, takes more power from the grid than it injects – it is deemed to have obtained the shortfall from a third party via a retail sale subject to state regulation. *Id.*; *see also PJM III*, 95 FERC ¶ 61,333, at 62,186.

Additional regulation attaches if the generator meets its station power needs through remote self-supply or third-party supply and does not own, or does not have the right to use, the grid connecting its facility to the source of the station power. If the generator requires service over FERC-jurisdictional transmission facilities to receive station power, then it takes that service under the FERC-jurisdictional open access transmission tariff. *PJM III*, 95 FERC ¶ 61,333, at

62,186. If the generator requires access to local distribution facilities to receive station power, then it takes that service under a state-jurisdictional local distribution tariff. *Id*. *See also* Tariff Rehearing Order at PP 2-6 (discussing FERC station power policies established in *PJM* and other orders), JA 256-58.

2. The *Niagara Mohawk* decision

In *Niagara Mohawk*, this Court addressed a challenge to the implementation of the Commission's station power policies in New York, which were alleged to have "encroache[d] upon state jurisdiction over local distribution services and retail sales." 452 F.3d at 827. The Court found the Commission's "jurisdictional rationale [to be] a bit confusing" as it failed to "clearly articulate[] why" the Commission's jurisdiction over interstate transmission "permits it to determine that no sale of any kind – including a retail sale – takes place when the generator takes station power from the grid." *Id*. at 828. The Court did not need to resolve the issue, however, in light of the petitioners' "clear concession that an hourly netting tariff would not violate the [Federal Power] Act." *Id*. "[I]f hourly netting is perfectly consistent with the statute," the Court could "see no principled reason why monthly netting violates the Act." *Id*. *See also Southern California Edison*, 603 F.3d at 999 (characterizing *Niagara Mohawk* as a "troubling case [that] was resolved based on a concession petitioners made").

C. Edison's Challenge To The Commission's Station Power Policies

1. The Complaint Orders

In 2004, Duke Energy Moss Landing LLC, a merchant generator interconnected to the transmission system controlled by the California ISO, alleged that the California ISO's Tariff failed to comply with the Commission's station power policies. At the time, the Tariff's "Permitted Netting" provisions only allowed generators to net their station power on-site when the generator was running (and prohibited netting at all other times). *See Duke Energy Moss Landing LLC v. Cal. Indep. Sys. Operator Corp*., 109 FERC ¶ 61,170, at PP 3-4 (2004) (R. 16) ("Complaint Order"), JA 20-21. The California ISO agreed that its Tariff did not conform to the Commission's station power policies, and requested a stakeholder process to develop appropriate tariff revisions. *Id*. P 8, JA 22.

In sending the matter to the California ISO's stakeholder process, the Commission rejected the contention that the Commission's station power policies encroached upon state jurisdiction over retail sales and local distribution of energy. The Commission explained that its prior orders "fully articulated [FERC's] station power policies," which were premised on the Commission's jurisdiction over the transmission of station power, and addressed under what circumstances the procurement of station power involves a retail sale or an element of local

distribution. *Id*. P 21, JA 25. The Commission therefore declined to "revisit these fundamental station power issues." *Id*.

On rehearing, the Commission explained that it has "jurisdiction, in the first instance, to determine its jurisdiction." *Duke Energy Moss Landing LLC v. Cal. Indep. Sys. Operator Corp*., 111 FERC ¶ 61,451, at P 12 (2005) (R. 43) ("Complaint Rehearing Order") (internal quotation marks omitted), JA 151. It thus possesses authority to assess whether station power transactions involve self-supply or third-party sales "and, importantly, whether the generator has used transmission facilities or local distribution facilities to move station power to it." *Id*. The Commission emphasized that its "jurisdiction is over the transmission of station power. The use of a reasonable netting interval is designed to determine when, in fact, such transmission has taken place." *Id*. P 14, JA 152.

2. The California ISO's Station Power Protocol

In April 2005, the California ISO filed its Station Power Protocol, designated as Amendment No. 68 to its Tariff. *See* Amendment No. 68 to the ISO Tariff, filed Apr. 18, 2005 (R. 22), JA 28. The Protocol established a voluntary program through which generators could self-supply their station power over a monthly netting interval. *Id*., Attachment B at Orig. Sheet No. 948, SPP 1.3.2, JA 126.

The terms of the Protocol provide that, if the California ISO's monthly metering data establish that a participating generator's output (*i.e.*, generation) exceeds its demand (*i.e.*, station power), the generator is deemed to have self-supplied its station power on-site. In this circumstance, the ISO will not assess a transmission access charge (since transmission is deemed unnecessary for on-site self-supply). *See id*. at Orig. Sheet Nos. 949, 950, SPP 3.2, 4.1, 5, JA 127-28. When the station power demand of one of a generator's units exceeds its output, but the aggregate net output from other facilities in the generator's portfolio covers that shortfall, the generator is deemed to have self-supplied its station power remotely. In this circumstance, the ISO will assess a transmission access charge (since transmission is deemed to be used in moving the station power between the generator's facilities). *Id*. at SPP 3.1, 4.1, JA 127-28.

If the generator's units collectively withdraw more station power from the grid than they supply during the netting interval, the generator is deemed to have purchased the amount of the deficiency from a third party via a retail sale. *Id*. at SPP 3.1, JA 127. In this circumstance, the ISO bills the relevant utility for the applicable transmission charges. *Id*. at SPP 4.2, JA 128. The utility then bills the generator under the applicable retail tariff. *Id*., Attachment A, Appendix 1 at 7, JA 57.

3. The Tariff Order

On June 22, 2005, the Commission conditionally accepted the Station Power Protocol, while ordering certain revisions that are not at issue in this appeal. *California Indep. Sys. Operator Corp*., 111 FERC ¶ 61,452, at PP 1, 62 (2005) (R. 44) ("Tariff Order"), JA 160, 180. In doing so, the Commission rejected Edison's assertion that approval of the Protocol impermissibly encroaches upon state authority to determine when retail sales occur. The Commission reasoned that the Station Power Protocol does not "conflict with state law or state tariffs relating to the rates, terms or conditions of retail sales because . . . when a generator is self-supplying, no sale has occurred." *Id*. P 17, JA 166. And when a merchant generator's net output is negative during a netting interval, "and thus a third party sale has in fact occurred, state law and the relevant tariff language would apply." *Id*.

4. Edison's Proposed Retail Tariff Revisions

While rehearing of the Tariff Order was pending, Edison filed proposed retail tariff revisions with its state regulator, the California Public Utilities Commission. In its filing, Edison sought authority to impose retail and load-based (*i.e*., demand-based) charges – such as a Competition Transition Charge (implemented to recover stranded costs associated with the restructuring of the electric industry) and a Department of Water Resources Power Charge

(implemented to recover costs associated with power procurement during and after the California Energy Crisis) – upon generators making use of the Station Power Protocol. *See* Attachment A to Motion for Clarification of Constellation Generation Group, *et al*., at 4 (R. 65), JA 197.

5. The Tariff Rehearing Order

In its order denying rehearing of the Tariff Order, the Commission clarified that its earlier station power orders preclude Edison from imposing retail and other load-based charges on generators that self-supply station power under the terms of the California ISO Tariff without making use of state-jurisdictional local distribution services. Tariff Rehearing Order at P 1, JA 255. The Commission explained that self-supplying generators are not taking any retail services and, as a result, any "load-based charges for this self-supply are costs that have no relationship to any service provided by another party." *Id*. P 76, JA 279. To permit such charges would "impair[] the ability of merchant generators to utilize the netting provisions" of the Station Power Protocol. *Id.* (internal quotation marks omitted). Accordingly, "the charges specified in the [California ISO] tariff would apply to the exclusion of any retail tariff." *Id*. P 39, JA 268.

6. The *Southern California Edison* Decision

On appeal, the issue before the Court was "stark": did the Commission "exceed[] its jurisdiction" when it found that "the netting period it approved to

calculate energy delivered to and taken from the grid" must also govern charges imposed under state law "for the generator's own use of power"? *Southern California Edison*, 603 F.3d at 999. In resolving that question in the affirmative, the Court initially observed that the Commission's use of a netting interval to determine whether the procurement of station power constitutes a retail sale is "rather arbitrary and unprincipled – certainly as a jurisdictional standard." *Id*. at 1000. The Court continued that the Commission's jurisdiction over the transmission of station power does not empower it to dictate when the supply of station power implicates a retail sale. The Court held that, "[u]nless a transaction falls within FERC's wholesale or transmission authority, it doesn't matter how FERC characterizes it." *Id*. at 1001.

The Court also rejected the assertion that the use of different netting intervals for retail sales of energy, on the one hand, and the transmission of that energy, on the other, presents a conflict requiring preemption of the State's method for identifying retail sales or imposing consumption charges on station power. The Court held that, "in an unbundled market, transmission and power are procured through separate transactions. And, as we recognized in *Niagara Mohawk*, the netting periods for power and transmission need not be the same." *Id*. at 1002. Accordingly, the Court vacated the orders under review and "remand[ed] for further proceedings consistent with this opinion." *Id*.

III. THE ORDERS ON REVIEW

A. The Remand Order

In its order on remand, the Commission concluded "that the Commission and the states can use different methodologies … [for] determin[ing] the amount of station power that is transmitted on the Commission-jurisdictional transmission grid and … the amount of station power that is sold in state-jurisdictional retail sales." Remand Order at P 16, JA 5. The Commission therefore found that the Station Power Protocol "should address only Commission-jurisdictional transmission of station power." *Id*. Whether any such station power is purchased via a retail sale is "properly the subject of state-jurisdictional tariffs." *Id*., JA 6. The Commission explained that this result logically follows from the *Southern California Edison* decision, "particularly given its determination that the Commission and the states can employ different netting periods." *Id*., JA 5.

B. The Remand Rehearing Order

On rehearing, the Commission rejected the contention that its decision departed from long-standing precedent without reasonable explanation. The Commission explained that it had considered multiple jurisdictional bases when developing its station power policies and ultimately based those policies upon its statutory authority over interstate transmission service. "The court, however, found that, in so doing, the Commission had improperly intruded on the state's jurisdiction over retail sales." Remand Rehearing Order at P 22, JA 14.

As to the contention that differing state and federal netting intervals would "trap" a portion of a generator's output and render it unavailable for sale at wholesale, the Commission noted the movants' acknowledgment that, under the Tariff, energy payments would be based on the generator's total output. *Id*. P 26, JA 16. And while different state and federal netting intervals may require a generator "to purchase station power at retail when it previously could have self-supplied," such a result "is a consequence of the court's determination that the netting period for transmission and power need not be the same." *Id*. P 28, JA 17.

The Commission declined to reevaluate the justness and reasonableness of the Station Power Protocol, as the issue on remand "was limited to implementation of the jurisdictional findings of the Court of Appeals." *Id*. P 30, JA 17. Nonetheless, the Commission encouraged the parties to commence a stakeholder process to "modify the Station Power Protocol to better reconcile it with state law." *Id*. P 28, JA 17.

SUMMARY OF THE ARGUMENT

On remand, the Commission faithfully executed the Court's mandate. Consistent with the Court's ruling in *Southern California Edison*, the Commission declared that different netting methods may be used to "determine[] the amount of station power that is transmitted on the Commission-jurisdictional transmission

grid" and "the amount of station power that is sold in state-jurisdictional retail sales." Remand Order at P 16, JA 5. As a result, the Commission ordered the California ISO to revise the Station Power Protocol so that it "address[es] only Commission-jurisdictional transmission of station power." *Id*.

Calpine and the Associations contend that *Southern California Edison* simply expressed concern regarding the Commission's lack of reasoning, and did not make any findings with respect to the scope of the Commission's jurisdiction. But this ignores the Court's recognition that Edison there argued, successfully, that the Commission's station power policies encroached upon state retail ratemaking authority and thus exceeded the Commission's wholesale ratemaking and transmission authority. *See Southern California Edison*, 603 F.3d at 997, 999-1000. This contention also ignores the Court's finding that the Commission's use of netting to determine when a state may assert jurisdiction over the procurement of station power was "arbitrary and unprincipled." *Id.* at 1000. "Unless a transaction falls within FERC's wholesale or transmission authority," the Court explained, "it doesn't matter how FERC characterizes it." *Id*. at 1001. And consistent with the Court's mandate, the Commission has explained that the procurement of station power – as opposed to its transmission – does not fall within the Commission's wholesale or transmission authority.

Similarly, the assertion that the Commission failed to explore other

jurisdictional theories on remand ignores prior precedent in which the Commission considered, and reasonably rejected, the contention that the procurement of station power could be regulated under the Federal Power Act as a wholesale sale or a matter that "affects or pertains" to transmission services.

Calpine and the supporting Associations nonetheless contend that the Commission should – indeed, must – preempt state retail tariffs because any conflicting state netting methods could frustrate the purpose of the Station Power Protocol and subject merchant generators to retail charges that may not be paid by vertically-integrated utilities. These precise concerns were presented to, and acknowledged by, the Court in *Southern California Edison*. The Court, however, did not believe that such conflicts warrant preemption since "transmission and power are procured through separate transactions" and thus "the netting periods for power and transmission need not be the same." 603 F.3d at 1002.

Calpine and the Associations attempt to bolster their call for preemption by asserting that the use of conflicting netting periods "traps" a portion of a generator's output. But this claim is based on the faulty assertion that the Station Power Protocol deems self-supplied station power to be unavailable for sale. The Station Power Protocol does not determine the amount of electricity a generator injects into the grid for sale. As Calpine acknowledges, such injections are sold "in real time at prevailing market rates." Br. at 25-26. The Protocol's netting

method only determines whether station power withdrawals require Commission-jurisdictional transmission.

The Commission also reasonably declined to reexamine the reasonableness of the Station Power Protocol in response to Calpine's claim that, at some point in the future, generators may be retroactively assessed retail charges for station power that was self-supplied under the Protocol. On remand, the Commission's task was to implement the Court's jurisdictional findings by ordering revisions to the California ISO's Tariff. Calpine acknowledges that it has state remedies in the event retroactive charges are assessed under state retail tariffs. And if Calpine believes that such retroactive retail assessments render FERC-jurisdictional charges under the California ISO's Tariff unreasonable, it may petition the Commission for relief.

ARGUMENT

I. STANDARD OF REVIEW

In proceedings on remand, the Commission's determinations are reviewed to ensure that they are responsive to the Court's mandate. *See, e.g., Process Gas Consumers Grp. v. FERC*, 292 F.3d 831, 840 (D.C. Cir. 2002). Where the Court has ruled on an issue, an agency is bound by the ruling. *Atlantic City Elec. Co. v. FERC*, 329 F.3d 856, 858-59 (D.C. Cir. 2003). While it is for the Court, of course, to construe its own mandate, *see FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 141

(1940), "the court's opinion may be consulted to ascertain the intent of the mandate." *City of Cleveland v. FPC*, 561 F.2d 344, 347 n.25 (D.C. Cir. 1977) (citing cases).

In addition to the requirement that it comply with the Court's mandate in *Southern California Edison*, the Commission's determination that utilities may employ a different station power netting method than that used by the California ISO is subject to the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under this deferential standard, the Commission's decisions must be upheld if they are reasoned and responsive. *East Tex. Elec. Coop., Inc. v. FERC*, 218 F.3d 750, 753 (D.C. Cir. 2000). So long as the Court can "discern a reasoned path" to the decision, the challenged orders will be upheld. *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008).

This case also raises issues regarding the Commission's interpretation of the scope of its jurisdiction under the Federal Power Act. An agency's construction of the statute it administers is reviewed under well-settled principles. If Congress has directly spoken to the precise question at issue, the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). If the statute is silent or ambiguous, the Court "must defer to a 'reasonable interpretation made by the

[agency].'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 481 (2001) (quoting *Chevron*, 467 U.S. at 844).

II. THE COMMISSION PROPERLY DETERMINED THAT UTILITIES AND THE CALIFORNIA ISO NEED NOT EMPLOY IDENTICAL NETTING INTERVALS WITH RESPECT TO THE PROCUREMENT AND TRANSMISSION OF STATION POWER.

The Commission's task on remand was to faithfully enforce the *Southern California Edison* mandate. The Commission found that, as interpreted by the Court, its jurisdiction over the transmission of station power does not permit it to require utilities to employ a netting method to identify retail sales of station power that matches the California ISO's method for determining the amount of transmission associated with that station power. *See* Remand Order at P 16, JA 5.

As explained below, Calpine's contention that *Southern California Edison* "did not purport to resolve the bounds of the Commission's jurisdiction" (Br. at 40) is based on an unreasonable interpretation of that decision. The assertion that the Commission failed to explore alternative jurisdictional theories for its station power policies ignores prior precedent in which the Commission considered and rejected a variety of jurisdictional bases. Similarly, while Calpine and supporting Associations note potential conflicts arising from the use of differing state and federal netting intervals, the Court has already held that such conflicts do not empower (much less compel) the Commission to preempt the State's authority to

employ its own method for identifying retail sales arising from the use of station power.

A. The Commission Properly Interpreted This Court's Mandate In *Southern California Edison*.

Calpine and supporting Associations assert that the *Southern California Edison* decision merely reflects the Court's "concern[] about the Commission's lack of reasoning" with respect to its jurisdictional authority to regulate station power, and "expressed no view on the correct substantive result." Br. at 41. *See also* Ass'n Br. at 3 (same). The Commission, however, reasonably read the *Southern California Edison* decision to reflect the Court's affirmative rejection of the Commission's jurisdictional analysis.

1. Prior to *Southern California Edison*, the Commission believed that its jurisdiction over the transmission of station power permitted it to assess whether the procurement of that station power involves a retail sale.

The jurisdictional analysis presented to the *Southern California Edison* Court had three central tenets. First, the Commission believed it had the authority to define, in the first instance, the characteristics of the transaction at issue – *i.e.*, the procurement and delivery of station power to merchant generators. That is, it was for the Commission alone to assess whether a generator's station power is supplied by a third party (and thus subject to state regulation) or self-supplied (and thus subject to federal jurisdiction to the extent transmission facilities are used to

move that station power). *See* Tariff Order at P 24, JA 169. *See also* Complaint Rehearing Order at P 12 ("The Commission … has jurisdiction, in the first instance, to determine its jurisdiction"), JA 151. And the Commission believed that its characterization of the transaction must govern, even if it lacks authority to regulate aspects of the transaction. *See* Complaint Rehearing Order at P 12 ("Our authority to make this determination does not depend on the ultimate outcome of this determination."), JA 151; *id*. P 13 ("when there is a conflict between station power provisions in Commission-jurisdictional and state-jurisdictional tariffs, the former must control"), JA 151-52.

Second, the Commission believed that it was reasonable to use a netting interval to determine whether a generator's station power was self-supplied, or whether it was procured from a third party. *See, e.g.*, Tariff Order at P 16 ("netting over a reasonable period of time is an accepted means of determining whether a generator has, in fact, self-supplied station power rather than purchased station power"), JA 166.[6]

Third, the Commission found that section 201 of the Federal Power Act –

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[6] *See also Niagara Mohawk Power Corp. v. Huntley Power LLC*, 109 FERC ¶ 61,169, at P 38 (2004) (explaining that "[n]etting is simply the traditional accounting for station power as negative generation" and rejecting as impractical "the theory that a generator makes a retail purchase of station power whenever there is a single momentary power fluctuation during the netting period").

which grants the Commission jurisdiction over the "transmission of electric energy in interstate commerce," 16 U.S.C. § 824(b)(1) – vests it with exclusive authority to regulate the self-supply of station power. In the Commission's view, such self-supply does not infringe upon state jurisdiction because no retail sale takes place, but it may implicate FERC-jurisdictional activities to the extent the interstate grid is used to deliver station power to the generator. The netting method thus determines what, if any, transmission load is associated with station power when it is self-supplied remotely or through a third-party sale:

> The Commission, thus, has the authority to determine whether transactions involving station power (including determining whether a generator has self-supplied station power or whether the generator has instead purchased station power at retail, and importantly, whether the generator has used transmission facilities or local distribution facilities to move station power to it) are subject to Commission jurisdiction pursuant to section 201(b)(1) of the Federal Power Act.

Complaint Rehearing Order at P 12, JA 151. *See also id*. P 14 ("[O]ur jurisdiction is over the transmission of station power. The use of a reasonable netting interval is designed to determine when, in fact, such transmission has taken place."), JA 152.

2. The Court rejected the Commission's earlier jurisdictional theory.

The Commission's jurisdictional analysis was affirmatively rejected by the Court in *Southern California Edison*, which upheld Edison's contention that the

Commission had "exceeded its authority by insisting that the same method used for calculating transmission charges for station power be used to calculate retail charges." 603 F.3d at 997. *See also id*. at 999 (noting the "stark" issue presented by Edison's assertion "that FERC … has exceeded its jurisdiction"); *id*. at 1000 (noting Edison's claim that "FERC has no authority to set *any* netting period to determine whether a retail sale occurs").

The Court first considered the Commission's use of a netting method to draw the line between the federally-regulated self-supply of station power and the state-regulated third-party supply and characterized it as arbitrary and unprincipled: "whether a retail sale occurs depends, in [the Commission's] view, on the length of the netting period, which seems rather arbitrary and unprincipled – certainly as a jurisdictional standard." *Id*. at 1000.

More fundamentally, the Court found that the Commission exceeded its jurisdiction under the Federal Power Act by requiring that the netting interval used to calculate transmission charges associated with a generator's procurement of station power apply to the exclusion of any conflicting netting intervals in state retail tariffs. Put another way, the Commission lacked authority to require utilities to abide by the Commission's determination that a net positive generator has not purchased any station power at retail:

> To simply declare that the state lacks jurisdiction because FERC believes no retail sale has taken place really begs the

> jurisdictional question. *Unless a transaction falls within FERC's wholesale or transmission authority, it doesn't matter how FERC characterizes it.*

Id. at 1000-01 (emphasis supplied). And here, the Commission has determined that the procurement of station power does not fall within its jurisdiction, although the transmission of that station power may require the use of FERC-jurisdictional services: "the Commission [has] emphasized the difference between the energy used to meet station power needs (which does not involve a sale subject to Commission jurisdiction) and the delivery of that energy (which may involve a sale subject to Commission jurisdiction)." *Huntley Power*, 109 FERC ¶ 61,169 at P 24 ("incorporated herein by reference" in Complaint Order at P 21 n.15, JA 25).

Relying primarily upon *Entergy Servs. Inc. v. FERC*, 400 F.3d 5 (D.C. Cir. 2005), Calpine and supporting Associations nonetheless argue that the Commission's jurisdiction over transmission and wholesale sales permits it to regulate all aspects of the procurement and delivery of station power, even if such regulation has the "incidental effect of also determining when a generator needs to purchase energy from third parties at retail." Br. at 54-55. *See also* Ass'n Br. at 14-17. The Commission raised this same argument in *Southern California Edison*,[7] where the Court found that "FERC's order does not just sideswipe state

[7] *See* Brief of Respondent, filed Feb. 25, 2010, in *Southern California Edison Co. v. FERC*, Nos. 05-1327 and 08-1384, at 36-40.

jurisdiction; it attacks it frontally." 603 F.3d at 1001.

In any event, *Entergy Services* is inapposite. That case involved Entergy's practice of first allocating a generator's output to its scheduled transactions, with the remainder allocated to its "host load," generally an industrial customer. 400 F.3d at 6. If the generator's output was insufficient to serve its host load, Entergy would supply the shortfall under a retail tariff. *Id*. at 7. The Commission found that, in making up any shortfall, Entergy was actually providing a wholesale service under its FERC-jurisdictional Generator Imbalance Agreement. *Id*. at 8. In rejecting the assertion that the Commission exceeded its jurisdiction in ordering the refund of improperly collected retail rates, the Court explained that "[t]he rates at issue related to what Entergy should have considered as a wholesale service … which is clearly within the Commission's regulatory jurisdiction." *Id*.

Entergy Services thus involved the Commission's determination that a contested transaction – the supply of a shortfall in generation – implicates a FERC-jurisdictional service. In the orders on review in *Southern California Edison*, the Commission determined that the procurement of station power (as opposed to its transmission) does not involve a FERC-jurisdictional service, but also does not constitute a state-jurisdictional retail sale. In *Southern California Edison*, the Court rejected the Commission's claimed authority to dictate when a state-jurisdictional retail sale occurs, concluding that, "[u]nless a transaction falls within

FERC's wholesale or transmission authority, it doesn't matter how FERC characterizes it." 603 F.3d at 1001.

3. The remand orders effectuate the Court's mandate.

Contrary to Calpine's charge, the remand orders do not constitute a departure from the Commission's prior policy "without a reasoned explanation." Br. at 45. Instead, they reflect the Commission's attempt to faithfully carry out the Court's mandate. In the orders on review in *Southern California Edison*, "the Commission asserted its jurisdiction over the netting of station power sales based on its authority over interstate transmission under sections 201 and 205 of the Federal Power Act." Remand Rehearing Order at P 18, JA 12. The Court found, however, "that the Commission had 'exceeded' its authority by 'insisting that the netting period it approved to calculate energy delivered to and taken from the grid by generators for transmission charges must also govern charges the utilities seek to impose for the generator's own use of power.'" *Id*. (quoting *Southern California Edison*, 603 F.3d at 999). Accordingly, the Commission's determination on remand – that "the Commission and states can use different methodologies" for determining the amount of station power "transmitted on the Commission-jurisdictional transmission grid" and "the amount of station power that is sold in state-jurisdictional retail sales," Remand Order at P 16, JA 5 – "was compelled" by the Court's "finding on the scope of our jurisdiction." Remand

Rehearing Order at P 18, JA 12.

B. The Commission Considered And Reasonably Rejected Alternative Jurisdictional Bases For Its Station Power Policies.

Calpine charges that the Commission failed to conduct "meaningful remand proceedings" because it purportedly "refused to give fair consideration to arguments that the practice of self-supplying station power falls under its authority to regulate wholesale sales." Br. 41, 42. But as the Commission explained, it "was not writing on a clean slate in its Order on Remand." Remand Rehearing Order at P 18, JA 12. Throughout the development of its station power policies, the Commission "considered and rejected arguments" that the procurement of station power involves a wholesale sale or "affects or pertains" to wholesale services, and ultimately "based its station power authority on its jurisdiction over interstate transmission service." *Id*. P 20, JA 13.

1. The Commission reasonably has determined that the procurement of station power does not involve a wholesale sale of energy.

The Commission has previously determined that the supply of station power does not fall within its jurisdiction over the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). Because a self-supplying generator is only using its own generating resources, "'it is not causing another to incur costs associated with the usage of the other's generating resources that would warrant a form of consideration.'" Complaint Rehearing Order at P 17 (quoting *PJM II*, 94

FERC ¶ 61,251, at 61,890), JA 154. Accordingly, "there is no sale (for end use or otherwise) between two different parties." *Id.*[8] *See also* Tariff Order at P 16 ("the Commission has consistently held that the self-supply of station power is not a sale"), JA 165-66.

In the case of third-party supply, a generator's station power needs are necessarily being met by "another party's generation facilities." *PJM II*, 94 FERC ¶ 61,251, at 61,891. While such third-party supply involves a sale of energy, "the energy being sold is not sold for resale, and therefore it is not a transaction which [the Commission] can regulate under the [Federal Power Act]." *Id. See also Southern California Edison*, 603 F.3d at 1000 & n.5 (noting that the Commission "does not rest on its wholesale jurisdiction," and agreeing that there is no "strong[] basis" to do so).

2. The Commission has reasonably determined that the procurement of station power does not "affect or pertain" to wholesale sales or transmission services.

Section 205(a) of the Federal Power Act gives the Commission the authority to ensure that "all rates and charges … for or in connection with the transmission or sale or electric energy subject to the jurisdiction of the Commission, and all rules and regulation affecting or pertaining to such charges [are] just and

[8] Section 201(d) of the Federal Power Act, 16 U.S.C. § 824(d), defines a "sale of electric energy at wholesale" as a "sale of electric energy to any person for resale."

reasonable." 16 U.S.C. § 824d(a).[9] Calpine and supporting Associations contend that the Commission is obligated to assert jurisdiction over the procurement of station power as a matter "affecting or pertaining" to wholesale services because (a) station power is a necessary input for generation, and (b) the station power netting method affects the amount of energy available for wholesale sales. Br. at 46, 52-53; Ass'n Br. at 12-14. But as the Commission explained on remand, it has previously "considered and rejected arguments that the third party provision of station power 'affects or relates' to wholesale services." Remand Rehearing Order at P 20, JA 13. None of the arguments raised by Calpine and the Associations demonstrates that this rejection is now unreasonable.

a. Station power as an integral component of generation

Calpine and the Associations first claim that the supply of station power "affects or pertains" to the Commission's regulation of transmission and wholesale sales because "station power is inextricably part of the process of generating energy." Ass'n Br. at 13. *See also* Br. at 46, 56 (same). But "there is an infinitude of practices affecting rates and service," and it is left to the Commission's

[9] *See also* 16 U.S.C. § 824d(c) (requiring public utilities to file with the Commission "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges"); 18 C.F.R. § 35.1(a) (same).

considerable discretion to "give a concrete application to this amorphous directive." *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985). Here, the Commission reasonably declined to characterize the procurement of station power as a matter that "affects or pertains" to jurisdictional services. *See* Remand Rehearing Order at P 20 & n.32 (citing earlier station power orders, and declining to revisit that argument that procuring station power bears a meaningful relation to FERC-jurisdictional wholesale service, especially when the Court "gave no indication that it would welcome such" a reexamination), JA 13-14.

Although station power is "an input for production of wholesale energy," that does not "convert[] the provision of station power into a wholesale transaction subject to our jurisdiction," since by definition "the energy used by station power is consumed and not resold." *PJM II*, 94 FERC ¶ 61,251, at 61,184. Indeed, there are numerous "integral" inputs for the generation of electricity, such as the plant labor force and generator fuel sources. But the fact that these inputs might "affect" the rates charged for the resulting electricity does not necessarily bring their procurement within the ambit of the Commission's jurisdiction, particularly where that procurement is regulated by other entities.[10]

[10] To the extent the cost of these inputs is a component of the cost of electricity sold at wholesale, the Commission would have authority to require the filing of contracts for their procurement to assist in a review of the subsequent wholesale rates that include these costs. *See* 16 U.S.C. § 824d(c); *PJM II*, 94 FERC ¶ 61,251, at 61,895 n.76.

As this Court has held when considering the analogous phrase "contract … affecting [a] rate" in section 5 of the Natural Gas Act, "[c]ontracts that 'affect a rate indirectly, merely by affecting the costs that determine what pipeline sales rates are permissible" under federal law "are beyond" the statute's reach. *American Gas Ass'n v. FERC*, 912 F.2d 1496, 1506 (D.C. Cir. 1990). Similarly, in *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261 (8th Cir. 1991), the Eighth Circuit found that the Commission's authority under sections 4 and 5 of the Natural Gas Act – companions to sections 205 and 206 of the Federal Power Act – does not extend to those matters that are directly regulated by the states. *Id*. at 1274 ("The power we recognize here granted by §§ 4 and 5 does not extend to … activities [that] are within the purview of the states."). *See also PJM III*, 95 FERC ¶ 61,333, at 62,187 (discussing *Northern Natural*). Here, the Commission has acknowledged that station power "is in fact regulated by some states as a sale for end use, and … is expressly provided for in some retail rate schedules." *PJM II*, 94 FERC ¶ 61,251, at 61,896. And this Court has held that the Commission's attempt to define when the procurement of station power constitutes a retail sale "does not just sideswipe state jurisdiction; it attacks it frontally." *Southern California Edison*, 603 F.2d at 1001.

b. The netting method's effect on the amount of energy available for sale at wholesale

Calpine and supporting Associations also argue that the provision of station power "affects or pertains" to wholesale service because the netting interval "inevitably affects the amount of generator-produced energy that is available for sale at wholesale." Br. at 52. In their view, "the amount of electricity deemed used to fulfill the generator's station power requirements reduces the amount of generator-produced energy transmitted over the grid." Ass'n Br. at 14. This argument, however, mischaracterizes the effect of the Station Power Protocol.[11]

The Protocol's netting method does not govern the amount of energy a generator places onto the grid for resale. It is only used to assess (a) whether a generator's intake of station power was served by its own resources or through a third-party sale, and (b) the amount of FERC-jurisdictional transmission associated with that intake. In this regard, the Protocol states:

> The determination of Net Output and attribution of On-Site Self Supply, Remote Self-Supply and Third Party Supply to serving Station Power under this [Station Power Protocol] shall apply only to determine whether Station Power was self-supplied during the

[11] Calpine and the Associations' argument may be technically true when a generator engages in "Permitted Netting" – *i.e.*, the contemporaneous netting of station power while the generator is running. *See* Tariff Rehearing Order at P 23 n.34 (discussing Permitted Netting), JA 263. Permitting Netting is not at issue in this case and remains an option for generators. *Id*. P 29, JA 265. The method at issue here permits netting over a month-long interval, even when a generator is not running during portions of that interval.

> Netting Period and will have no effect on the price of Energy sold or consumed at any facility.

Amendment No. 68, at Appendix 4, SPP § 5, JA 90-91.[12] Indeed, Calpine itself acknowledges that "generators are permitted to sell the energy they produce in real time at prevailing market rates." Br. at 25-26.

Calpine nonetheless contends that the Station Power Protocol "essentially reverses the sale of the megawatts of energy deemed not available for wholesale sale because they were used for station power." Br. at 26. But the Station Power Protocol does not "deem" any amount of megawatts unavailable for wholesale sale. Instead, the Protocol's netting method calculates the generator's station power demand, determines whether that demand was met with the generator's own resources, and specifies under what circumstances transmission and retail charges will apply to that demand. *See* Amendment No. 68, Attachment A at 10-11 (discussing station power charges), JA 37-38; *see also supra* pp. 13-14 (discussing operation of the Protocol). While the obligation to pay for station power and any associated transmission charges does, in some sense, "financially reduce[] the value" of the generator's output (Br. at 26), the Station Power Protocol does not deem the megawatts attributed to station power intake unavailable for sale.

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[12] *See also Huntley Power*, 109 FERC ¶ 61,169, at P 25 ("If a generator remotely self-supplies or uses third party supply to meet its station power needs, monthly netting determines the quantity of transmission the generator must obtain") ("incorporated herein by reference" in Complaint Order at P 21 n.15, JA 25).

In the Tariff Order, the Commission referred to its *PJM IV* decision and the description provided by the PJM (mid-Atlantic) transmission operator regarding the interplay between its monthly station power netting method and the hourly pricing method applied to energy injections and withdrawals from the grid:

> [T]his proposal has nothing whatsoever to do with the price or value of energy that [a] generator either sells to others or consumes itself …. [F]or each hour when the generator has a positive net output and delivers energy into the PJM grid, it would be paid the locational marginal price (LMP)[13] at its bus for all energy delivered to PJM in that hour. Conversely, for each hour when the generator has a negative net output and has received station power from the grid, it would pay the LMP at its bus for all that energy.

Tariff Order at P 56 (quoting *PJM IV*, 95 FERC ¶ 61,470, at 62,684), JA 178. With respect to the California market in particular, the Commission explained that the Station Power Protocol's net output calculation does not determine the amount of generation available for sale, but only assesses whether and how much Commission-jurisdictional transmission was used in connection with the generator's intake of station power:

> Hourly energy pricing is not affected by calculations of net output, which is used to determine whether the generator has placed a transmission load associated with station power on the [California ISO]-controlled transmission network.

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[13] Under a locational marginal price rate design, energy prices vary by location and time in order to reflect the cost of energy, including the cost of transmission losses and congestion, at each location on the grid. *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 541 n.3 (D.C. Cir. 2010).

Id. P 57, JA 179.[14]

Because the Station Power Protocol only "determine[s] whether the generator has placed a transmission load associated with station power on the [California ISO]-controlled transmission network," *id*. P 57, JA 179, the Commission reasonably characterized station power netting as a matter pertaining only to its jurisdiction over interstate transmission, *see, e.g.*, *id*. P 14, JA 169, rather than a practice "affecting or pertaining" to wholesale services. The Court in *Southern California Edison* held that the Commission may not exercise its transmission jurisdiction in a manner that defines when a state-jurisdictional retail sale occurs, and the Commission implemented that mandate on remand.

C. The Court Has Already Ruled That Different Federal And State Netting Intervals Do Not Warrant Preemption.

In *Southern California Edison*, the Court remarked that the Commission had "yet to explain why [its] general concern" regarding the competitive position of merchant generators "can be grounds to preempt the state's authority to set the netting period for station power." 603 F.3d at 1002. Seizing upon that remark, Calpine and supporting Associations assert that the Commission is "not only authorized but required" to exercise its jurisdiction in a manner that preempts the

[14] *See also Huntley Power*, 109 FERC ¶ 61,169, at P 31 ("If a generator remotely self-supplies or uses third party supply to meet its station power needs, monthly netting determines the quantity of transmission the generator must obtain") (incorporated by reference into Complaint Order at P 21 n.15, JA 25).

State from imposing a netting method for assessing retail sales of station power that differs from that employed by the Commission to determine the transmission charges associated with the movement of station power. Br. at 34. They argue that the use of different netting intervals (a) renders the self-supply option provided by the Station Power Protocol uneconomical given their exposure to retail charges, and (b) "traps" a portion of the generator's total output. Br. at 46-47, 56-60; Ass'n Br. at 18-23. The first claim was presented to, and rejected by, the Court in *Southern California Edison*. The second mischaracterizes the operation of the Station Power Protocol.

1. The Court rejected the Commission's assertion that the increased costs resulting from different federal and state netting intervals require the preemption of any conflicting state tariff provisions.

Calpine and supporting Associations note that different federal and state netting intervals "will force generators to 'purchase' unneeded energy at retail" (Ass'n Br. at 22) and expose them to "competitive transition charges and certain above-market generation costs." *Id*. at 21. *See also* Br. 57-59 (same). The Commission presented these same arguments to the Court in *Southern California Edison*:

> [P]ermitting Edison to charge for retail sales of station power under a shorter netting interval would undermine the effectiveness of the netting provisions in the California ISO Tariff. Rather than promoting competition by eliminating the disparities between merchant generators and traditional utilities,

> Edison's approach would require merchant generators to pay for energy purchases they do not want or take. Merchant generators would thus be deprived of the ability to obtain least-cost station power which, in turn, would harm the customers they serve.

Brief of Respondent, filed Feb. 25, 2010, in *Southern California Edison Co. v. FERC*, D.C. Cir. Nos. 05-1327 & 08-1384, at 21.[15] Because a shorter state netting interval would impair merchant generators' ability to self-supply station power, the Commission believed that any such inconsistent retail tariff provisions must yield to the federal regulatory scheme. *Id*. at 41-45 (asserting that "the jurisdictional line drawn by the Commission must govern").[16]

The Court recognized these concerns, noting that "if a generator is permitted to net its power use against its power output on a monthly basis, as opposed to an hourly basis, its costs will be lower … because a generator could often produce

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[15] *See also id*. at 40-45 (arguing that different station power netting intervals would hinder the pro-competitive aims of the Commission's station power policies); Tariff Rehearing Order at P 76 ("a state retail tariff that impairs the ability of merchant generators to utilize the netting provisions of the ISO's station power protocol prevents the generators from self-supplying station power and forces them to pay for fictitious energy purchases when they are, in fact, self-supplying") (internal quotation marks and alterations omitted), JA 279; *id*. P 83 (permitting Edison to impose above-market retail charges on self-supplying generators would "prevent a merchant generator from fully-exercising its right to self-supply under the [California ISO's] Station Power Protocol"), JA 282.

[16] *See also* Complaint Rehearing Order at P 13 (explaining that "when there is a conflict between station power provision in Commission-jurisdictional and state-jurisdiction tariffs, the former must control"), JA 151-52.

enough power in a month to totally avoid any retail charges." *Southern California Edison*, 603 F.3d at 998. *See also id*. at 1002 (noting the Commission's "rather obvious[] concern about the competitive position of the independent generators *vis-a-vis* those utilities who still maintain their own generator capacity"). While these issues gave rise to "a familiar sort of preemption argument," the Court did "not see the conflict." *Id*. at 1001. In the Court's view, "the netting periods for power and transmission need not be the same," since, "in an unbundled market, transmission and power are procured through separate transactions." *Id*. at 1002.

On remand, the Commission understood the Court's decision, rejecting its jurisdictional analysis, as precluding it from exercising its jurisdiction over the transmission of station power in a manner that preempts the State from determining whether the procurement of station power involves a retail sale. *See* Remand Order at P 16, JA 5; Remand Rehearing Order at P 24, JA 15. The Commission recognized that generators may "face increased costs due to the application of different federal and state netting periods," but explained that "any increased charges due from generators are a result of the state's approach to estimating station power and are, simply put, not within our jurisdictional purview under the D.C. Circuit Decision." Remand Rehearing Order at P 24, JA 15.

2. The "trapping" argument mischaracterizes the function of the Station Power Protocol.

Calpine and the Associations argue that inconsistent federal and state netting

intervals result in the inequitable "trapping" of a portion of the generator's net output. *See* Br. at 42, 57-59, 64; Ass'n Br. at 23. They contend that, under the Station Power Protocol, a generator's self-supplied station power "is deemed not available for transmission and wholesale sale," but, under state netting rules, the generator is obligated to purchase its station power at retail rates (if it is not supplied via Permitted Netting). Br. at 58. This purportedly results in "energy trapped in a regulatory no man's land – where it will not be recognized by the Commission as transmitted and available for sale at wholesale and also will not be available to serve the generator's station power requirements." Ass'n Br. at 23.

But again, the Station Power Protocol does not determine the amount of energy a generator injects into the grid for resale. The Protocol's netting procedure only assesses whether and to what extent Commission-jurisdictional transmission is used to satisfy the generator's station power needs. Tariff Order at P 57, JA 179. While a net output figure is calculated to determine whether station power is self-supplied, the Protocol does not deem the difference between a generator's gross output and net output (*i.e.*, its station power intake) unavailable for sale at wholesale. Instead, "generators are permitted to sell the energy they produce in real time at prevailing market prices." Br. at 25-26. *See also* Tariff Order at P 57 ("Hourly energy pricing is not affected by calculations of net output …."), JA 179; Remand Rehearing Order at P 26 (noting generators' acknowledgment "that

'energy payments to the generator would be calculated based on the full 100 MW hours'"), JA 16.

To be sure, there may be instances where the Station Power Protocol would deem a generator to have self-supplied its station power and not used any transmission (*e.g.*, if a net positive generator self-supplied on-site), while state netting rules would deem that same generator to have purchased its station power requirements at retail. The Commission, however, recognized that *Southern California Edison* "determined that a potential mismatch between energy transmission and generation via the application of differing federal and state netting periods does not permit us to exercise our jurisdiction in a manner that defines when a retail sale occurs." Remand Rehearing Order at P 27 (citing *Southern California Edison*, 603 F.3d at 1002), JA 17. *See also Southern California Edison*, 603 F.3d at 1002 ("It is, of course, true that under differing netting periods FERC can conclude that no transmission for station power took place in a month in which California would recognize retail sales of that power, but that is hardly a conflict.").

Likewise, different federal and state netting intervals could result in a generator being required to purchase station power at retail (*e.g.*, if it were net negative over an hourly netting interval) in circumstances where it would be deemed to have self-supplied its station power under the Station Power Protocol

(*e.g.*, if it were net positive over a monthly netting interval). But again, the Commission viewed this as "a consequence of the court's determination that the netting period for transmission and power need not be the same." Remand Rehearing Order at P 28, JA 17.

The Commission therefore reasonably declined to exercise its jurisdiction over the transmission of station power in a manner that preempts the State from determining whether the procurement of station power involves a retail sale. *See Southern California Edison*, 603 F.3d at 1000 (while not ruling on intervenors' trapping argument, because the Commission had not relied on that rationale in the underlying orders, the Court nevertheless remarked that it did "not see any such claim in this case").

D. The Commission Properly Found That *Southern California Edison* Precluded It From Remedying Any Disparity Between Merchant Generators And Traditional Utilities With Respect To The Procurement Of Station Power.

Calpine and supporting Associations argue that the Commission must exercise its authority under sections 205(b) and 206(a) of the Federal Power Act, 16 U.S.C. §§ 824d(b), 824e(a), to prevent undue discrimination between merchant generators and traditional utilities arising from the procurement of station power. Br. at 65-66; Ass'n Br. at 24-28. They contend that if utilities are permitted to employ a shorter netting interval to measure the procurement of station power than that used by the California ISO for station power transmission charges, merchant

generators will be saddled with retail charges that integrated utilities are able to avoid. Br. at 66; Ass'n Br. at 25-27.

The Commission identified these same concerns when it developed its station power policies.[17] The disparity between traditional utilities and merchant generators arises from the imposition of retail charges on the procurement of station power when it is characterized as a sale under state tariffs. Although retail sales are plainly a matter of state jurisdiction, 16 U.S.C. § 824(b)(1), the Commission believed it could remedy any disparity by exercising its jurisdiction over the transmission of station power in a manner that defines when such station power is self-supplied and purchased at retail.

While the Commission believed its characterization of the manner in which station power is procured must govern over any conflicting state characterization, the Court held that, "[u]nless a transaction falls within FERC's wholesale or transmission authority, it doesn't matter how FERC characterizes it." *Southern California Edison*, 603 F.3d at 1001. And here, the Commission found that the

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[17] *See, e.g.*, Complaint Rehearing Order at P 25 (station power policies "prevent[] competing suppliers from being charged inappropriate costs by utilities with whom they compete for load, thus encouraging competition in electricity products"), JA 156; *PJM II*, 94 FERC ¶ 61,251, at 61,893 (station power policies "will better ensure comparable treatment, and will address the concerns of the merchant generators that some vertically-integrated utilities are favoring their own or affiliate generating facilities to the competitive disadvantage of merchant generators").

procurement of station power – as opposed to its transmission – does not fall within its jurisdiction. *See supra* pp. 29, 32-40. Accordingly, the Commission reasonably determined that *Southern California Edison* precluded it from remedying, in this instance, any disparity between merchant generators and traditional utilities with respect to the procurement of station power. *See* Remand Rehearing Order at P 28 (finding that the need for merchant generators to purchase station power at retail "is a consequence of the court's determination, … we cannot act to rectify it"), JA 17.

III. THE COMMISSION REASONABLY DECLINED TO ORDER MODIFICATIONS TO THE STATION POWER PROTOCOL APART FROM THOSE REQUIRED BY THE *SOUTHERN CALIFORNIA EDISON* DECISION.

On remand, the Commission understood its task as "limited to implementation of the jurisdictional findings of the Court of Appeals," Remand Rehearing Order at P 30, JA 17: specifically, the Court's holding that the Commission lacks jurisdiction to require the use of the same netting method employed by the California ISO to calculate transmission charges to identify retail charges under state tariffs. Remand Order at PP 8-9, 16, JA 4, 5. Accordingly, the Commission ordered the California ISO to revise the Station Power Protocol so that it "address[es] only Commission-jurisdictional transmission of station power and employ[s] a Commission-approved netting period to calculate transmission load." *Id*. P 16, JA 5-6. The Commission also encouraged interested parties to

make use of the previously-approved stakeholder process to determine the revisions needed to better reconcile the Station Power Protocol with state law. *Id.* P 16 n.21, JA 6; Remand Rehearing Order at PP 28, 30, JA 17-18.

Calpine contends the Commission erred in failing "to consider the impact its orders will have on the justness and reasonableness" of the Station Power Protocol. Br. at 35. It asserts that, because the Protocol no longer applies to the exclusion of any applicable retail tariff, self-supplying generators may be subjected to double charges. Br. at 67. But as the Commission noted, and as Calpine acknowledges (*id.*), "no generator is required to self-supply under the terms of the Station Power Protocol, and any generator that is currently registered … can deregister." Remand Rehearing Order at P 28, JA 17.

Calpine further notes that the California Public Utilities Commission has approved certain retail tariffs that may permit utilities to retroactively charge merchant generators for station power taken since the Commission's approval of the Station Power Protocol. Br. at 68. Calpine contends that it "would not have chosen to participate" in the California ISO's station power program "if it knew that it was going to … be assessed retail charges as though it was not self-supplying at all." *Id.* But Edison and the California Public Utilities Commission first sought appellate review of the Commission's extension of its station policies to the California market in August 2005 – seven months before the Station Power

Protocol became effective. *See S. Cal. Edison Co. v. FERC*, Nos. 05-1327, 05-1331 (D.C. Cir.).[18] In 2006, Edison sought authorization from the California Public Utilities Commission to impose certain retail and other load-based charges on generators using the Station Power Protocol. *See* Tariff Rehearing Order at P 47, JA 270. And in 2009, Edison and other utilities filed tariffs that specified that retail charges for station power service might be assessed in the event the Commission's orders were overturned on appeal. *See* NRG Companies Rehearing Request, filed Sept. 29, 2010 (R. 21), Attachment A at p. 3 & Sheet 2, JA 426, 433. From the start and throughout these proceedings, generators were thus on notice of the possibility that they might be assessed retail charges for station power if the Commission's orders were vacated on appeal.

Calpine's fundamental concern is that, at some point, utilities may retroactively assess charges under state retail tariffs for station power taken under the Station Power Protocol between April 1, 2006 (the effective date of the Station Power Protocol) and August 10, 2010 (the date of the Remand Order). Calpine acknowledges that, should this happen, it could seek relief from the California

[18] California Public Utilities Commission's appeal was voluntarily dismissed in January 2009. *See* Order, dated Jan. 7, 2009, in D.C. Cir. No. 05-1331. Edison's appeal was held in abeyance pending the Commission's approval of the revised Station Power Protocol, then consolidated with Edison's appeal of that approval (D.C. Cir. No. 08-1384), and resolved in *Southern California Edison*.

Public Utility Commission. *See* Br. at 69. Likewise, if Calpine believes that the retroactive assessment of retail charges for station power renders charges assessed under the California ISO's Tariff unjust and unreasonable in violation of the Federal Power Act, it could petition the Commission for relief. *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229-30 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order. Under these circumstances, the Commission could properly conclude that the public interest required the producers to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest.").

CONCLUSION

For the reasons stated, the petition for review should be denied, and the Commission's orders affirmed, in all respects.

Respectfully submitted,

Michael A. Bardee
General Counsel

Robert H. Solomon
Solicitor

/s/ Robert M. Kennedy
Robert M. Kennedy
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-8904
FAX: (202) 273-0901
robert.kennedy@ferc.gov

February 9, 2012

Southern California Edison Co. v. FERC **D.C. Cir. No. 11-1122**

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 11,810 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, (v) certificates of service, and (vi) addenda.

/s/ Robert M. Kennedy

Robert M. Kennedy
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: (202) 502-8904
Fax: (202) 273-0901

February 9, 2012

ADDENDUM

STATUTES
AND
REGULATIONS

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 703. Form and venue of proceeding

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

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

(i) a copy of the rule;

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

(iii) the proposed effective date of the rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

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

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

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

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

EFFECTIVE DATE OF 2005 AMENDMENT

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

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

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

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

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

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

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

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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.

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

Section 4 of Pub. L. 100–473 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.''

[1] See References in Text note below.

AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

SOURCE: Order 271, 28 FR 10573, Oct. 2, 1963, unless otherwise noted.

Subpart A—Application

§ 35.1 Application; obligation to file rate schedules, tariffs and certain service agreements.

(a) Every public utility shall file with the Commission and post, in conformity with the requirements of this part, full and complete rate schedules and tariffs and those service agreements not meeting the requirements of § 35.1(g), clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy subject to the jurisdiction of this Commission, the classifications, practices, rules and regulations affecting such rates, charges, classifications, services, rules, regulations or practices, as required by section 205(c) of the Federal Power Act (49 Stat. 851; 16 U.S.C. 824d(c)). Where two or more public utilities are parties to the same rate schedule or tariff, each public utility transmitting or selling electric energy subject to the jurisdiction of this Commission shall post and file such rate schedule, or the rate schedule may be filed by one such public utility and all other parties having an obligation to file may post and file a certificate of concurrence on the form indicated in § 131.52 of this chapter: *Provided, however,* In cases where two or more public utilities are required to file rate schedules or certificates of concurrence such public utilities may authorize a designated representative to file upon behalf of all parties if upon written request such parties have been granted Commission authorization therefor.

(b) A rate schedule, tariff, or service agreement applicable to a transmission or sale of electric energy, other than that which proposes to supersede, cancel or otherwise change the provisions of a rate schedule, tariff, or service agreement required to be on file with this Commission, shall be filed as an initial rate in accordance with § 35.12.

(c) A rate schedule, tariff, or service agreement applicable to a transmission or sale of electric energy which proposes to supersede, cancel or otherwise

change any of the provisions of a rate schedule, tariff, or service agreement required to be on file with this Commission (such as providing for other or additional rates, charges, classifications or services, or rules, regulations, practices or contracts for a particular customer or customers) shall be filed as a change in rate in accordance with § 35.13, except cancellation or termination which shall be filed as a change in accordance with § 35.15.

(d)(1) The provisions of this paragraph (d) shall apply to rate schedules, tariffs or service agreements tendered for filing on or after August 1, 1976, which are applicable to the transmission or sale of firm power for resale to an all-requirements customer, whether tendered pursuant to § 35.12 as an initial rate schedule or tendered pursuant to § 35.13 as a change in an existing rate schedule whose term has expired or whose term is to be extended.

(2) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to give the party furnishing service the unrestricted right to file unilateral rate changes under section 205 of the Federal Power Act:

Nothing contained herein shall be construed as affecting in any way the right of the party furnishing service under this rate schedule to unilaterally make application to the Federal Energy Regulatory Commission for a change in rates under section 205 of the Federal Power Act and pursuant to the Commission's Rules and Regulations promulgated thereunder.

(3) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to withhold from the party furnishing service the right to file any unilateral rate changes under section 205 of the Federal Power Act:

The rates for service specified herein shall remain in effect for the term of _____ or until _____, and shall not be subject to change through application to the Federal Energy Regulatory Commission pursuant to the provisions of Section 205 of the Federal Power Act absent the agreement of all parties thereto.

(4) Rate schedules covered by the terms of paragraph (d)(1) of this section, but which are not covered by paragraphs (d)(2) or (d)(3) of this section, are not required to contain either of the boilerplate provisions set forth in paragraph (d)(2) or (d)(3) of this section.

(e) No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge or compensation for or in connection with electric service subject to the jurisdiction of the Commission, or impose any classification, practice, rule, regulation or contract with respect thereto, which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown.

(f) A rate schedule applicable to the sale of electric power by a public utility to the Bonneville Power Administration under section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act (Pub. L. No. 96–501 (1980)) shall be filed in accordance with subpart D of this part.

(g) For the purposes of paragraph (a) of this section, any service agreement that conforms to the form of service agreement that is part of the public utility's approved tariff pursuant to § 35.10a of this chapter and any market-based rate agreement pursuant to a tariff shall not be filed with the Commission. All agreements must, however, be retained and be made available for public inspection and copying at the public utility's business office during regular business hours and provided to the Commission or members of the public upon request. Any individually executed service agreement for transmission, cost-based power sales, or other generally applicable services that deviates in any material respect from the applicable form of service agreement contained in the public utility's tariff and all unexecuted agreements under which service will commence at the request of the customer,

are subject to the filing requirements of this part.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 541, 40 FR 56425, Dec. 3, 1975; Order 541–A, 41 FR 27831, July 7, 1976; 46 FR 50520, Oct. 14, 1981; Order 337, 48 FR 46976, Oct. 17, 1983; Order 541, 57 FR 21734, May 22, 1992; Order 2001, 67 FR 31069, May 8, 2002; Order 714, 73 FR 57530, 57533, Oct. 3, 2008; 74 FR 55770, Oct. 29, 2009]

§ 35.2 Definitions.

(a) *Electric service*. The term *electric service* as used herein shall mean the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale for resale in interstate commerce, and may be comprised of various classes of capacity and energy sales and/or transmission services. *Electric service* shall include the utilization of facilities owned or operated by any public utility to effect any of the foregoing sales or services whether by leasing or other arrangements. As defined herein, *electric service* is without regard to the form of payment or compensation for the sales or services rendered whether by purchase and sale, interchange, exchange, wheeling charge, facilities charge, rental or otherwise.

(b) *Rate schedule*. The term *rate schedule* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing and may take the physical form of a contract, purchase or sale or other agreement, lease of facilities, or other writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A rate schedule is designated with a Rate Schedule number.

(c)(1) *Tariff*. The term *tariff* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section offered on a generally applicable basis, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A tariff is designated with a Tariff Volume number.

(2) *Service agreement*. The term *service agreement* as used herein shall mean an agreement that authorizes a customer to take electric service under the terms of a tariff. A service agreement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A service agreement is designated with a Service Agreement number.

(d) *Filing date*. The term *filing date* as used herein shall mean the date on which a rate schedule, tariff or service greement filing is completed by the receipt in the office of the Secretary of all supporting cost and other data required to be filed in compliance with the requirements of this part, unless such rate schedule is rejected as provided in § 35.5. If the material submitted is found to be incomplete, the Director of the Office of Energy Market Regulation will so notify the filing utility within 60 days of the receipt of the submittal.

(e) *Posting* (1) The term posting as used in this part shall mean:

(i) Keeping a copy of every rate schedule, service agreement, or tariff of a public utility as currently on file, or as tendered for filing, with the Commission open and available during regular business hours for public inspection in a convenient form and place at the public utility's principal and district or division offices in the territory served, and/or accessible in electronic format, and

(ii) Serving each purchaser under a rate schedule, service agreement, or tariff either electronically or by mail in accordance with the service regulations in Part 385 of this chapter with a copy of the rate schedule, service agreement, or tariff. Posting shall include, in the event of the filing of increased rates or charges, serving either electronically or by mail in accordance with the service regulations in Part 385 of this chapter each purchaser under a

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 9th day of February 2012, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

Anna Jennifer Valdberg Southern California Edison Company 2244 Walnut Grove Avenue Rosemead, CA 91770	US Mail
Ashley Charles Parrish David G. Tewksbury King & Spalding, LLP 1700 Pennsylvania Avenue, NW Suite 200 Washington, DC 20006-4706	Email
Brian Michael Meloy Leonard, Street and Deinard, PA 150 South Fifth Street Suite 2300 Minneapolis, MN 55402	Email
Charles Glaston Cole Jennifer L. Key Steptoe & Johnson LLP 1330 Connecticut Avenue, NW Washington, DC 20036-1795	Email
Daniel Shonkwiler Roger Edward Collanton California Independent System Operator Corporation 250 Outcropping Way Folsom, CA 95630	Email

Donald E. Brookhyser Alcantar & Kahl 1300 SW Fifth Avenue Suite 1750 Portland, OR 97201	Email
Jennifer R. Hasbrouck Southern California Edison Company 2244 Walnut Grove Avenue Rosemead, CA 91770	Email
Michael Alcantar Alcantar & Kahl 1300 SW Fifth Avenue Suite 1750 Portland, OR 97201	US Mail
Neil Lawrence Levy Stephanie Szu-Ping Lim King & Spalding, LLP 1700 Pennsylvania Avenue, NW Suite 200 Washington, DC 20006-4706	US Mail
Robert C Fallon Leonard, Street & Deinard, PA 1350 I Street, NW Suite 800 Washington, DC 20005	Email

/s/ Robert M. Kennedy
Robert M. Kennedy
Attorney

Federal Energy Regulatory Commission
Washington, DC 20426
Tel: (202) 502-8904
Fax: (202) 273-0901
Email: robert.kennedy@ferc.gov