ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 11-1283

MOUSSA I. KOUROUMA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

TONY WEST
ASSISTANT ATTORNEY GENERAL

MARK B. STERN
LINDSEY POWELL
ATTORNEYS, APPELLATE STAFF

CIVIL DIVISION
U.S. DEPARTMENT OF JUSTICE
950 PENNSYLVANIA AVE., NW
WASHINGTON, D.C. 20530

MICHAEL A. BARDEE
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

ROBERT M. KENNEDY
ATTORNEY

FEDERAL ENERGY REGULATORY COMMISSION
888 FIRST STREET, NE
WASHINGTON, D.C. 20426

Corrected Copy: February 22, 2012

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and *Amici*

The parties before this Court are identified in Petitioner's brief.

B. Ruling Under Review

Moussa I. Kourouma d/b/a Quntum Energy LLC, "Order on Show Cause Response," 135 FERC ¶ 61,245 (June 16, 2011), JA 155.

C. Related Cases

This case has not been before this Court or any other court, and counsel is not aware of any other related cases pending before this or any other court.

/s/ Robert M. Kennedy
Attorney

February 3, 2012

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STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably determined that section 31(d) of the Federal Power Act, 16 U.S.C. § 823b(d), did not require an evidentiary hearing before assessing a civil penalty against Petitioner Moussa I. Kourouma for violations of FERC regulations, where Mr. Kourouma admitted the material facts alleged and acknowledged that there was no basis to hold a hearing.

2. Whether the Commission reasonably determined that section 35.41(b) of its Federal Power Act regulations, 18 C.F.R. § 35.41(b), which obligates parties

to provide "accurate and factual information" in any communications with the Commission, and provides a safe harbor to those that exercise due diligence in connection with such communications, does not require proof that a party intended to deceive the Commission.

3. Whether the Commission reasonably found that the undisputed facts established that Mr. Kourouma knowingly submitted false or misleading information to FERC and PJM Interconnection LLC ("PJM") in violation of 18 C.F.R. § 35.41(b), where Mr. Kourouma admitted using the names of his one-year-old daughter and a family acquaintance to hide his participation in the formation and operation of Quntum Energy LLC.

4. Whether the Commission reasonably determined that Mr. Kourouma's knowing submission of false or misleading information to FERC and PJM warranted the imposition of a $50,000 civil penalty.

STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in Addendum A to this brief.

STATEMENT OF JURISDICTION

This case concerns a civil penalty assessed against Mr. Kourouma for violations of the Commission's market behavior regulations that impose a duty of candor upon wholesale energy market participants in their communications with

the Commission. The penalty was imposed pursuant to section 316A of the Federal Power Act which makes it unlawful for any person to violate any rule issued under Part II of the Act. 16 U.S.C. § 825o-1(a).[1]

Section 316A(b) provides that civil penalties for such violations shall be assessed in accordance with the procedures specified in section 31 of the Act. *Id.* § 825o-1(b). Section 31(d), in turn, states that "[a]ny person against whom a penalty is assessed under this paragraph may, within 60 calendar days after the date of the order of the Commission assessing such penalty, institute an action in the United States court of appeals for the appropriate judicial circuit." 16 U.S.C. § 823b(d)(2)(B). This specific judicial review provision – unlike the general review provision in section 313 of the Federal Power Act, 16 U.S.C. § 825*l*(b) – does not require a petition for agency rehearing and a rehearing order before judicial review can commence.

Accordingly, unlike the typical petition for review of a FERC order, application to the Commission for rehearing is not a prerequisite to this Court's jurisdiction in this case, and the Court does not have the benefit of a rehearing order from the Commission. *See, e.g.*, *Bluestone Energy Design, Inc. v. FERC*, 74

[1] Part I of the Federal Power Act, enacted in 1920 as the Federal Water Power Act, 41 Stat. 1063, addresses regulation of the Nation's hydroelectric resources. Parts II and III of the Act, added by the Public Utility Act of 1935, 49 Stat. 838, concern regulation of the interstate transmission and wholesale sale of electricity.

F.3d 1288, 1293 (D.C. Cir. 1996) (observing that section 31(d)(2)(B) of the Federal Power Act "does not require a party challenging a penalty to seek rehearing; a party against whom the Commission assesses a penalty may appeal directly to an appropriate court within sixty days").

INTRODUCTION

In February 2009, Moussa Kourouma created Quntum Energy LLC, an energy trading firm operating in the market organized by PJM, the FERC-approved regional transmission organization for the mid-Atlantic region. In order to evade a contractual agreement not to compete with his then-current employer, Energy Endeavors LP, Mr. Kourouma embarked on a scheme to mask his involvement with Quntum Energy. The scheme included, among other things, listing his one-year-old daughter as the firm's managing member in applications to the Commission, and impersonating a family acquaintance – who had no role in Quntum Energy's activities – in communications with PJM.

In February 2011, the Commission commenced an enforcement action against Mr. Kourouma alleging violations of section 35.41(b) of its Federal Power Act regulations, 18 C.F.R. § 35.41(b), which prohibits participants in Commission-approved markets from submitting false or misleading information, or omitting material information, in communications with the Commission or regional transmission organizations. *See Moussa I. Kourouma d/b/a Quntum Energy LLC*,

134 FERC ¶ 61,105, at P 1 (2011) ("Show Cause Order") (R. 1), JA 1. In response, Mr. Kourouma admitted the facts alleged in the Show Cause Order, acknowledged that there were no disputed issues of material fact, and asserted that there was no basis to hold an evidentiary hearing. Mr. Kourouma argued, however, that he was entitled to summary disposition because he did not intend to deceive the Commission or PJM, but only his employer, Energy Endeavors.

The Commission agreed that an evidentiary hearing was unnecessary, but found that the undisputed facts, when viewed in the light most favorable to Mr. Kourouma, established that he had provided false or misleading information to the Commission and PJM in violation of 18 C.F.R. § 35.41(b). *Moussa I. Kourouma d/b/a Quntum Energy LLC*, 135 FERC ¶ 61,245, at P 10 (2011) ("Assessment Order") (R. 8), JA 158. In order to promote Mr. Kourouma's compliance with the law, and dissuade other market participants from submitting false or misleading information, the Commission imposed a $50,000 penalty to be paid in installments over the course of five years. *Id*. P 55, 57, JA 177. The Commission subsequently stayed the penalty assessment pending the resolution of this appeal.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

The Federal Power Act grants the Commission exclusive authority to regulate the transmission and wholesale sale of electric energy in interstate

commerce. 16 U.S.C. § 824(b). *See also New York v. FERC*, 535 U.S. 1, 6-8 (2002). The Act charges the Commission with the duty to ensure just and reasonable rates in the electric industry, and empowers it to correct rates and practices that are unjust or unreasonable. 16 U.S.C. §§ 824d(a), 824e.

A. The Commission's Market Behavior Rules

In 2001, the Commission became concerned about the potential for abuse and manipulation as competition was becoming more widespread in the wholesale electric markets. An investigation pursuant to section 206 of the Federal Power Act, *id*. § 824e, revealed instances of anticompetitive behavior and led the Commission to conclude that "clearly-delineated rules of the road to govern market participant conduct" were necessary. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorization*, 105 FERC ¶ 61,218, at P 3 (2003) ("Market Behavior Order"). *See also Colo. Office of Consumer Counsel v. FERC*, 490 F.3d 954, 956-57 (D.C. Cir. 2007) (discussing development of Commission's Market Behavior Rules and affirming same).

The "rules of the road" developed by the Commission consisted of six Market Behavior Rules to be included in all tariffs authorizing the sale of electricity at market-based rates. For purposes of this appeal, only Market Behavior Rule 3 – subsequently codified in 18 C.F.R. § 35.41(b) – is relevant. That rule imposes a duty of candor upon market participants when communicating

with the Commission or entities involved in the administration of the wholesale electric markets. Market participants must:

> Provide accurate and factual information and not submit false or misleading information, or omit material information in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators or jurisdictional transmission providers, unless [the market participant] exercised due diligence to prevent such occurrences.

Market Behavior Order, 105 FERC ¶ 61,218 at P 106. Any violation of this obligation would constitute a tariff violation that could lead to, among other things, disgorgement of unjust profits and possible suspension or revocation of the authority to sell at market-based rates. *Id*. at Appendix A.

B. The Commission's Market Behavior Regulations

In 2005, Congress expanded the Commission's enforcement authority with the enactment of section 1283 of the Energy Policy Act of 2005, Pub. L. No. 109-58 (codified in 16 U.S.C. § 824v), which prohibits the use of "any manipulative or deceptive device or contrivance" in connection with FERC-jurisdictional transactions. In Order No. 670, the Commission adopted regulations implementing its new anti-manipulation authority. *See Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047, *reh'g denied*, 114 FERC ¶ 61,300 (2006).

In an effort to promote regulatory clarity, the Commission rescinded those Market Behavior Rules which had been rendered superfluous by its new anti-manipulation regulations. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165, at P 1 (2006). The remaining rules were codified as regulations. *Id*. PP 1, 43. Thus, Market Behavior Rule 3 became section 35.41(b) of the Commission's Federal Power Act regulations, and now provides:

> *Communications*. A Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.

18 C.F.R. § 35.41(b). "Seller" includes "any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act." *Id*. § 35.36(a)(1).

C. The Commission's Civil Penalty Authority

Section 316A of the Federal Power Act makes it "unlawful for any person to violate any provision of subchapter II of this chapter or any rule or order issued under any such provision." 16 U.S.C. § 825o-1(a). The Commission is authorized to impose civil penalties "of not more than $1,000,000 for each day such violation

continues." *Id*. § 825o-1(b). Any such penalty shall be assessed "after notice and opportunity for public hearing, in accordance with the same provisions as are applicable under section 823b(d) of this title in the case of civil penalties assessed under section 823b of this title." *Id*.

1. Statutory procedures for penalty assessments

Section 31(d) of the Federal Power Act, 16 U.S.C. § 823b(d) – which addresses civil penalties for violations of Part I of the Act – provides two procedural options for those who receive notice of a proposed penalty from the Commission. A party may choose to have the penalty immediately assessed by the Commission. In such circumstances, the law and facts underlying the assessment would be subject to *de novo* review in a United States district court during any collection action commenced by the Commission. 16 U.S.C. § 823b(d)(3). Alternatively, a party may elect to have the Commission "assess the penalty, by order, after a determination of violation has been made on the record after an opportunity for an agency hearing pursuant to section 554 of title 5 before an administrative law judge." *Id*. § 823b(d)(2)(A). Any such assessment order "shall include the administrative law judge's findings and the basis for such assessment." *Id*. In the event a penalty is assessed under section 31(d)(2), a party may, within 60 days, seek judicial review in the appropriate United States court of appeals,

which may "affirm[], modif[y], or set[] aside in whole or in part, the order of the Commission." *Id*. § 823b(d)(2)(B).

2. Regulatory procedures for penalty assessments

Before assessing a civil penalty under section 316A of the Federal Power Act, the Commission will issue the respondent a notice of the proposed penalty and a statement of the material facts constituting the violation. *See Statement Of Administrative Policy Regarding The Process For Assessing Civil Penalties*, 117 FERC ¶ 61,317, at P 5.1 (2006). The notice will specify that the respondent has the option of seeking an administrative hearing pursuant to section 31(d)(2), or an immediate penalty assessment under section 31(d)(3). *Id*.

If an administrative hearing is chosen, it will be conducted pursuant to the Commission's Rules of Practice and Procedure. *Id*. P 5.1 n.18. Those rules provide that, in any proceeding before the Commission, summary disposition is available, either on a party's motion or *sua sponte* by the Commission, after notice to, and comment from, the parties where practicable. 18 C.F.R. §§ 385.217(c)(1), (3). Summary disposition is appropriate where "there is no genuine issue of fact material to the decision of a proceeding or part of a proceeding." *Id*. § 385.217(b).

II. MR. KOUROUMA'S SUBMISSION OF FALSE OR MISLEADING INFORMATION

In January 2008, Mr. Kourouma joined Energy Endeavors as an energy trader. Enforcement Staff Report and Recommendation, dated Jan. 7, 2011 ("Staff

Report"), at 5, JA 8 (attached as Appendix A to Show Cause Order, JA 4).[2] In his employment contract, Mr. Kourouma agreed that he would not engage in any business that competes with Energy Endeavors or to independently conduct business with any of its customers within two years of the cessation of his employment with the firm. Affidavit of Moussa I. Kourouma, dated Mar. 13, 2011 ("Kourouma Aff."), at ¶ 2, JA 58 (attached to Motion For Summary Disposition And Answer To Order To Show Cause, filed Mar. 16, 2011 ("Answer") (R. 3), JA 21).

A. The Creation Of Quntum Energy

Concerned with what he perceived to be Energy Endeavors' uncertain future, Mr. Kourouma set about to create his own energy trading firm. Kourouma Aff. at ¶ 9, JA 59. To that end, on February 18, 2009, "acting on [his] own, [Mr. Kourouma] incorporated Quntum Energy LLC" in Delaware. *Id.* At the time, Mr. Kourouma was fully aware of his agreement not to compete with Energy Endeavors. *Id*. Although he "was the principal organizer of Quntum Energy," Staff Report at 7 (internal quotation marks omitted), JA 10, Mr. Kourouma used his one-year-old "daughter's name, [I.F.K.], as the registered agent in order to

[2] In this section, all "Staff Report" citations are to Section III.A of that Report. Mr. Kourouma has "admit[ted] the facts as presented by [Office of Enforcement] Staff in Section III.A of its report, subject to any defense he may have to OE Staff's interpretation or conclusions drawn from those facts." Answer at 3 n.3, JA 26.

avoid making Energy Endeavors aware of [his] involvement in this venture." Kourouma Aff. at ¶ 9, JA 59.

B. Mr. Kourouma's Communications With The Commission And PJM

1. Quntum Energy's application for market-based rate authority

On March 13, 2009, Mr. Kourouma applied to the Commission for authorization to engage in wholesale sales of electric energy, capacity, and ancillary services on behalf of Quntum Energy under section 205 of the Federal Power Act, 16 U.S.C. § 824d. *See* Staff Report at 5, JA 8; Kourouma Aff. at ¶ 10, JA 59; Petition for Acceptance of Initial Tariff, filed Mar. 13, 2009 ("Application") (R. 18), SA 1.[3] In doing so, Mr. Kourouma identified his one-year-old daughter as Quntum Energy's managing director and submitted the application under her purported signature. Staff Report at 6, JA 9; Kourouma Aff. at ¶ 10, JA 60; Application at 4, SA 5. Mr. Kourouma took these steps in order "to hide his participation in the formation, ownership, and active involvement" in Quntum Energy. Staff Report at 7, JA 10. *See also* Kourouma Aff. at ¶ 11, JA 60.

2. Quntum Energy's application for PJM membership

On March 17, 2009, Mr. Kourouma prepared and filed on behalf of Quntum Energy an application for membership in PJM, the Commission-approved regional

[3] Cites to "SA" refer to the Supplemental Appendix filed contemporaneously with this brief.

transmission organization responsible for the operation of the wholesale electricity market in the mid-Atlantic region. Kourouma Aff. at ¶ 12, JA 60. In the application, Mr. Kourouma listed Deckonti Dennis as the sole manager of Quntum Energy. *Id*.; *see also* Staff Report at 6, JA 29. Ms. Dennis was an acquaintance of Mr. Kourouma's wife, whom Kourouma asked to sign the application in order to mask his involvement in Quntum Energy. Kourouma Aff. at ¶ 12, JA 60. "Ms. Dennis was completely unfamiliar with Quntum's business and only signed her name … to documents as instructed by Mr. Kourouma." Staff Report at 7, JA 10. PJM approved Quntum Energy's application effective April 1, 2009. Kourouma Aff. at ¶ 12, JA 60.

3. Quntum Energy's amended application for market-based rate authority

On April 3, 2009, Energy Endeavors protested Quntum Energy's application for market-based rate authority, noting that it failed to disclose the identity of Quntum Energy's owners. Kourouma Aff. at ¶ 15, JA 61. *See also* Motion for Leave and Protest, filed Apr. 3, 2009 ("Protest") (R. 21), SA 13. Rather than curing this omission, Mr. Kourouma filed an amended application which identified Deckonti Dennis as president of Quntum Energy and his one-year-old daughter as the firm's managing member. Staff Report at 6, JA 9; Amended Petition for Acceptance of Initial Tariff, filed Apr. 17, 2009 ("Amended Application") (R. 22),

SA 19. The Amended Application "did not identify [Mr. Kourouma's] affiliation with Quntum as its sole owner and manager." Staff Report at 6, JA 9.

Because the Amended Application again failed to identify any owners of Quntum Energy, the Commission issued a deficiency letter on April 22, 2009. Kourouma Aff. at ¶ 17, JA 61; Deficiency Notice, Quntum Energy LLC (FERC Dkt. No. ER09-805 (Apr. 22, 2009)) (R. 24), SA 30. The Commission subsequently rejected Quntum Energy's request for market-based rate authority because this deficiency was not corrected. *See* Rejection of Application for Market-Based Rate Authorization, *Quntum Energy LLC* (FERC Dkt. No. ER09-805 (June 9, 2009)) (R. 26), SA 34.

4. The cessation of Quntum Energy's activities

In addition to protesting Quntum Energy's application for market-based rate authority, Energy Endeavors, through its general partner, Crane Energy Inc., filed an action in Delaware state court seeking to enjoin Mr. Kourouma from trading energy in violation of his covenant not to compete. Staff Report at 6, JA 9; Kourouma Aff. at ¶ 16, JA 61. On May 26, 2009, the court entered a preliminary injunction barring Mr. Kourouma and Quntum Energy from trading energy on any independent system operator market or trading under market-based rate authority from the Commission. Kourouma Aff. at ¶ 18, JA 61. The injunction, which was formalized in a June 5 order, also obligated Mr. Kourouma and Quntum Energy to

"terminate their accounts and/or membership with any and all [independent system operators], including PJM, and withdraw any and all applications pending before FERC." *Crane Energy Inc. v. Kourouma*, No. 4512-VCS (Del. Ch. June 5, 2009) (A copy of this order is attached as Addendum B).

Pursuant to that injunction, Quntum Energy withdrew its membership from PJM via a letter which identified Deckonti Dennis as the firm's manager. Staff Report at 6, JA 9. *See also* May 27, 2009 ltr. from Quntum Energy to PJM, JA 95 (attached as Ex. B to Enforcement Staff's Reply to Answer to Order to Show Cause, filed Apr. 13, 2011 ("Response") (R. 4), JA 65). Before doing so, however, Quntum Energy undertook a series of trades which earned Mr. Kourouma more than $8,000 in profits during April and May 2009. Br. 11. Throughout his dealings with PJM, "Mr. Kourouma represented to PJM employees in emails and on phone calls that he was 'Dennis' or 'Mr. Deckonti Dennis' so as to conceal from Energy Endeavors his participation and involvement in the activities of Quntum." Staff Report at 7, JA 10. *See also* Response at Exs. C & D, JA 96-99.

On May 27, 2009, Quntum Energy filed a notice asking the Commission to cancel its market-based rate tariff. Staff Report at 6 n.22, JA 9; Kourouma Aff. at ¶ 16, JA 61. The filing was submitted under the name of Deckonti Dennis, who was now identified as Quntum Energy's Vice President. Staff Report at 6, JA 9. On June 29, 2009, the Commission rejected the submittal as moot because Quntum

Energy's request for market-based rate authority already had been denied. *See* Rejection of Notice of Cancellation As Moot, *Quntum Energy LLC* (FERC Dkt. No. ER09-1205 (June 29, 2009)) (R. 29).

III. THE PROCEEDINGS BELOW

A. The Show Cause Order

In an order issued February 14, 2011, FERC directed Mr. Kourouma to show cause why he had not violated section 35.41(b) of the Commission's Federal Power Act regulations by submitting false or misleading information regarding his role in Quntum Energy, and omitting material information regarding the true owner of the firm. Show Cause Order at P 1, JA 1. The order summarized the findings of the investigation conducted by FERC's Office of Enforcement Staff and attached the Staff Report. *Id*. P 2, JA 1-2. Mr. Kourouma was instructed to file an answer admitting or denying each material allegation contained in the Staff Report and identifying all disputed issues of fact. *Id*. P 3 n.7, JA 2.

Mr. Kourouma subsequently filed a combined answer and motion for summary disposition, in which he "admit[ted] the facts as presented by [Office of Enforcement] Staff." Answer at 3 n.3, JA 26. Mr. Kourouma asserted that, because "there are no facts in dispute and only questions of law remain, summary disposition is appropriate … [and] there is no basis to hold a hearing." *Id*. at 14, JA 37. Instead, Mr. Kourouma argued that, as a matter of law, he could not be

found to have violated section 35.41(b) because he only intended to deceive Energy Endeavors, not the Commission or PJM. *Id*. at 15-26, JA 38-49. In its response, Enforcement Staff agreed that summary disposition was appropriate as there were no genuine issues of material fact. Staff argued, however, that Mr. Kourouma's admissions established the necessary factual predicate for finding a violation of the Commission's market behavior regulations. *See* Response at 1-2, JA 65-66.[4]

B. The Assessment Order

In the June 16, 2011 Assessment Order, the Commission determined that it was unnecessary to convene an evidentiary hearing in light of Mr. Kourouma's admission of the material facts underlying the alleged violation. Assessment Order at P 12, JA 159. Those undisputed facts, even when viewed in the light most favorable to Mr. Kourouma, established that he had violated section 35.41(b) in the course of communications with the Commission and PJM. *Id*. P 10, JA 158.

Mr. Kourouma's statements regarding the various management positions purportedly held by his one-year-old daughter and family acquaintance were "clearly false" and "clearly misleading" given that Mr. Kourouma "was solely responsible for all of Quntum's activities." *Id*. P 24, JA 166. The failure to

[4] Mr. Kourouma subsequently filed an answer to the Enforcement Staff's Reply (R. 5, JA 131), which prompted a reply from the Staff (R. 6, JA 146), followed by a surreply from Mr. Kourouma (R. 7, JA 150). The Commission declined to accept any of these filings. Assessment Order at P 5, JA 156.

identify Mr. Kourouma's ownership of Quntum Energy also amounted to a material omission given that such information is "of fundamental importance to the Commission's market-based rate analysis." *Id*. P 24 n.48, JA 166. Mr. Kourouma's submission of this false or misleading information did not stem from inadvertence or mistake, but rather was part of a deliberate effort "to hide his involvement with Quntum from his former employers." *Id*. P 27, JA 167.

The Commission determined that a $50,000 penalty was appropriate, after due consideration of the seriousness of violations, any mitigating factors, and Mr. Kourouma's finances. *Id*. PP 43-57, JA 173-77. After reviewing supplemental financial information, the Commission subsequently agreed to stay the penalty assessment pending resolution of Mr. Kourouma's appeal. *Moussa I. Kourouma d/b/a Quntum Energy LLC*, 137 FERC ¶ 61,205, at P 15 (2011).

SUMMARY OF ARGUMENT

1. In the proceedings below, Mr. Kourouma admitted that, in an effort to evade a covenant not to compete with his employer, he represented to the Commission and PJM that his one-year-old daughter and a family acquaintance held management roles with Quntum Energy when, in fact, those individuals played no role in the firm. Mr. Kourouma further acknowledged that there were no material facts in dispute regarding his alleged violation of the duty of candor imposed by the Commission's market behavior regulations, but only questions of

law, and that there was accordingly "no basis to hold a hearing." Answer at 14, JA 37.

Now that the Commission has resolved those questions of law against him, Mr. Kourouma contends for the first time that section 31(d)(2)(A) of the Federal Power Act, 16 U.S.C. § 823b(d)(2)(A) – which authorizes civil penalty assessments after "an opportunity for an agency hearing" – guarantees him an evidentiary hearing. But even where an opportunity for hearing is provided by statute, "no evidentiary hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law." *Citizens for Allegan Cnty. Inc. v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969).

2. Section 35.41(b) of the Commission's regulations prohibits the submission of "false or misleading information" in any communication with the Commission and certain FERC-jurisdictional entities, unless the communicant "exercised due diligence to prevent such occurrences." 18 C.F.R. § 35.41(b). Mr. Kourouma contends that his misrepresentations were only intended to deceive his employer, Energy Endeavors, and argues therefore that section 35.41(b) should be read only to prohibit knowing misrepresentations made with intent to deceive the Commission.

But this intent standard has no support in the plain language of section 35.41(b), its history, or analogous precedent. As the Commission reasonably

found, section 35.41(b) prohibits all submissions of false or misleading information, but grants an exception to parties that have exercised due diligence to prevent the submission of such information. Assessment Order at P 20, JA 164. Indeed, when Market Rule 3 (the predecessor to section 35.41(b)) was adopted, the Commission specifically rejected the inclusion of an express intent requirement. *Id*. P 22, JA 165.

The assertion that section 35.41(b) is unconstitutionally vague and overbroad is also misguided. The regulation imposes an obligation to "provide accurate and factual information and not submit false or misleading information, or omit material information" in communications with the Commission and other jurisdictional entities. 18 C.F.R. § 35.41(b). This straight-forward language is sufficiently specific to provide market participants with fair warning that their communications must be truthful.

3. The Commission reasonably determined that the undisputed facts demonstrated that Mr. Kourouma submitted false and misleading information to the Commission and PJM. All of Mr. Kourouma's arguments regarding the purported unreasonableness of this conclusion fall before his admissions that he (a) concealed his ownership and management of Quntum Energy, (b) represented to the Commission that his one-year-old daughter was the firm's managing

member, and (c) impersonated a family acquaintance in communications with PJM, all in an effort to evade his covenant not to compete.

Ignoring the bulk of his misrepresentations, Mr. Kourouma claims that his failure to identify his ownership of Quntum Energy should be excused by his lack of sophistication and familiarity with FERC practice. But Mr. Kourouma is presumed to be familiar with the Commission's orders, regulations, and forms, each of which call for such disclosure. Moreover, Mr. Kourouma's application for market-based rate authority was met with a protest that specifically highlighted the absence of any ownership information. Rather than provide that information, Mr. Kourouma continued his charade by amending his application to falsely designate a family acquaintance as Quntum Energy's president.

4. The Commission reasonably imposed a $50,000 civil penalty upon Mr. Kourouma. Given Mr. Kourouma's numerous violations persisting over a number of months, this figure represents a tiny fraction of the maximum statutory penalty of $1 million per violation, per day. The Commission reasonably accommodated Mr. Kourouma's current financial situation by making the penalty payable in installments over the course of five years. It was permissible for the Commission to observe that the imposition of a civil penalty would deter other market participants from engaging in similar conduct. Deterrence is an inherent feature of civil penalties, and is relevant to the Commission's analysis of the

"seriousness of the violation" as required by section 316A of the Federal Power Act, 16 U.S.C. § 825o-1(b).

ARGUMENT

I. STANDARD OF REVIEW

Section 31(d)(2)(B) of the Federal Power Act, through its adoption of the judicial review standards of the Administrative Procedure Act, provides for a limited review of Commission penalty assessments. 16 U.S.C. § 823b(d)(2)(B). The Commission's findings of fact must be accepted if supported by substantial evidence. 5 U.S.C. §706(2)(E). The Commission's legal conclusions are similarly entitled to deference so long as they are not arbitrary, capricious, or an abuse of discretion. *Id*. § 706(2)(A). *See also Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1265 (D.C. Cir. 1996) (discussing applicable standard of review). In keeping with this limited review, the Court "will not overturn the Commission's choice of a sanction unless the sanction is either unwarranted in law . . . or without justification in fact." *Bluestone Energy*, 74 F.3d at 1294 (internal quotation marks omitted).

This case concerns, in part, the Commission's interpretation of section 31(d) of the Federal Power Act, as well as section 35.41(b) of its regulations. 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). Similarly, "the Commission's interpretation [of its own regulations] is entitled to substantial deference and subject to reversal only if it is plainly erroneous or inconsistent with the regulation." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (internal quotation marks omitted).

II. THE COMMISSION REASONABLY FOUND THAT SECTION 31(d)(2) OF THE FEDERAL POWER ACT DOES NOT MANDATE AN EVIDENTIARY HEARING WHEN NO MATERIAL FACTS ARE IN DISPUTE.

Before the agency, Mr. Kourouma admitted that he used the names of his one-year-old daughter and a family acquaintance in communications with the Commission and PJM, in order to mask his involvement in the formation and management of Quntum Energy. *See, e.g.*, Staff Report at 5-7, JA 8-10, Kourouma Aff. at ¶¶ 9-18, JA 59-61. He chose "not [to] dispute the material facts alleged," and asserted that "only questions of law remain[ed]," leaving "no basis to hold a hearing." Answer at 14, JA 37.

Now that those admitted facts have been found to constitute a violation of the Commission's market behavior rules, Mr. Kourouma seeks to revisit his

strategic decision. He contends that section 31(d)(2)(A) of the Federal Power Act – which authorizes the Commission to assess civil penalties "after a determination of violation has been made on the record after an opportunity for an agency hearing pursuant to section 554 of title 5 before an administrative law judge," 16 U.S.C. § 823b(d)(2)(A) – guarantees him an evidentiary hearing, even in the absence of any dispute as to the material facts. Br. 26-30. This Court has emphasized, however, that the "right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing." *Citizens for Allegan Cnty.*, 414 F.2d at 1128. *Cf. Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) ("Common sense suggests the futility of hearings where there is no factual dispute of substance.").

A. Evidentiary Hearings Are Not Required Where The Material Facts Are Not In Dispute.

Even where adjudicatory proceedings are provided by statute, "no evidentiary hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law." *Citizens for Allegan Cnty.*, 414 F.2d at 1128. This rule has consistently been applied to sections of the Federal Power Act, as well as sections of the companion Natural Gas Act, providing for "hearings" or the "opportunity for hearings." *See, e.g.*, *id*. at 1128-29 (the "opportunity for hearing" provided by § 203(a)(4) of the Federal Power Act, 16 U.S.C. § 824b(a)(4), does not require an evidentiary hearing "where there is no

dispute on the facts"); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (the "opportunity for hearing" provided by § 7(a) of the Natural Gas Act, 15 U.S.C. § 717f(a), does not require a trial-type hearing "when there are no disputed issues of material fact").[5]

The fact that section 31(d)(2)(A) of the Federal Power Act references "an agency hearing pursuant to section 554" of the Administrative Procedure Act does not change the result. "[N]either the Administrative Procedure Act nor FERC's own precedents require a hearing where there has been no showing that material facts are in dispute." *Pacific Gas & Electric Co. v. FERC*, 746 F.2d 1383, 1386 (9th Cir. 1984). *See also Wisconsin v. FERC*, 104 F.3d 462, 467 (D.C. Cir. 1997) (holding that "the APA [does not] guarantee an unqualified right to an evidentiary hearing," and that such a hearing is only required to resolve "a dispute of material fact").[6]

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[5] *See also Cerro Wire & Cable v. FERC*, 677 F.2d 124, 128-29 (D.C. Cir. 1982) (the "due hearing" referenced in § 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), need not be an "evidentiary hearing when no issue of material fact is in dispute"); *Pa. Pub. Util. Comm. v. FERC*, 881 F.2d 1123, 1126 (D.C. Cir. 1989) (the "hearing" provided by § 7(c), 15 U.S.C. §§ 717f(c), of the Natural Gas Act does not require "a formal trial-type hearing … where there are no material facts in dispute").

[6] *See also Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 750 (6th Cir. 2004) (holding that summary disposition is appropriate in hearings governed by the Administrative Procedure Act and noting that "it would be bizarre if administrative agencies" could not summarily resolve cases when "there are no genuine issues of material fact"). *Cf. Kornman v. SEC*, 592 F.3d 173, 182-83

Mr. Kourouma contends that section 31(d)(2)(A)'s statement that penalty assessment orders "shall include the administrative law judge's findings," 16 U.S.C. § 823b(d)(2)(A), indicates that evidentiary hearings are mandatory in all circumstances. Br. 20, 28. But one "cannot impute to Congress the design of requiring … a hearing when it appears conclusively from the applicant's 'pleadings'" that a hearing is unnecessary. *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621 (1973).

Indeed, in *National Independent Coal Operators Ass'n. v. Klepp*e, 423 U.S. 388 (1976), the Supreme Court held that language in the Federal Coal Mine Health and Safety Act, providing for the assessment of civil penalties only after an "opportunity for hearing" and "a decision incorporating the Secretary's findings of fact," did not preclude the use of summary procedures when an evidentiary hearing was not timely requested, and the alleged violation therefore deemed uncontested. *Id*. at 397-98.[7] The Court observed that the phrase "opportunity for a hearing" "would be meaningless" if the statute were read to require "formal adjudicated

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(D.C. Cir. 2010) (holding that the Investment Advisers Act's reference to findings "on the record after notice and opportunity for hearing" does not preclude the imposition of civil penalties via summary procedures where the material facts are not in dispute).

[7] Section 109(a)(3) of the Act authorized the Interior Secretary to penalize mine operators after notice and "an opportunity for a public hearing" pursuant to the Administrative Procedure Act through a "decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted." *Kleppe*, 423 U.S. at 392-93.

findings" in all circumstances. *Id*. at 398. And in *Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980), the Court further clarified that a statutorily-provided "opportunity for hearing" may be conditioned upon "the identification of a disputed issue of material fact by an interested party." *Id.* at 213.

These precedents demonstrate that the Commission reasonably determined that section 31(d)(2)(A) merely "give[s] the respondent an *opportunity* for an agency hearing before an ALJ before issuing an order assessing a penalty." Assessment Order at P 12, JA 159. And Mr. Kourouma's failure to raise any disputed issues of material fact – the resolution of which is the very purpose of adjudicatory hearings – dispenses with the need for such a hearing. *Id*. ("a hearing before an ALJ is not required and would be a waste of Commission resources").

B. Mr. Kourouma Was Afforded An "Opportunity For Hearing."

Mr. Kourouma cannot deny that he was afforded an "opportunity for hearing." The Commission informed him in writing of the allegations against him, and instructed Mr. Kourouma to admit or deny the factual allegations and identify any disputed issues of fact. *See, e.g.*, Show Cause Order at P 2 & n.7, JA 2. Mr. Kourouma chose "not [to] dispute the material facts alleged." Answer at 14, JA 37. Instead, he asserted that his alleged violation raised "only questions of law," thereby making "summary disposition [] appropriate." *Id*. In so doing, Mr. Kourouma had an opportunity to frame and answer those questions of law. *See*

Assessment Order at P 10 ("We find that the respondent has been afforded a reasonable opportunity to present arguments and factual support by submitting an answer to the Show Cause Order."), JA 158. *See also* Answer at 14 (noting that "there is no basis to hold a hearing"), JA 37.

Mr. Kourouma now claims that he might have made a different strategic choice had he "been aware of FERC's novel interpretation of section 31(d)(2)." Br. 30. For more than 35 years, however, "[t]he case law in this Circuit [has been] clear that an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose," such as where there are no disputed issues of fact. *Indep. Bankers Ass'n. v. Bd. of Governors*, 516 F.2d 1206, 1220 (D.C. Cir. 1975). Nonetheless, Mr. Kourouma raises the specter of a denial of his "due process rights." Br. 30. But "if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between [the parties]." *Codd v. Velger*, 429 U.S. 624, 627 (1972).[8]

Finally, Mr. Kourouma's lament regarding his alleged inability "to challenge FERC's summary findings," and to challenge the arguments presented by Enforcement Staff (Br. 30), ignores the fact that he could have sought rehearing of the Assessment Order before the Commission. *See* 16 U.S.C. § 825*l*(a); *Statement*

[8] *See also* 2 Richard J. Pierce Jr., *Administrative Law* § 8.3 (4th ed. 2002) ("Even when an agency is required by statute or by the Constitution to provide an oral evidentiary hearing, it need do so only if there exists a dispute concerning a material fact.").

Of Administrative Policy Statement Regarding The Process For Assessing Civil Penalties, 117 FERC ¶ 61,317, at P 5.1.a.iv. Instead, Mr. Kourouma made the strategic decision to bring his arguments directly to this Court. *See Blumenthal v. FERC*, 613 F.3d 1142, 1145-46 (D.C. Cir. 2010) (due process requires only a meaningful opportunity to be heard, not an in-person evidentiary hearing; petitioner enjoyed opportunity to submit its objections, especially given opportunity to respond to Commission's findings in petition for rehearing).

III. THE COMMISSION REASONABLY INTERPRETED SECTION 35.41(b) OF ITS FEDERAL POWER ACT REGULATIONS.

Throughout this proceeding, Mr. Kourouma's primary defense has been that he "only" intended to deceive Energy Endeavors, a market participant, and not the Commission and PJM, the market's regulator and operator. *See* Assessment Order at P 15 ("respondent argues that he lacked the requisite intent because his application was not intended to deceive the Commission or its jurisdictional entities"), JA 161. Accordingly, Mr. Kourouma contends that 18 C.F.R. § 35.41(b) must be read to include an intent requirement – specifically, proof of an intentional submission of false or misleading information with the purpose of deceiving the Commission, or another entity enumerated in the regulation. Br. 40-47. In Mr. Kourouma's view, he should not be subject to liability because the Commission and PJM were not the object of his fraudulent scheme, but merely conduits through which the scheme was effectuated.

The Commission reasonably rejected this contention, and held that intent is not an element of a *prima facie* violation of section 35.41(b). Mr. Kourouma argues that (a) the Commission acted arbitrarily in failing to recognize such an intent requirement, and (b) if such a requirement is not recognized, then section 35.41(b) is unconstitutionally vague. Neither contention has merit.

A. Intent Is Not An Element Of A *Prima Facie* Violation Of Section 35.41(b).

Mr. Kourouma does not – and cannot – contend that his proffered intent requirement can be found in the plain language of section 35.41(b). As the Commission explained:

> Section 35.41(b) prohibits the submission of "false or misleading information" or the omission of material information in any communication with the Commission and certain jurisdictional entities, and does not make reference to the seller's intent in doing so; instead, it grants an exception to sellers that have exercised due diligence to prevent the submission of such information

Assessment Order at P 20, JA 164.

Section 35.41(b) was originally promulgated as Market Behavior Rule 3. *See supra* pp. 6-8 (explaining history of 18 C.F.R. § 35.41(b)). When the rule was adopted, the Commission did note that it "prohibits the knowing submission of false or misleading data." *Market Behavior Order*, 105 FERC ¶ 61,218 at P 110. That statement, however, was meant to assure market participants that the Rule's

due diligence defense would ensure that the "inadvertent submission of inaccurate or incomplete information [would] not be sanctioned." *Id*.

Any ambiguity as to whether intent was a necessary element of a *prima facie* violation was eliminated on rehearing of the Market Behavior Order when the Commission considered, and rejected, the contention that the "due diligence standard be further strengthened (or simply replaced) by an express intent requirement." *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 107 FERC ¶ 61,175, at P 96 (2004). The Commission explained that any issues regarding intent could be considered in the context of a due diligence defense, which provides market participants with "sufficient latitude to bring all relevant facts on this issue before the Commission." *Id*.[9] And in 2010, when it issued a revised policy statement regarding civil penalties, the Commission reiterated that "section 35.41(b) does not contain a scienter requirement." *Revised Policy Statement On Penalty Guidelines*, 132 FERC ¶ 61,216, at P 176 (2010). *See*

[9] Mr. Kourouma quotes a snippet from Commissioner Brownell's concurrence in which she states that "intent is a necessary element of any violation of Market Behavior Rule 2(b), 2(c), or 3." 107 FERC ¶ 61,175, at 61,726 (Brownell, Comm'r, concurring). That statement, however, comes in a discussion of how Commissioner Brownell would evaluate issues of intent in the context of the due diligence defense. *See id*. ("I do not intend to hold a duly diligent seller liable for the intentional actions of a rogue trader."). In any event, one Commissioner's concurrence, like that of a judge, does not alter the holding in the majority opinion.

also Assessment Order at PP 21-22 (discussing history of section 35.41(b)), JA 164-65.

Mr. Kourouma argues that this construction of section 35.41(b) is unreasonable because the Commission noted in a policy statement that it would focus its enforcement efforts on "intentional and reckless misrepresentations and false statements aimed at misleading," rather than "inadvertent errors or miscommunications." Br. 45 (internal quotation marks omitted). But that is perfectly consistent with the Commission's conclusion that, while intent is not an element of a *prima facie* violation of section 35.41(b), the due diligence defense will ensure that inadvertent errors will not be penalized. Assessment Order at PP 21-22, JA 164-65.

Unable to find any support in the language of the pertinent regulation or its history, Mr. Kourouma notes that *other* enforcement regulations, like the Commission's market manipulation rules and the SEC's Rule 10b-5, contain a scienter requirement. Br. 46. But that has no bearing on whether such a requirement is imposed by section 35.41(b). Moreover, Mr. Kourouma's invocation of the securities laws hardly supports his position. First, even under Rule 10b-5, it is no defense to assert that a misrepresentation was not intended to deceive investors, but rather some other group. *See, e.g.*, *Semerenko v. Cendant Corp.*, 223 F.3d 165, 176 (3d Cir. 2000) ("it is irrelevant that the

misrepresentations were not made for the purpose or the object of influencing the investment decisions of market participants"). Second, there are a number of provisions in the securities law that, like section 35.41(b), impose an absolute duty of candor while affording a due diligence defense. *See, e.g.*, 15 U.S.C. §§ 77k(a), (b)(3)(A); *id*. at § 77*l*(a)(2). *See also Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) (observing that, under section 11 of the Securities Act, a plaintiff "need only show a material misstatement or omission to establish his *prima facie* case. Liability against the issuer of a security is virtually absolute, even for innocent misstatements. Other defendants bear the burden of demonstrating due diligence.").

In short, Mr. Kourouma can point to nothing in the language of the regulation, its history, or analogous precedent establishing that the Commission's construction of section 35.41(b) was unreasonable.

B. Section 35.41(b) Is Constitutionally Permissible.

1. Section 35.41(b) provides a reasonably prudent person with fair warning as to what conduct is prohibited.

Mr. Kourouma argues that, if section 35.41(b) does not contain an intent requirement, then it is unconstitutionally vague and overbroad. Br. 38-40. This argument is largely founded on the false premise that, as interpreted by the Commission, section 35.41(b) is a "strict liability rule" that imposes penalties upon

"*any* error, misstatement or omission." Br. 38 (emphasis in original). As the Commission has explained, however, section 35.41(b)'s due diligence standard exempts from liability the inadvertent submission of inaccurate or incomplete information. *See* Assessment Order at PP 20-22, JA 164-65.

Section 35.41(b) requires market participants to "provide accurate and factual information and not submit false or misleading information, or omit material information" in communications with the Commission and certain other jurisdictional entities. 18 C.F.R. § 35.41(b). This language is sufficiently specific such that "a reasonably prudent person, familiar with the conditions the regulation[] [is] meant to address and the objectives the regulation[] [is] meant to achieve, would have fair warning of what the regulation[] require[s]." *Freeman United Coal Mining Co. v. Fed. Mine Safety and Health Review Comm'n*, 108 F.3d 358, 362 (1997). *See also United States v. Williams*, 553 U.S. 285, 306 (2008) (rejecting vagueness challenge where determination of whether statute was violated required only "a true or false determination").

A reasonably prudent person would know that it was false or misleading to "represent[] that certain individuals" – particularly a one-year-old daughter and a family acquaintance – "hold management roles with a company when those individuals do not have any role in the company." Assessment Order at P 36, JA 171. Indeed, Mr. Kourouma admits that he intentionally used these names to

conceal his involvement with Quntum Energy. *See, e.g.*, Kourouma Aff. at ¶¶ 10-12, JA 59-60; Staff Report at 7, JA 10.

A reasonably prudent person seeking market-based rate authority also would understand that the omission of ownership information could constitute a material omission. *See* Assessment Order at P 35, JA 170-71. Indeed, the fundamental question in determining whether to grant market-based rate authority is whether the applicant and its affiliates possess market power. *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, at P 7 (2007) (discussing Commission's analysis of whether market-based rate authority should be granted). In Order No. 697, the Commission established that the "first step for a seller seeking market-based rate authority is to file an application to show that it and its affiliates do not have, or have adequately mitigated, market power." *Id*. P 290. Ownership information is critical for this analysis. *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order 697-A, 123 FERC ¶ 61,005, at P 181 n.258 (2008) ("A seller seeking market-based rate authority must provide information regarding its affiliates and its corporate structure or upstream ownership.").

In this regard, the Commission's regulations call for information regarding an applicant's affiliates so it can be determined whether they have the ability to

exercise market power, or whether restrictions on transaction between affiliates must be imposed. *See* 18 C.F.R. § 35.37 (discussing necessary market power analysis); *id*. § 35.39 (discussing affiliate restrictions); *id*. App. B. to Subpart H of Part 35 (form application requiring disclosure of affiliates). "Affiliate" is defined to include "[a]ny person that directly or indirectly owns, controls, or holds with power to vote 10 percent or more of the outstanding voting securities for the specified company." *Id*. § 35.36(a)(9)(i).

While Mr. Kourouma professes ignorance of these requirements, he, like every other person or entity appearing before the Commission, "is held responsible for being familiar with the agency's regulations." Assessment Order at P 35 n.67 (internal quotation marks omitted), JA 171. *See also id*. P 27 n.53 (citing *San Diego Gas & Elec. Co*., 112 FERC ¶ 61,330, at P 8 (2005)), JA 167; *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) ("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation."); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947) ("Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents."). Mr. Kourouma in any event claims no ignorance of the market behavior rule prohibiting the provision of false information.

2. Mr. Kourouma's arguments regarding the attempted withdrawal of his application do not demonstrate that section 35.41(b) is unconstitutional.

Mr. Kourouma asserts that section 35.41(b) is unconstitutionally vague because he "did not have 'fair warning' that the decision to withdraw the application (by cancelling the tariff), instead of correcting it, … would lead to a violation that would not have otherwise existed." Br. 48. But it was not Mr. Kourouma's decision to withdraw the application that led to the enforcement action against him. It was his decision to misrepresent and conceal his role in the management and ownership of Quntum Energy in communications with the Commission and PJM. *See* Assessment Order at P 37, JA 171. The Commission explained that "merely correcting Quntum's application would not resolve the issues presented here." *Id*.

Mr. Kourouma next argues that the Commission discriminated against him because "FERC staff has regularly provided applicants the opportunity to correct filings." Br. 48. He attempts to bolster this claim with the assertion that "he did not intentionally (or 'deliberately' as phrased by FERC) make misrepresentations as part of the subject Application." Br. 49. But it is far too late for Mr. Kourouma to recant his admission that, among other things, "he used his one-year-old daughter's name to hide his participation in the formation, ownership, and active involvement of Quntum and its activities with the Commission and PJM." Staff

Report at 7, JA 10. And while the Commission has provided market participants with the opportunity to correct inadvertent errors or minor deficiencies, Mr. Kourouma has failed to point to any instance "analogous to the case here … involv[ing] the submission of false and misleading statements to the Commission." Assessment Order at P 37, JA 171.

IV. THE COMMISSION REASONABLY GRANTED SUMMARY DISPOSITION AGAINST MR. KOUROUMA.

A. The Commission Reasonably Found That Mr. Kourouma Submitted False Or Misleading Information.

The Commission found that the undisputed facts established that Mr. Kourouma violated section 35.41(b) in his communications with the Commission and PJM. This conclusion was supported by Mr. Kourouma's admission that he submitted applications for market-based rate authority to the Commission which stated that his one-year-old daughter and a family acquaintance held various management positions at Quntum Energy. "These statements were clearly false," since both individuals were "completely unfamiliar with Quntum's business." Assessment Order at P 24, JA 166. The statements were also misleading, as demonstrated by Mr. Kourouma's admission that "he listed [I.F.K.] and Ms. Dennis in order to conceal his own involvement with Quntum." *Id.* *See also id.* P 25 (addressing similar misrepresentations to PJM), JA 167. The Commission also determined that Mr. Kourouma's failure to identify himself as the owner of

Quntum Energy was a material omission, since "a seller seeking market-based rate authority must provide this fundamental information regarding its corporate structure or upstream ownership." *Id*. P 24, JA 166. Mr. Kourouma raises various challenges to these conclusions, none of which have merit.[10]

First, Mr. Kourouma argues that the Commission somehow "twisted" his words when it found that there were no material facts in dispute. Br. 31. But in his response to the Show Cause Order – which instructed him to identify all disputed issues of fact (Show Cause Order at P 3 n.7, JA 2) – Mr. Kourouma unambiguously (a) "admit[ted] the facts as presented by OE Staff in Section III.A of its report" (Answer at 3 n.3, JA 26), (b) asserted that "there are no facts in dispute and only questions of law remain" (*id*. at 14, JA 37), and (c) stated that "there is no basis to hold a hearing." *Id*. That Mr. Kourouma believed the undisputed facts failed, as a matter of law, to establish a violation of section 35.41(b) does not mean that the Commission erred in relying upon his admissions.

Mr. Kourouma next argues the Commission unreasonably found that the use of his one-year-old daughter's name was misleading because he "accurately described the company as it was incorporated in Delaware." Br. 33. But even if

[10] Mr. Kourouma variously labels these arguments as the Commission's failure to (a) view the facts in the light most favorable to him (Br. 30-37), (b) properly employ a reasonably prudent person standard (Br. 50-53), or (c) support its purported ruling regarding Mr. Kourouma's intent with substantial evidence (Br. at 53-55).

true,[11] Mr. Kourouma does not contend that his one-year-old daughter, whom he described as Quntum Energy's managing member in communications with the Commission, played any role in the management of the firm. Moreover, Mr. Kourouma's argument ignores his admission that "he used his one-year-old daughter's name" in communications with the Commission "to hide his participation in the formation, ownership, and active involvement of Quntum." Staff Report at 7, JA 10. *See also* Kourouma Aff. at ¶ 10-11 (admitting that he used his one-year-old daughter's name in applications to the Commission to conceal his activities from Energy Endeavors), JA 59-60.

Mr. Kourouma further contends that the Commission unreasonably found that his use of the name of a family acquaintance in applications to the Commission and communications with PJM was misleading. Mr. Kourouma contends that summary disposition was improper because he "may have been authorized to make such communications." Br. 33. But "mere allegations of disputed fact are insufficient to mandate a hearing; a petitioner must make an adequate proffer of evidence to support them." *Woolen Mill Associates v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990). And this argument too ignores Mr.

[11] According to his affidavit, Mr. Kourouma listed his one-year-old daughter as Quntum Energy's "registered agent" when incorporating the firm in Delaware. Kourouma Aff. at ¶ 9, JA 59. In his application to the Commission, Mr. Kourouma described his one-year-old daughter as Quntum Energy's "managing member." *See* Staff Report at 6, JA 9; Application at 1, SA 2.

Kourouma's admission that Ms. Dennis "was completely unfamiliar with Quntum's business and only signed her name … to documents as instructed by Mr. Kourouma," and that he "represented to PJM employees … that he was 'Dennis' or 'Mr. Deckonti Dennis' so as to conceal from Energy Endeavors his participation and involvement in the activities of Quntum." Staff Report at 7, JA 10. *See also* Kourouma Aff. at ¶ 12 (admitting that he had Ms. Dennis sign the PJM application to conceal his activities from Energy Endeavors), JA 60.

Mr. Kourouma also points to the Commission's failure to cite "specific evidence" in finding that he "'persistently and systematically provided false and misleading information to conceal his management of Quntum Energy.'" Br. 35-36 (quoting Assessment Order at P 47, JA 174). But there was no such failure of evidence. The Commission made detailed findings – based on Mr. Kourouma's own admissions – that he repeatedly misrepresented the management and ownership structure of Quntum Energy to the Commission and PJM in an effort to conceal his involvement with the firm. Assessment Order at PP 24-27, JA 166-67.

Finally, Mr. Kourouma argues that there was an insufficient basis for the Commission to conclude that the failure to disclose his ownership of Quntum Energy was a material omission. Br. 33. Mr. Kourouma does not challenge that his ownership of Quntum Energy was omitted from his applications for market-based rate authority. Nor does he challenge the Commission's assertion that this

omission was material because information regarding an entity's corporate structure and ownership is "of fundamental importance to the Commission's market-based rate analysis," which is based in large part upon the ability of the applicant and its affiliates to exercise market power. Assessment Order at P 24 n.48, JA 166. Instead, Mr. Kourouma points to factors that purportedly render this omission reasonable. But as discussed below (*see infra* pp. 43-44), there are no issues of material fact as to whether Mr. Kourouma exercised due diligence to prevent this omission or any of the other false or misleading information submitted to the Commission and PJM.

B. The Commission Reasonably Found That Mr. Kourouma Did Not Exercise Due Diligence In His Communications With The Commission And PJM.

The Commission found that the undisputed facts established that Mr. Kourouma failed to exercise due diligence to prevent the submission of false or misleading information to the Commission and PJM. In support, the Commission pointed to, among other things, Mr. Kourouma's admission that "his application to the Commission for market-based rate authority contained false statements concerning [I.F.K.'s] and Ms. Dennis's involvement in Quntum's affairs and were designed to conceal his involvement with the company." Assessment Order at P 26, JA 167. *See also* Staff Report at 7 (addressing Mr. Kourouma's affirmative misrepresentations designed "to conceal from Energy Endeavors his participation

and involvement in the activities of Quntum"), JA 10; Kourouma Aff. at ¶¶ 9-15 (same), JA 59-61.

Mr. Kourouma contests this finding, arguing that he "did make an effort to file Quntum's application in a manner consistent with FERC's regulations" and subsequently "sought to correct the filing." Br. 34. But Mr. Kourouma cannot seriously argue that the challenged misstatements were the result of inadvertence. Indeed, Mr. Kourouma has admitted that he intentionally listed the names of his one-year-old daughter and family acquaintance – neither of whom played any role in the management of Quntum Energy – in communications with the Commission in order to conceal his management and ownership of the firm. *See* Staff Report at 6-7, JA 9-10; Kourouma Aff. at ¶¶ 9-15, JA 59-61. And Mr. Kourouma makes no effort to argue that his impersonation of Ms. Dennis in communications with PJM somehow supports the notion that he acted with due diligence.

Mr. Kourouma also argues that there is an issue of fact as to whether he exercised due diligence in connection with the failure to disclose his ownership of Quntum Energy. In this regard, Mr. Kourouma points to his inexperience with FERC practice, his lack of representation, the purported complexity of the Commission's market-based rate application requirements, and that fact that he "sought to correct" his initial application. *See* Br. 33, 35, 51-52, 54. But Mr. Kourouma's purported ignorance of the requirements pertaining to market-based

rate applications hardly raises an issue of fact as to whether he acted with due diligence. This is highlighted by the fact that the application form itself calls for the identification of whom the filing entity is "owned by" and "controlled by." *See, e.g.*, Application at Appendix, SA 6. Moreover, Mr. Kourouma was confronted with a protest that specifically pointed to "the fail[ure] to disclose the identity of the owner(s) of Quntum." Protest at 1, SA 11.

He claims to have attempted to "amend the Petition with the information claimed to be missing." Kourouma Aff. at ¶ 15, JA 61. But rather than doing so, Mr. Kourouma again omitted any reference to his management and ownership of Quntum Energy. *See* Amended Application, SA 27. The only material change was to list Deckonti Dennis as Quntum Energy's president. *Id*. at 1, 2, SA 19-20.[12] Mr. Kourouma's continued obfuscation does not raise a question of fact as to whether he exercised due diligence to prevent the submission of false or misleading information.

In short, Mr. Kourouma's current effort to characterize his conduct as "the result of inexperience" (Br. 36), or a "misunderstanding" coupled with "attempted due diligence" (Br. 55), defies credulity and is contradicted by his own admissions.

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[12] Elsewhere, Mr. Kourouma argues that Commission treated him unfairly because the omission of his ownership of Quntum Energy "could readily have been corrected as part of the application process." Br. 54. Of course, as noted above, Mr. Kourouma had a chance to correct this omission. Rather than take this opportunity, Mr. Kourouma chose to continue his charade with a false and misleading amended application.

The Commission reasonably found that those admissions established that Mr. Kourouma violated the duty of candor imposed by section 35.41(b) of its regulations. *See* Assessment Order at PP 23-27, JA 166-67.

C. The Commission Reasonably Declined To Accept Supplemental Pleadings.

Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits the filing of replies to responsive pleadings without leave of the Commission. 18 C.F.R. § 385.213(a)(2). Consistent with that rule, the Commission declined to accept Mr. Kourouma's reply to Enforcement Staff's Response to his Answer (along with Staff's response to that reply and Mr. Kourouma's subsequent surreply). Assessment Order at P 5, JA 156. Mr. Kourouma contends that this was "unfair" for two reasons. Br. 35.

First, he asserts that Staff's response was, in effect, a cross-motion to which he should be permitted to reply. Br. 35. But however styled, it cannot be said that Enforcement Staff's Response raised any new issues. The Staff simply argued that, in light of Mr. Kourouma's admissions, the factual predicate for a violation of section 35.41(b) of the agency's regulations – an issue originally raised in the Show Cause Order – had been established. Response at 1-5, JA 65-69. The Staff went on to address the questions of law raised in Mr. Kourouma's Answer, and his arguments regarding the appropriate penalty. *Id*. at 5-16, JA 69-80.

The only "new" information highlighted in the Response was that, in 2008, Mr. Kourouma earned nearly $350,000 for his work as an energy trader at Energy Endeavors, and that, in 2010, he incorporated Tibiri Energy, an energy consulting firm. Staff argued that these facts countered Mr. Kourouma's claim that some of the misrepresentations at issue stemmed from his lack of sophistication and familiarity with the Commission's regulations. Response at 11-14, JA 75-78. In his reply, Mr. Kourouma did not dispute either of these facts. Instead, he argued that the facts did not establish that he was a sophisticated participant in the energy markets. *See* Answer to Enforcement Staff Reply, filed Apr. 28, 2011, at 8-9 (R. 5), JA 138-39. In any event, the Commission did not rely upon this supplemental information when determining that Mr. Kourouma violated section 35.41(b). *See* Assessment Order at PP 23-27, JA 166-67.[13]

Second, Mr. Kourouma argues that his reply "identified specific evidence" that precluded summary disposition against him. Br. 35. Mr. Kourouma's brief fails to describe this "specific evidence." And the only evidence offered in the reply was an affidavit regarding Tibiri Energy's operations. *See* Supp. Kourouma Aff., dated Apr. 21, 2011, JA 144-45. The Commission did not rely on any

[13] In determining that a civil penalty was warranted, the Commission noted that "respondent has started another energy company, Tibiri, and that he has requested information from the Commission for the specific purpose of trading power in various markets throughout the United States." Assessment Order at P 54, JA 176. Mr. Kourouma does not dispute these facts.

information regarding Tibiri Energy in determining that Mr. Kourouma violated section 35.41(b). Assessment Order at PP 20-27, JA 164-67. Accordingly, the Commission's refusal to accept Mr. Kourouma's reply does not constitute an abuse of the "broad discretion" it enjoys in connection with the management of its own docket. *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 266 (D.C. Cir. 2003). *See also Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc*., 435 U.S. 519, 524 (1978) ("this Court has, for more than four decades, emphasized that the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress [has] confided the responsibility for substantive judgments").

V. THE COMMISSION REASONABLY ASSESSED A $50,000 PENALTY FOR MR. KOUROUMA'S VIOLATIONS OF SECTION 35.41(b) OF THE AGENCY'S REGULATIONS.

After close consideration of the seriousness of Mr. Kourouma's violations and potentially mitigating factors, the Commission determined that a civil penalty of $50,000 was fair and reasonable. Assessment Order at PP 42-53, JA 173-76. The Commission believed that such an amount was necessary to promote Mr. Kourouma's compliance with the law and noted that it would "encourage other entities to cautiously avoid the submission of false or misleading information to the Commission in the future." *Id*. P 54, JA 176-77.

Mr. Kourouma claims that the Commission failed to give adequate consideration to his financial resources when setting the penalty amount. Br. 55. As an initial matter, section 316A of the Federal Power Act does not require the Commission to consider a violator's ability to pay when assessing penalties. 16 U.S.C. § 825o-1(b). *See also Bluestone Energy*, 74 F.3d at 1295 (addressing similar language in 16 U.S.C. § 823b(c)). Nonetheless, the Commission was aware of Mr. Kourouma's limited assets when it set the proposed penalty amount in the Show Cause Order. *See* Staff Report at 15, JA 18. And in the Assessment Order, the Commission devised a payment plan – $5,000 within 90 days, followed by five annual payments of $9,000 – in recognition of Mr. Kourouma's financial situation. Assessment Order at P 57, JA 177. (The Commission also took Mr. Kourouma's financial situation into account in later deciding to stay collection of the civil penalty pending judicial review. *See Moussa I. Kourouma*, 137 FERC ¶ 61,205, at P 15.)

While Mr. Kourouma essentially contends that his finances should immunize him from a monetary penalty, the Commission found that his violations were knowing and deliberate and "harmed the integrity of the regulatory process [and] undermined the transparency of the PJM market." Assessment Order at P 44, JA 173-74; *see also id*. P 46, JA 174. Although the Commission identified numerous violations persisting over multiple months, it imposed a penalty

amounting to a tiny fraction of the statutory maximum. *Id*. PP 47, 55 JA 174, 177. *See also* 16 U.S.C. § 825o-1(b) (authorizing a maximum penalty of $1 million per day, per violation). Given these findings, it cannot be said that the Commission's choice of sanction was "either unwarranted in law or without justification in fact." *Bluestone Energy*, 74 F.3d at 1294 (internal quotation marks omitted). *See also Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("[T]he breadth of agency discretion is, if anything, at its zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions . . . in order to arrive at maximum effectuation of Congressional objectives.").

Mr. Kourouma next argues (at 56-57) that the Commission erred in considering the deterrent effect that a civil penalty, as opposed to some other type of compliance measure, would have upon other market participants. *See* Assessment Order at P 54 (noting that a civil penalty would "encourage other entities to cautiously avoid the submission of false or misleading information to the Commission in the future"), JA 176. But in empowering the Commission to impose civil penalties, Congress necessarily authorized a consideration of deterrence since that is an inherent feature of such penalties. *See, e.g., Hudson v. United States*, 522 U.S. 93, 102 (1997) ("We have since recognized that all civil penalties have some deterrent effect."); *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940, 947 (D.C. Cir. 1991) ("A fine or penalty . . . is a

pecuniary form of punishment for the commission of an act society finds repugnant and seeks to deter.").

The deterrent effect of a civil penalty is also relevant to the Commission's statutory responsibility to consider the "seriousness of the violation." 16 U.S.C. § 825o-1(b). The imposition and size of civil penalties alert market participants to the Commission's view as to the seriousness of the underlying conduct. Accordingly, when assessing this broad statutory factor, the Commission looks at, among other things, "the effect [the violation] has on other entities and the market," *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156, at P 55 (2008), and asks "what penalty amount best discourages improper conduct, while not excessively discouraging beneficial market participation." *Id*.

Here, the Commission explained that section 35.41(b) of its regulations "was intended to emphasize the need for market-based rate sellers to act honestly and in good faith when interacting with the Commission . . . and that . . . open competitive markets rel[y] on the openness and honesty of market participant communications." Assessment Order at P 44 (internal quotation marks omitted), JA 174. The imposition of a civil penalty, as opposed to only a compliance measure, was meant to signal to the industry the seriousness of the duty of candor owed by market participants and to discourage any breaches of that duty. *Id*. P 54, JA 176-77. This deterrent effect was a permissible factor for the Commission to

consider. *See Hudson*, 522 U.S. at 105 ("[W]e recognize that the imposition of [] money penalties … will deter others from emulating petitioners' conduct" and will serve the goal of "promoting stability in the [] industry.").

CONCLUSION

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

Respectfully submitted,

Tony West
Assistant Attorney General

Mark B. Stern
Attorney, Appellate Staff

Lindsey Powell
Attorney, Appellate Staff

Civil Division
U.S. Department of Justice
Washington, DC 20530

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) 502-6600
Fax: (202) 273-0901
Email: Robert.kennedy@ferc.gov

February 3, 2012

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 11,695 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 3, 2012

ADDENDUM A

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.

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facility continues to comply with the provisions of this section and terms and conditions included in any such exemption.

(d) Violation of terms of exemption

Any violation of a term or condition of any exemption granted under subsection (a) of this section shall be treated as a violation of a rule or order of the Commission under this chapter.

(e) Fees for studies

The Commission, in addition to the requirements of section 803(e) of this title, shall establish fees which shall be paid by an applicant for a license or exemption for a project that is required to meet terms and conditions set by fish and wildlife agencies under subsection (c) of this section. Such fees shall be adequate to reimburse the fish and wildlife agencies referred to in subsection (c) of this section for any reasonable costs incurred in connection with any studies or other reviews carried out by such agencies for purposes of compliance with this section. The fees shall, subject to annual appropriations Acts, be transferred to such agencies by the Commission for use solely for purposes of carrying out such studies and shall remain available until expended.

(June 10, 1920, ch. 285, pt. I, § 30, as added Pub. L. 95–617, title II, § 213, Nov. 9, 1978, 92 Stat. 3148; amended Pub. L. 99–495, § 7, Oct. 16, 1986, 100 Stat. 1248.)

REFERENCES IN TEXT

The Fish and Wildlife Coordination Act, referred to in subsec. (c), is act Mar. 10, 1934, ch. 55, 48 Stat. 401, as amended, which is classified generally to sections 661 to 666c of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

PRIOR PROVISIONS

A prior section 30 of act June 10, 1920, was classified to section 791 of this title, prior to repeal by act Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847.

AMENDMENTS

1986—Subsec. (b). Pub. L. 99–495, § 7(a), inserted provision setting the maximum installation capacity for exemptions under subsec. (a) at 40 megawatts in the case of a facility constructed, operated, and maintained by an agency or instrumentality of a State or local government solely for water supply for municipal purposes.

Subsec. (c). Pub. L. 99–495, § 7(b), which directed the insertion of ''National Marine Fisheries Service'' after ''the Fish and Wildlife Service'' in both places such term appears, was executed by inserting ''National Marine Fisheries Service'' after ''the United States Fish and Wildlife Service'' and ''the Fish and Wildlife Service'', as the probable intent of Congress.

Subsec. (e). Pub. L. 99–495, § 7(c), added subsec. (e).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

APPLICATION OF SUBSECTION (c)

Section 8(c) of Pub. L. 99–495 provided that: ''Nothing in this Act [see Short Title of 1986 Amendment note set out under section 791a of this title] shall affect the application of section 30(c) of the Federal Power Act [16 U.S.C. 823a(c)] to any exemption issued after the enactment of this Act [Oct. 16, 1986].''

§ 823b. Enforcement

(a) Monitoring and investigation

The Commission shall monitor and investigate compliance with each license and permit issued under this subchapter and with each exemption granted from any requirement of this subchapter. The Commission shall conduct such investigations as may be necessary and proper in accordance with this chapter. After notice and opportunity for public hearing, the Commission may issue such orders as necessary to require compliance with the terms and conditions of licenses and permits issued under this subchapter and with the terms and conditions of exemptions granted from any requirement of this subchapter.

(b) Revocation orders

After notice and opportunity for an evidentiary hearing, the Commission may also issue an order revoking any license issued under this subchapter or any exemption granted from any requirement of this subchapter where any licensee or exemptee is found by the Commission:

(1) to have knowingly violated a final order issued under subsection (a) of this section after completion of judicial review (or the opportunity for judicial review); and

(2) to have been given reasonable time to comply fully with such order prior to commencing any revocation proceeding.

In any such proceeding, the order issued under subsection (a) of this section shall be subject to de novo review by the Commission. No order shall be issued under this subsection until after the Commission has taken into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation.

(c) Civil penalty

Any licensee, permittee, or exemptee who violates or fails or refuses to comply with any rule or regulation under this subchapter, any term, or condition of a license, permit, or exemption under this subchapter, or any order issued under subsection (a) of this section shall be subject to a civil penalty in an amount not to exceed $10,000 for each day that such violation or failure or refusal continues. Such penalty shall be assessed by the Commission after notice and opportunity for public hearing. In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation, failure, or refusal and the efforts of the licensee to remedy the violation, failure, or refusal in a timely manner. No civil penalty shall be assessed where revocation is ordered.

(d) Assessment

(1) Before issuing an order assessing a civil penalty against any person under this section, the Commission shall provide to such person notice of the proposed penalty. Such notice shall, except in the case of a violation of a final order issued under subsection (a) of this section, inform such person of his opportunity to elect in writing within 30 days after the date of receipt of such notice to have the procedures of para-

graph (3) (in lieu of those of paragraph (2)) apply with respect to such assessment.

(2)(A) In the case of the violation of a final order issued under subsection (a) of this section, or unless an election is made within 30 calendar days after receipt of notice under paragraph (1) to have paragraph (3) apply with respect to such penalty, the Commission shall assess the penalty, by order, after a determination of violation has been made on the record after an opportunity for an agency hearing pursuant to section 554 of title 5 before an administrative law judge appointed under section 3105 of such title 5. Such assessment order shall include the administrative law judge's findings and the basis for such assessment.

(B) Any person against whom a penalty is assessed under this paragraph may, within 60 calendar days after the date of the order of the Commission assessing such penalty, institute an action in the United States court of appeals for the appropriate judicial circuit for judicial review of such order in accordance with chapter 7 of title 5. The court shall have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in Part,[1] the order of the Commission, or the court may remand the proceeding to the Commission for such further action as the court may direct.

(3)(A) In the case of any civil penalty with respect to which the procedures of this paragraph have been elected, the Commission shall promptly assess such penalty, by order, after the date of the receipt of the notice under paragraph (1) of the proposed penalty.

(B) If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (A), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in Part,[1] such assessment.

(C) Any election to have this paragraph apply may not be revoked except with the consent of the Commission.

(4) The Commission may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation in a timely manner at any time prior to a final decision by the court of appeals under paragraph (2) or by the district court under paragraph (3).

(5) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order under paragraph (2), or after the appropriate district court has entered final judgment in favor of the Commission under paragraph (3), the Commission shall institute an action to recover the amount of such penalty in any appropriate district court of the United States. In such action, the validity and appropriateness of such final assessment order or judgment shall not be subject to review.

[1] So in original. Probably should not be capitalized.

(6)(A) Notwithstanding the provisions of title 28 or of this chapter, the Commission may be represented by the general counsel of the Commission (or any attorney or attorneys within the Commission designated by the Chairman) who shall supervise, conduct, and argue any civil litigation to which paragraph (3) of this subsection applies (including any related collection action under paragraph (5)) in a court of the United States or in any other court, except the Supreme Court. However, the Commission or the general counsel shall consult with the Attorney General concerning such litigation, and the Attorney General shall provide, on request, such assistance in the conduct of such litigation as may be appropriate.

(B) The Commission shall be represented by the Attorney General, or the Solicitor General, as appropriate, in actions under this subsection, except to the extent provided in subparagraph (A) of this paragraph.

(June 10, 1920, ch. 285, pt. I, § 31, as added Pub. L. 99–495, § 12, Oct. 16, 1986, 100 Stat. 1255.)

EFFECTIVE DATE

Section applicable to licenses, permits, and exemptions without regard to when issued, see section 18 of Pub. L. 99–495, set out as an Effective Date of 1986 Amendment note under section 797 of this title.

§ 823c. Alaska State jurisdiction over small hydroelectric projects

(a) Discontinuance of regulation by the Commission

Notwithstanding sections 797(e) and 817 of this title, the Commission shall discontinue exercising licensing and regulatory authority under this subchapter over qualifying project works in the State of Alaska, effective on the date on which the Commission certifies that the State of Alaska has in place a regulatory program for water-power development that—

(1) protects the public interest, the purposes listed in paragraph (2), and the environment to the same extent provided by licensing and regulation by the Commission under this subchapter and other applicable Federal laws, including the Endangered Species Act (16 U.S.C. 1531 et seq.) and the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.);

(2) gives equal consideration to the purposes of—

(A) energy conservation;

(B) the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat);

(C) the protection of recreational opportunities;

(D) the preservation of other aspects of environmental quality;

(E) the interests of Alaska Natives; and

(F) other beneficial public uses, including irrigation, flood control, water supply, and navigation; and

(3) requires, as a condition of a license for any project works—

(A) the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by

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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

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§ 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.

not adequately providing price discovery or market transparency. Nothing in this section, however, shall affect any electronic information filing requirements in effect under this chapter as of August 8, 2005.

(b) Exemption of information from disclosure

(1) Rules described in subsection (a)(2) of this section, if adopted, shall exempt from disclosure information the Commission determines would, if disclosed, be detrimental to the operation of an effective market or jeopardize system security.

(2) In determining the information to be made available under this section and time to make the information available, the Commission shall seek to ensure that consumers and competitive markets are protected from the adverse effects of potential collusion or other anticompetitive behaviors that can be facilitated by untimely public disclosure of transaction-specific information.

(c) Information sharing

(1) Within 180 days of August 8, 2005, the Commission shall conclude a memorandum of understanding with the Commodity Futures Trading Commission relating to information sharing, which shall include, among other things, provisions ensuring that information requests to markets within the respective jurisdiction of each agency are properly coordinated to minimize duplicative information requests, and provisions regarding the treatment of proprietary trading information.

(2) Nothing in this section may be construed to limit or affect the exclusive jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.).

(d) Exemption from reporting requirements

The Commission shall not require entities who have a de minimis market presence to comply with the reporting requirements of this section.

(e) Penalties for violations occurring before notice

(1) Except as provided in paragraph (2), no person shall be subject to any civil penalty under this section with respect to any violation occurring more than 3 years before the date on which the person is provided notice of the proposed penalty under section 825*o*–1 of this title.

(2) Paragraph (1) shall not apply in any case in which the Commission finds that a seller that has entered into a contract for the sale of electric energy at wholesale or transmission service subject to the jurisdiction of the Commission has engaged in fraudulent market manipulation activities materially affecting the contract in violation of section 824v of this title.

(f) ERCOT utilities

This section shall not apply to a transaction for the purchase or sale of wholesale electric energy or transmission services within the area described in section 824k(k)(2)(A) of this title.

(June 10, 1920, ch. 285, pt. II, §220, as added Pub. L. 109–58, title XII, §1281, Aug. 8, 2005, 119 Stat. 978.)

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in subsec. (c)(2), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to chapter 1 (§1 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1 of Title 7 and Tables.

§ 824u. Prohibition on filing false information

No entity (including an entity described in section 824(f) of this title) shall willfully and knowingly report any information relating to the price of electricity sold at wholesale or the availability of transmission capacity, which information the person or any other entity knew to be false at the time of the reporting, to a Federal agency with intent to fraudulently affect the data being compiled by the Federal agency.

(June 10, 1920, ch. 285, pt. II, §221, as added Pub. L. 109–58, title XII, §1282, Aug. 8, 2005, 119 Stat. 979.)

§ 824v. Prohibition of energy market manipulation

(a) In general

It shall be unlawful for any entity (including an entity described in section 824(f) of this title), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of title 15), in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.

(b) No private right of action

Nothing in this section shall be construed to create a private right of action.

(June 10, 1920, ch. 285, pt. II, §222, as added Pub. L. 109–58, title XII, §1283, Aug. 8, 2005, 119 Stat. 979.)

§ 824w. Joint boards on economic dispatch

(a) In general

The Commission shall convene joint boards on a regional basis pursuant to section 824h of this title to study the issue of security constrained economic dispatch for the various market regions. The Commission shall designate the appropriate regions to be covered by each such joint board for purposes of this section.

(b) Membership

The Commission shall request each State to nominate a representative for the appropriate regional joint board, and shall designate a member of the Commission to chair and participate as a member of each such board.

(c) Powers

The sole authority of each joint board convened under this section shall be to consider issues relevant to what constitutes ''security constrained economic dispatch'' and how such a mode of operating an electric energy system affects or enhances the reliability and affordability of service to customers in the region concerned and to make recommendations to the Commission regarding such issues.

ation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

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

§ 825k. Publication and sale of reports

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

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

CODIFICATION

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

(b) Writs of mandamus

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

(c) Employment of attorneys

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

(d) Prohibitions on violators

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

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

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

CODIFICATION

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

§ 825*o*–1. Enforcement of certain provisions

(a) Violations

It shall be unlawful for any person to violate any provision of subchapter II of this chapter or any rule or order issued under any such provision.

(b) Civil penalties

Any person who violates any provision of subchapter II of this chapter or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than $1,000,000 for each day that such violation continues. Such penalty shall be assessed by the Commission, after notice and opportunity for public hearing, in accordance with the same provisions as are applicable under section 823b(d) of this title in the case of civil penalties assessed under section 823b of this title. In determining the amount of a proposed penalty, the Commission shall take into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner.

(June 10, 1920, ch. 285, pt. III, § 316A, as added Pub. L. 102–486, title VII, § 725(b), Oct. 24, 1992, 106 Stat. 2920; amended Pub. L. 109–58, title XII, § 1284(e), Aug. 8, 2005, 119 Stat. 980.)

AMENDMENTS

2005—Pub. L. 109–58 substituted ''subchapter II of this chapter'' for ''section 824j, 824k, 824*l*, or 824m of this title'' in subsecs. (a) and (b) and ''$1,000,000'' for ''$10,000'' in subsec. (b).

STATE AUTHORITIES; CONSTRUCTION

Nothing in this section 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.

§ 825p. Jurisdiction of offenses; enforcement of liabilities and duties

The District Courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

(June 10, 1920, ch. 285, pt. III, § 317, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 862; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107.)

CODIFICATION

As originally enacted, this section contained reference to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of Title 28 which states that ''the District of Columbia constitutes one judicial district''.

''Sections 1254, 1291, and 1292 of title 28'', referred to in text, were substituted for ''sections 128 and 240 of the Judicial Code, as amended (U.S.C. title 28, secs. 225 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

§ 825q. Repealed. Pub. L. 109–58, title XII, § 1277(a), Aug. 8, 2005, 119 Stat. 978

Section, act June 10, 1920, ch. 285, pt. III, § 318, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 863, related to conflict of jurisdiction.

EFFECTIVE DATE OF REPEAL

Repeal 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.

§ 825q–1. Office of Public Participation

(a)(1) There shall be an office in the Commission to be known as the Office of Public Participation (hereinafter in this section referred to as the ''Office'').

(2)(A) The Office shall be administered by a Director. The Director shall be appointed by the Chairman with the approval of the Commission. The Director may be removed during his term of office by the Chairman, with the approval of the Commission, only for inefficiency, neglect of duty, or malfeasance in office.

(B) The term of office of the Director shall be 4 years. The Director shall be responsible for the discharge of the functions and duties of the Office. He shall be appointed and compensated at a rate not in excess of the maximum rate prescribed for GS–18 of the General Schedule under section 5332 of title 5.

(3) The Director may appoint, and assign the duties of, employees of such Office, and with the concurrence of the Commission he may fix the compensation of such employees and procure temporary and intermittent services to the same extent as is authorized under section 3109 of title 5.

(b)(1) The Director shall coordinate assistance to the public with respect to authorities exercised by the Commission. The Director shall also coordinate assistance available to persons

(c) Additional information required by rules and regulations

Any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(d) Classification of prospectuses

In the exercise of its powers under subsections (a), (b), or (c) of this section, the Commission shall have authority to classify prospectuses according to the nature and circumstances of their use or the nature of the security, issue, issuer, or otherwise, and, by rules and regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate and consistent with the public interest and the protection of investors.

(e) Information in conspicuous part of prospectus

The statements or information required to be included in a prospectus by or under authority of subsections (a), (b), (c), or (d) of this section, when written, shall be placed in a conspicuous part of the prospectus and, except as otherwise permitted by rules or regulations, in type as large as that used generally in the body of the prospectus.

(f) Prospectus consisting of radio or television broadcast

In any case where a prospectus consists of a radio or television broadcast, copies thereof shall be filed with the Commission under such rules and regulations as it shall prescribe. The Commission may by rules and regulations require the filing with it of forms and prospectuses used in connection with the offer or sale of securities registered under this subchapter.

(May 27, 1933, ch. 38, title I, § 10, 48 Stat. 81; June 6, 1934, ch. 404, title II, § 205, 48 Stat. 906; Aug. 10, 1954, ch. 667, title I, § 8, 68 Stat. 685.)

AMENDMENTS

1954—Act Aug. 10, 1954, complemented changes in section 77e of this title by act Aug. 10, 1954, permitted offering activities in the waiting period and in so doing rearranged the sequence of the subsections, added new text contained in subsec. (b), and renumbered subsecs. (c) and (d) as (e) and (f), respectively.

1934—Subsec. (b)(1). Act June 6, 1934, amended par. (1).

EFFECTIVE DATE OF 1954 AMENDMENT

Amendment by act Aug. 10, 1954, effective 60 days after Aug. 10, 1954, see note under section 77b of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection,

and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) of this section shall be determined in accordance with section 78u–4(f) of this title.

(B) For purposes of this paragraph, the term ''outside director'' shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

(May 27, 1933, ch. 38, title I, § 11, 48 Stat. 82; June 6, 1934, ch. 404, title II, § 206, 48 Stat. 907; Pub. L. 104–67, title II, § 201(b), Dec. 22, 1995, 109 Stat. 762; Pub. L. 105–353, title III, § 301(a)(2), Nov. 3, 1998, 112 Stat. 3235.)

AMENDMENTS

1998—Subsec. (f)(2)(A). Pub. L. 105–353 made technical amendment to reference in original act which appears in text as reference to section 78u–4(f) of this title.

1995—Subsec. (f). Pub. L. 104–67 designated existing provisions as par. (1), substituted ''Except as provided in paragraph (2), all'' for ''All'', and added par. (2).

1934—Subsec. (a). Act June 6, 1934, inserted last par.

Subsecs. (b)(3), (c) to (e). Act June 6, 1934, amended subsecs. (b)(3) and (c) to (e).

EFFECTIVE DATE OF 1995 AMENDMENT

Section 202 of title II of Pub. L. 104–67 provided that: ''The amendments made by this title [amending this section and section 78u–4 of this title] shall not affect or apply to any private action arising under the securities laws commenced before and pending on the date of enactment of this Act [Dec. 22, 1995].''

CONSTRUCTION OF 1995 AMENDMENT

Nothing in amendment by Pub. L. 104–67 to be deemed to create or ratify any implied right of action, or to prevent Commission, by rule or regulation, from restricting or otherwise regulating private actions under Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), see section 203 of Pub. L. 104–67, set out as a Construction note under section 78j–1 of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

§ 77*l*. Civil liabilities arising in connection with prospectuses and communications

(a) In general

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b) of this section, to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2) of this section, if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) of this section represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

(May 27, 1933, ch. 38, title I, § 12, 48 Stat. 84; Aug. 10, 1954, ch. 667, title I, § 9, 68 Stat. 686; Pub. L. 104–67, title I, § 105, Dec. 22, 1995, 109 Stat. 757; Pub. L. 106–554, § 1(a)(5) [title II, § 208(a)(3)], Dec. 21, 2000, 114 Stat. 2763, 2763A–435.)

AMENDMENTS

2000—Subsec. (a)(2). Pub. L. 106–554 substituted ''paragraphs (2) and (14)'' for ''paragraph (2)''.

1995—Pub. L. 104–67 designated existing provisions as subsec. (a), inserted heading, inserted '', subject to subsection (b) of this section,'' after ''shall be liable'' in concluding provisions, and added subsec. (b).

1954—Act Aug. 10, 1954, inserted ''offers or'' before ''sells'' in pars. (1) and (2).

EFFECTIVE DATE OF 1995 AMENDMENT

Section 108 of title I of Pub. L. 104–67 provided that: ''The amendments made by this title [enacting sections 77z–1, 77z–2, 78u–4, and 78u–5 of this title and amending this section and sections 77t, 78*o*, 78t, and 78u of this title and section 1964 of Title 18, Crimes and Criminal Procedure] shall not affect or apply to any private action arising under title I of the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.] or title I of the Securities Act of 1933 [15 U.S.C. 77a et seq.], commenced before and pending on the date of enactment of this Act [Dec. 22, 1995].''

EFFECTIVE DATE OF 1954 AMENDMENT

Amendment by act Aug. 10, 1954, effective 60 days after Aug. 10, 1954, see note under section 77b of this title.

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planning process that considers and evaluates projects for reliability and/or congestion and is found to be acceptable to the Commission; or

(ii) A project that has received construction approval from an appropriate state commission or state siting authority.

(2) To the extent these approval processes do not require that a project ensures reliability or reduce the cost of delivered power by reducing congestion, the applicant bears the burden of demonstrating that its project satisfies these criteria.

(j) *Commission authorization to site electric transmission facilities in interstate commerce*. If the Commission pursuant to its authority under section 216 of the Federal Power Act and its regulations thereunder has issued one or more permits for the construction or modification of transmission facilities in a national interest electric transmission corridor designated by the Secretary, such facilities shall be deemed to either ensure reliability or reduce the cost of delivered power by reducing congestion for purposes of section 219(a).

[Order 679, 71 FR 43338, July 31, 2006, as amended by Order 679–A, 72 FR 1172, Jan. 10, 2007, Order 691, 72 FR 5174, Feb. 5, 2007]

Subpart H—Wholesale Sales of Electric Energy, Capacity and Ancillary Services at Market-Based Rates

SOURCE: Order 697, 72 FR 40038, July 20, 2007, unless otherwise noted.

§ 35.36 Generally.

(a) For purposes of this subpart:

(1) *Seller* means any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act.

(2) *Category 1 Sellers* means wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888, FERC Stats. & Regs. ¶ 31,036); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.

(3) *Category 2 Sellers* means any Sellers not in Category 1.

(4) *Inputs to electric power production* means intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; sites for generation capacity development; physical coal supply sources and ownership of or control over who may access transportation of coal supplies.

(5) *Franchised public utility* means a public utility with a franchised service obligation under State law.

(6) *Captive customers* means any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation.

(7) *Market-regulated power sales affiliate* means any power seller affiliate other than a franchised public utility, including a power marketer, exempt wholesale generator, qualifying facility or other power seller affiliate, whose power sales are regulated in whole or in part on a market-rate basis.

(8) *Market information* means non-public information related to the electric energy and power business including, but not limited to, information regarding sales, cost of production, generator outages, generator heat rates, unconsummated transactions, or historical generator volumes. Market information includes information from either affiliates or non-affiliates.

(9) *Affiliate* of a specified company means:

(i) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company;

(ii) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company;

(iii) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate; and

(iv) Any person that is under common control with the specified company.

(v) For purposes of paragraph (a)(9), owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.

(b) The provisions of this subpart apply to all Sellers authorized, or seeking authorization, to make sales for resale of electric energy, capacity or ancillary services at market-based rates unless otherwise ordered by the Commission.

[Order 697, 72 FR 40038, July 20, 2007, as amended by Order 697–A, 73 FR 25912, May 7, 2008; Order 697–B, 73 FR 79627, Dec. 30, 2008]

§ 35.37 Market power analysis required.

(a) (1) In addition to other requirements in subparts A and B, a Seller must submit a market power analysis in the following circumstances: when seeking market-based rate authority; for Category 2 Sellers, every three years, according to the schedule contained in Order No. 697, FERC Stats. & Regs. ¶ 31,252; or any other time the Commission directs a Seller to submit one. Failure to timely file an updated market power analysis will constitute a violation of Seller's market-based rate tariff.

(2) When submitting a market power analysis, whether as part of an initial application or an update, a Seller must include an appendix of assets in the form provided in Appendix B of this subpart.

(b) A market power analysis must address whether a Seller has horizontal and vertical market power.

(c) (1) There will be a rebuttable presumption that a Seller lacks horizontal market power if it passes two indicative market power screens: a pivotal supplier analysis based on the annual peak demand of the relevant market, and a market share analysis applied on a seasonal basis. There will be a rebuttable presumption that a Seller possesses horizontal market power if it fails either screen.

(2) Sellers and intervenors may also file alternative evidence to support or rebut the results of the indicative screens. Sellers may file such evidence at the time they file their indicative screens. Intervenors may file such evidence in response to a Seller's submissions.

(3) If a Seller does not pass one or both screens, the Seller may rebut a presumption of horizontal market power by submitting a Delivered Price Test analysis. A Seller that does not rebut a presumption of horizontal market power or that concedes market power, is subject to mitigation, as described in § 35.38.

(4) When submitting a horizontal market power analysis, a Seller must use the form provided in Appendix A of this subpart and include all supporting materials referenced in the form.

(d) To demonstrate a lack of vertical market power, a Seller that owns, operates or controls transmission facilities, or whose affiliates own, operate or control transmission facilities, must have on file with the Commission an Open Access Transmission Tariff, as described in § 35.28; provided, however, that a Seller whose foreign affiliate(s) own, operate or control transmission facilities outside of the United States that can be used by competitors of the Seller to reach United States markets must demonstrate that such affiliate either has adopted and is implementing an Open Access Transmission Tariff as described in § 35.28, or otherwise offers comparable, non-discriminatory access to such transmission facilities.

(e) To demonstrate a lack of vertical market power in wholesale energy markets through the affiliation, ownership or control of inputs to electric power production, such as the transportation or distribution of the inputs to electric power production, a Seller must provide the following information:

(1) A description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, intrastate natural gas storage or distribution facilities;

(2) Sites for generation capacity development; and

(3) Physical coal supply sources and ownership or control over who may access transportation of coal supplies.

(4) A Seller must ensure that this information is included in the record of each new application for market-based rates and each updated market power analysis. In addition, a Seller is required to make an affirmative statement that it has not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.

(f) If the seller seeks to protect any portion of the application, or any attachment thereto, from public disclosure pursuant to §388.112 of this chapter, the seller must include with its request for privileged treatment a proposed protective order under which the parties to the proceeding will be able to review any of the data, information, analysis or other documentation relied upon by the seller for which privileged treatment is sought. A seller must grant access to privileged data to any party that signs a protective order within 5 days from the date that the party executes the protective order.

[Order 697, 72 FR 40038, July 20, 2007, as amended by Order 697–B, 73 FR 79627, Dec. 30, 2008]

§35.38 Mitigation.

(a) A Seller that has been found to have market power in generation or that is presumed to have horizontal market power by virtue of failing or foregoing the horizontal market power screens, as described in §35.37(c), may adopt the default mitigation detailed in paragraph (b) of this section or may propose mitigation tailored to its own particular circumstances to eliminate its ability to exercise market power. Mitigation will apply only to the market(s) in which the Seller is found, or presumed, to have market power.

(b) Default mitigation consists of three distinct products:

(1) Sales of power of one week or less priced at the Seller's incremental cost plus a 10 percent adder;

(2) Sales of power of more than one week but less than one year priced at no higher than a cost-based ceiling reflecting the costs of the unit(s) expected to provide the service; and

(3) New contracts filed for review under section 205 of the Federal Power Act for sales of power for one year or more priced at a rate not to exceed embedded cost of service.

§35.39 Affiliate restrictions.

(a) *General affiliate provisions.* As a condition of obtaining and retaining market-based rate authority, the conditions provided in this section, including the restriction on affiliate sales of electric energy and all other affiliate provisions, must be satisfied on an ongoing basis, unless otherwise authorized by Commission rule or order. Failure to satisfy these conditions will constitute a violation of the Seller's market-based rate tariff.

(b) *Restriction on affiliate sales of electric energy or capacity.* As a condition of obtaining and retaining market-based rate authority, no wholesale sale of electric energy or capacity may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the Federal Power Act. All authorizations to engage in affiliate wholesale sales of electric energy or capacity must be listed in a Seller's market-based rate tariff.

(c) *Separation of functions.* (1) For the purpose of this paragraph, entities acting on behalf of and for the benefit of a franchised public utility with captive customers (such as entities controlling or marketing power from the electrical generation assets of the franchised public utility) are considered part of the franchised public utility. Entities acting on behalf of and for the benefit of the market-regulated power sales affiliates of a franchised public utility with captive customers are considered part of the market-regulated power sales affiliates.

(2) (i) To the maximum extent practical, the employees of a market-regulated power sales affiliate must operate separately from the employees of any affiliated franchised public utility with captive customers.

(ii) Franchised public utilities with captive customers are permitted to share support employees, and field and maintenance employees with their market-regulated power sales affiliates. Franchised public utilities with captive customers are also permitted to share senior officers and boards of directors with their market-regulated power sales affiliates; provided, however, that the shared officers and boards of directors must not participate in directing, organizing or executing generation or market functions.

(iii) Notwithstanding any other restrictions in this section, in emergency circumstances affecting system reliability, a market-regulated power sales affiliate and a franchised public utility with captive customers may take steps necessary to keep the bulk power system in operation. A franchised public utility with captive customers or the market-regulated power sales affiliate must report to the Commission and disclose to the public on its Web site, each emergency that resulted in any deviation from the restrictions of section 35.39, within 24 hours of such deviation.

(d) *Information sharing.* (1) A franchised public utility with captive customers may not share market information with a market-regulated power sales affiliate if the sharing could be used to the detriment of captive customers, unless simultaneously disclosed to the public.

(2) Permissibly shared support employees, field and maintenance employees and senior officers and board of directors under §§ 35.39(c)(2)(ii) may have access to information covered by the prohibition of § 35.39(d)(1), subject to the no-conduit provision in § 35.39(g).

(e) *Non-power goods or services.* (1) Unless otherwise permitted by Commission rule or order, sales of any non-power goods or services by a franchised public utility with captive customers, to a market-regulated power sales affiliate must be at the higher of cost or market price.

(2) Unless otherwise permitted by Commission rule or order, sales of any non-power goods or services by a market-regulated power sales affiliate to an affiliated franchised public utility with captive customers may not be at a price above market.

(f) *Brokering of power.* (1) Unless otherwise permitted by Commission rule or order, to the extent a market-regulated power sales affiliate seeks to broker power for an affiliated franchised public utility with captive customers:

(i) The market-regulated power sales affiliate must offer the franchised public utility's power first;

(ii) The arrangement between the market-regulated power sales affiliate and the franchised public utility must be non-exclusive; and

(iii) The market-regulated power sales affiliate may not accept any fees in conjunction with any brokering services it performs for an affiliated franchised public utility.

(2) Unless otherwise permitted by Commission rule or order, to the extent a franchised public utility with captive customers seeks to broker power for a market-regulated power sales affiliate:

(i) The franchised public utility must charge the higher of its costs for the service or the market price for such services;

(ii) The franchised public utility must market its own power first, and simultaneously make public (on the Internet) any market information shared with its affiliate during the brokering; and

(iii) The franchised public utility must post on the Internet the actual brokering charges imposed.

(g) *No conduit provision.* A franchised public utility with captive customers and a market-regulated power sales affiliate are prohibited from using anyone, including asset managers, as a conduit to circumvent the affiliate restrictions in §§ 35.39(a) through (g).

(h) *Franchised utilities without captive customers.* If necessary, any affiliate restrictions regarding separation of functions, power sales or non-power goods and services transactions, or brokering involving two or more franchised public utilities, one or more of whom has

captive customers and one or more of whom does not have captive customers, will be imposed on a case-by-case basis.

[Order 697, 72 FR 40038, July 20, 2007, as amended by Order 697–A, 73 FR 25912, May 7, 2008]

§ 35.40 Ancillary services.

A Seller may make sales of ancillary services at market-based rates only if it has been authorized by the Commission and only in specific geographic markets as the Commission has authorized.

§ 35.41 Market behavior rules.

(a) *Unit operation.* Where a Seller participates in a Commission-approved organized market, Seller must operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable market. A Seller is not required to bid or supply electric energy or other electricity products unless such requirement is a part of a separate Commission-approved tariff or is a requirement applicable to Seller through Seller's participation in a Commission-approved organized market.

(b) *Communications.* A Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.

(c) *Price reporting.* To the extent a Seller engages in reporting of transactions to publishers of electric or natural gas price indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the Policy Statement issued by the Commission in Docket No. PL03–3–000 and any clarifications thereto. Unless Seller has previously provided the Commission with a notification of its price reporting status, Seller must notify the Commission within 15 days of the effective date of this regulation or within 15 days of the date it begins making wholesale sales, whichever is earlier, whether it engages in such reporting of its transactions. Seller must update the notification within 15 days of any subsequent change in its transaction reporting status. In addition, Seller must adhere to such other standards and requirements for price reporting as the Commission may order.

(d) *Records retention.* A Seller must retain, for a period of five years, all data and information upon which it billed the prices it charged for the electric energy or electric energy products it sold pursuant to Seller's market-based rate tariff, and the prices it reported for use in price indices.

§ 35.42 Change in status reporting requirement.

(a) As a condition of obtaining and retaining market-based rate authority, a Seller must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, the following:

(1) Ownership or control of generation capacity that results in net increases of 100 MW or more, or of inputs to electric power production, or ownership, operation or control of transmission facilities, or

(2) Affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation facilities or inputs to electric power production, affiliation with any entity not disclosed in the application for market-based rate authority that owns, operates or controls transmission facilities, or affiliation with any entity that has a franchised service area.

(b) Any change in status subject to paragraph (a) of this section, other than a change in status submitted to report the acquisition of control of a site or sites for new generation capacity development, must be filed no later

APPENDIX B TO SUBPART H OF PART 35

This is an example of the required appendix listing the filing entity and all its energy affiliates and their associated assets which should be submitted with all market-based rate filings.

MARKET-BASED RATE AUTHORITY AND GENERATION ASSETS

Filing entity and its energy affiliates	Docket No. where MBR authority was granted	Generation name	Owned by	Controlled by	Date control transferred	Location		In-service date	Nameplate and/or seasonal rating
						Balancing authority area	Geographic region (per Appendix D)		
ABC Corp..	ER05–23X–000	ABC falls plant #1.	ABC Corp.	ABC Corp.	NA*	ABC balancing authority area.	Central	8/12/1981 ..	153.5 MW (seasonal).
xyz Inc. ...	ER94–79XX–000	NA	NA	NA	NA	NA	NA	NA	NA.
RST LLC	ER01–2XX5–000	Green CoGen.	WWW Corp.	RST LLC.	5/23/2005	New York ISO.	Northeast.	12/20/2003	2000 MW (nameplate).
Sample Co..	ER03–XX45–000	Sample Co. 3.	Sample Co.	YYY Corp.	2/1/1982 ..	Sample Co. balancing authority.	Southwest.	5/13/1973 ..	10 MW (seasonal).

*If an entity has no assets or the field is not applicable please indicate so by inputting (NA).

ELECTRIC TRANSMISSION ASSETS AND/OR NATURAL GAS INTRASTATE PIPELINES AND/OR GAS STORAGE FACILITIES

Filing entity and its energy affiliates	Asset name and use	Owned by	Controlled by	Date control transferred	Location		Size
					Balancing authority area	Geographic region (per Appendix D)	
ABC Corp	CBA Line, used to interconnect Green Cogen to New York ISO transmission system.	ABC Corp	ABC Corp	NA*	New York ISO	Northeast	approximately five-mile, 500 kV line.
Etc. LP	Nowhere Pipeline, used to connect Storage LLC's—Longway Pipeline to ABC falls plant #1.	Etc. LP ...	Etc. LP ...	NA	ABC balancing authority area.	Central ...	approximately 14 miles of natural gas pipeline and related equipment with 50 MMcf/d capacity.

*If the field is not applicable please indicate so by inputting (NA).

Subpart I—Cross-Subsidization Restrictions on Affiliate Transactions

SOURCE: 73 FR 11025, Feb. 29, 2008, unless otherwise noted.

§ 35.43 Generally.

(a) For purposes of this subpart:

(1) *Affiliate* of a specified company means:

(i) For any person other than an exempt wholesale generator:

(A) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company;

(B) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with

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

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

§385.208 [Reserved]

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

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

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

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

(c) *Answers.* A person who is ordered to show cause must answer in accordance with Rule 213.

§385.210 Method of notice; dates established in notice (Rule 210).

(a) *Method.* When the Secretary gives notice of tariff or rate filings, applications, petitions, notices of tariff or rate examinations, and orders to show cause, the Secretary will give such notice in accordance with Rule 2009.

(b) *Dates for filing interventions and protests.* A notice given under this section will establish the dates for filing interventions and protests. Only those filings made within the time prescribed in the notice will be considered timely.

§385.211 Protests other than under Rule 208 (Rule 211).

(a) *General rule.* (1) Any person may file a protest to object to any application, complaint, petition, order to show cause, notice of tariff or rate examination, or tariff or rate filing.

(2) The filing of a protest does not make the protestant a party to the proceeding. The protestant must intervene under Rule 214 to become a party.

(3) Subject to paragraph (a)(4) of this section, the Commission will consider protests in determining further appropriate action. Protests will be placed in the public file associated with the proceeding.

(4) If a proceeding is set for hearing under subpart E of this part, the protest is not part of the record upon which the decision is made.

(b) *Service.* (1) Any protest directed against a person in a proceeding must be served by the protestant on the person against whom the protest is directed.

(2) The Secretary may waive any procedural requirement of this subpart applicable to protests. If the requirement of service under this paragraph is waived, the Secretary will place the protest in the public file and may send a copy thereof to any person against whom the protest is directed.

§385.212 Motions (Rule 212).

(a) *General rule.* A motion may be filed:

(1) At any time, unless otherwise provided;

(2) By a participant or a person who has filed a timely motion to intervene which has not been denied;

(3) In any proceeding except an informal rulemaking proceeding.

(b) *Written and oral motions.* Any motion must be filed in writing, except that the presiding officer may permit an oral motion to be made on the record during a hearing or conference.

(c) *Contents.* A motion must contain a clear and concise statement of:

(1) The facts and law which support the motion; and

(2) The specific relief or ruling requested.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 225–A, 47 FR 35956, Aug. 18, 1982; Order 376, 49 FR 21705, May 23, 1984]

§385.213 Answers (Rule 213).

(a) *Required or permitted.* (1) Any respondent to a complaint or order to

show cause must make an answer, unless the Commission orders otherwise.

(2) An answer may not be made to a protest, an answer, a motion for oral argument, or a request for rehearing, unless otherwise ordered by the decisional authority. A presiding officer may prohibit an answer to a motion for interlocutory appeal. If an answer is not otherwise permitted under this paragraph, no responsive pleading may be made.

(3) An answer may be made to any pleading, if not prohibited under paragraph (a)(2) of this section.

(4) An answer to a notice of tariff or rate examination must be made in accordance with the provisions of such notice.

(b) *Written or oral answers.* Any answer must be in writing, except that the presiding officer may permit an oral answer to a motion made on the record during a hearing conducted under subpart E or during a conference.

(c) *Contents.* (1) An answer must contain a clear and concise statement of:

(i) Any disputed factual allegations; and

(ii) Any law upon which the answer relies.

(2) When an answer is made in response to a complaint, an order to show cause, or an amendment to such pleading, the answerer must, to the extent practicable:

(i) Admit or deny, specifically and in detail, each material allegation of the pleading answered; and

(ii) Set forth every defense relied on.

(3) General denials of facts referred to in any order to show cause, unsupported by the specific facts upon which the respondent relies, do not comply with paragraph (a)(1) of this section and may be a basis for summary disposition under Rule 217, unless otherwise required by statute.

(4) An answer to a complaint must include documents that support the facts in the answer in possession of, or otherwise attainable by, the respondent, including, but not limited to, contracts and affidavits. An answer is also required to describe the formal or consensual process it proposes for resolving the complaint.

(5)(i) A respondent must submit with its answer any request for privileged treatment of documents and information under §388.112 of this chapter and a proposed form of protective agreement. In the event the respondent requests privileged treatment under §388.112 of this chapter, it must file the original and three copies of its answer with the information for which privileged treatment is sought and 11 copies of the pleading without the information for which privileged treatment is sought. The original and three copies must be clearly identified as containing information for which privileged treatment is sought.

(ii) A respondent must provide a copy of its answer without the privileged information and its proposed form of protective agreement to each entity that has either been served pursuant to §385.206 (c) or whose name is on the official service list for the proceeding compiled by the Secretary.

(iii) The complainant and any interested person who has filed a motion to intervene may make a written request to the respondent for a copy of the complete answer. The request must include an executed copy of the protective agreement and, for persons other than the complainant, a copy of the motion to intervene. Any person may file an objection to the proposed form of protective agreement.

(iv) A respondent must provide a copy of the complete answer to the requesting person within 5 days after receipt of the written request and an executed copy of the protective agreement.

(d) *Time limitations.* (1) Any answer to a motion or to an amendment to a motion must be made within 15 days after the motion or amendment is filed, unless otherwise ordered.

(2) Any answer to a pleading or amendment to a pleading, other than a complaint or an answer to a motion under paragraph (d)(1) of this section, must be made:

(i) If notice of the pleading or amendment is published in the FEDERAL REGISTER, not later than 30 days after such publication, unless otherwise ordered; or

(ii) If notice of the pleading or amendment is not published in the FEDERAL REGISTER, not later than 30

days after the filing of the pleading or amendment, unless otherwise ordered.

(e) *Failure to answer.* (1) Any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted.

(2) Failure to answer an order to show cause will be treated as a general denial to which paragraph (c)(3) of this section applies.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 602, 64 FR 17099, Apr. 8, 1999; Order 602–A, 64 FR 43608, Aug. 11, 1999]

§ 385.214 Intervention (Rule 214).

(a) *Filing.* (1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(2) Any State Commission, the Advisory Council on Historic Preservation, the U.S. Departments of Agriculture, Commerce, and the Interior, any state fish and wildlife, water quality certification, or water rights agency; or Indian tribe with authority to issue a water quality certification is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, each entity identified in this paragraph must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section, must file a motion to intervene.

(4) No person, including entities listed in paragraphs (a)(1) and (a)(2) of this section, may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

(b) *Contents of motion.* (1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.

(2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:

(i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;

(ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:

(A) Consumer,

(B) Customer,

(C) Competitor, or

(D) Security holder of a party; or

(iii) The movant's participation is in the public interest.

(3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.

(c) *Grant of party status.* (1) If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.

(2) If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted.

(d) *Grant of late intervention.* (1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:

(i) The movant had good cause for failing to file the motion within the time prescribed;

(ii) Any disruption of the proceeding might result from permitting intervention;

(iii) The movant's interest is not adequately represented by other parties in the proceeding;

(iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and

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may seek to withdraw a pleading by filing a notice of withdrawal. The procedures provided in this section do not apply to withdrawals of tariff or rate filings, which may be withdrawn only as provided in the regulations under this chapter.

(b) *Action on withdrawals.* (1) The withdrawal of any pleading is effective at the end of 15 days from the date of filing of a notice of withdrawal, if no motion in opposition to the notice of withdrawal is filed within that period and the decisional authority does not issue an order disallowing the withdrawal within that period. The decisional authority may disallow, for a good cause, all or part of a withdrawal.

(2) If a motion in opposition to a notice of withdrawal is filed within the 15 day period, the withdrawal is not effective until the decisional authority issues an order accepting the withdrawal.

(c) *Conditional withdrawal.* In order to prevent prejudice to other participants, a decisional authority may, on motion or otherwise, condition the withdrawal of any pleading upon a requirement that the withdrawing party leave material in the record or otherwise make material available to other participants.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 714, 73 FR 57538, Oct. 3, 2008]

§ 385.217 Summary disposition (Rule 217).

(a) *Applicability.* This section applies to:

(1) Any proceeding, or any part of a proceeding, while the Commission is the decisional authority; and

(2) Any proceeding, or part of a proceeding, which is set for hearing under subpart E.

(b) *General rule.* If the decisional authority determines that there is no genuine issue of fact material to the decision of a proceeding or part of a proceeding, the decisional authority may summarily dispose of all or part of the proceeding.

(c) *Procedures.* (1) Any participant may make a motion for summary disposition of all or part of a proceeding.

(2) If a decisional authority, other than the Commission, is considering summary disposition of a proceeding, or part of a proceeding, in the absence of a motion for summary disposition by a participant, the decisional authority will grant the participants an opportunity to comment on the proposed disposition prior to any summary disposition, unless, for good cause shown, the decisional authority provides otherwise.

(3) If, prior to setting a matter for hearing, the Commission is considering summary disposition of a proceeding or part of a proceeding in the absence of a motion for summary disposition by any participant and the Commission determines that notice and comment on summary disposition are practicable and necessary, the Commission may notify the participants and afford them an opportunity to comment on any proposed summary disposition.

(d) *Disposition.* (1)(i) If a decisional authority, other than the Commission, summarily disposes of an entire proceeding, the decisional authority will issue an initial decision for the entire proceeding.

(ii) Except as provided under paragraph (d)(1)(iii) of this section, a decisional authority, other than the Commission, which summarily disposes of part of a proceeding may:

(A) Issue a partial initial decision; or

(B) Postpone issuing an initial decision on the summarily disposed part and combine it with the initial decision on the entire proceeding or other appropriate part of the proceeding.

(iii) If the decisional authority, other than the Commission, summarily disposes of part of a proceeding and such disposition requires the filing of new tariff or rate schedule sheets or sections, the decisional authority will issue an initial decision on that part of the proceeding.

(2) Any initial decision issued under paragraph (d)(1) of this section is considered an initial decision issued under subpart G of this part, except that the following rules do not apply: Rule 704 (rights of participants before initial decision), Rule 705 (discretion of presiding officer before initial decision), Rule 706 (initial and reply briefs before

initial decision), Rule 707 (oral argument before initial decision), and Rule 709 (other types of decisions).

[Order 225, 47 FR 19022, May 3, 1982; Order 225–A, 47 FR 35956, Aug. 18, 1982, as amended by Order 714, 73 FR 57538, Oct. 3, 2008]

§ 385.218 Simplified procedure for complaints involving small controversies (Rule 218).

(a) *Eligibility*. The procedures under this section are available to complainants if the amount in controversy is less than $100,000 and the impact on other entities is *de minimis*.

(b) *Contents*. A complaint filed under this section must contain:

(1) The name of the complainant;

(2) The name of the respondent;

(3) A description of the relationship to the respondent;

(4) The amount in controversy;

(5) A statement why the complaint will have a *de minimis* impact on other entities;

(6) The facts and circumstances surrounding the complaint, including the legal or regulatory obligation breached by the respondent; and

(7) The requested relief.

(c) *Service*. The complainant is required to simultaneously serve the complaint on the respondent and any other entity referenced in the complaint.

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

(e) *Answers, interventions and comments*. (1) An answer to a complaint is required to conform to the requirements of § 385.213(c)(1), (2), and (3).

(2) Answers, interventions and comments must be filed within 10 days after the complaint is filed. In cases where the complainant requests privileged treatment for information in its complaint, answers, interventions, and comments must be filed within 20 days after the complaint is filed. In the event there is an objection to the protective agreement, the Commission will establish when answers, interventions, and comments are due.

(f) *Privileged treatment*. If a complainant seeks privileged treatment for any documents submitted with the complaint, a complainant must use the procedures described in section 385.206(e). If a respondent seeks privileged treatment for any documents submitted with the answer, a respondent must use the procedures described in section 385.213(c)(5).

[Order 602, 64 FR 17099, Apr. 8, 1999]

Subpart C [Reserved]

Subpart D—Discovery Procedures for Matters Set for Hearing Under Subpart E

SOURCE: Order 466, 52 FR 6966, Mar. 6, 1987, unless otherwise noted.

§ 385.401 Applicability (Rule 401).

(a) *General rule*. Except as provided in paragraph (b) of this section, this subpart applies to discovery in proceedings set for hearing under subpart E of this part, and to such other proceedings as the Commission may order.

(b) *Exceptions*. Unless otherwise ordered by the Commission, this subpart does not apply to:

(1) Requests for information under the Freedom of Information Act, 5 U.S.C. 552, governed by Part 388 of this chapter; or,

(2) Requests by the Commission or its staff who are not participants in a proceeding set for hearing under subpart E of this part to obtain information, reports, or data from persons subject to the Commission's regulatory jurisdiction; or

(3) Investigations conducted pursuant to Part 1b of this chapter.

§ 385.402 Scope of discovery (Rule 402).

(a) *General*. Unless otherwise provided under paragraphs (b) and (c) of this section or ordered by the presiding officer under Rule 410(c), participants may obtain discovery of any matter, not privileged, that is relevant to the subject matter of the pending proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having any knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible in the Commission proceeding if

ADDENDUM B

JUNE 5, 2009 ORDER IN

CRANE ENERGY INC. V. KOUROUMA,
NO. 4512-VCS (DEL. CH.)

GRANTED

EFiled: Jun 5 2009 2:54PM EDT
Transaction ID 25520792
Case No. 4512-VCS

IN THE COURT OF CHANCERY IN THE STATE OF DELAWARE

CRANE ENERGY, INC.,	)	
	)	
Plaintiff/Counterclaim Defendant,	)	
	)	
v.	)	
	)	
MOUSSA KOUROUMA,	)	C.A. No. 4512-VCS
	)	
Defendant/Counterclaim Plaintiff, and	)	
	)	
QUNTUM ENERGY LLC, a Delaware limited liability company,	)	
	)	
Defendant.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

WHEREAS, Plaintiff filed a Verified Complaint and Motion for a Preliminary Injunction on April 15, 2009;

WHEREAS, the Court held a hearing on May 26, 2009 and entered Plaintiff's Motion for a Preliminary Injunction on the record;

IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for a Preliminary Injunction is GRANTED.

2. Defendants Moussa Kourouma and Quntum Energy, LLC, their respective agents, employees, directors, officers, members, and/or owners (to the extent applicable) are enjoined from any activity which would violate the covenant not to compete contained in the January 11, 2008 Employment Agreement with Moussa Kourouma, including without limitation, trading energy on any Independent System Operator ("ISO") or utilizing market-based rate authorization from the Federal Energy Regulatory Commission to buy, sell and/or otherwise trade power and/or power generation.

3. Defendants are precluded from the activities described in Paragraph 2 until such time as the Court lifts the injunction.

4. Within five (5) business days of the entry of this Order, Defendants shall provide a copy of this Order to: (i) the Federal Energy Regulatory Commission ("FERC") by certified mail to Kimberly D. Bose, Secretary/Nathaniel J. Davis, Sr., Deputy Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426; (ii) PJM Interconnection, LLC ("PJM") by certified mail to Terry Boston, President & CEO, PJM Interconnection, L.L.C., Valley Forge Corporate Center, 955 Jefferson Avenue, Norristown, PA 19403; and (iii) any other ISO with which the Defendants have traded and/or sought trading privileges. Defendants shall file the certified mail return receipts with the Court within five (5) business days of receipt. Within five (5) business days of the entry of this Order, Defendants are required to terminate their accounts and/or membership with any and all ISOs, including PJM, and withdraw any and all applications pending before FERC.

Dated: _____

_____
Vice Chancellor Leo E. Strine, Jr.

This document constitutes a ruling of the court and should be treated as such.

Court: DE Court of Chancery Civil Action

Judge: Leo E Strine

File & Serve Transaction ID: 25503752

Current Date: Jun 05, 2009

Case Number: 4512-VCS

Case Name: Crane Energy Inc vs Moussa Kourouma et al

/s/ Judge Leo E Strine

Moussa I. Kourouma v. FERC **D.C. Cir. No. 11-1283**

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 22nd 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:

Stephen L. Markus — Email
Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, N.W.
Washington, DC 20037-1122

Joseph H. Fagan — Email
Day Pitney LLP
1100 New York Avenue, NW
Suite 300
Washington, DC 20005

Paul Brent Mohler — Email
Law Offices of Paul B. Mohler, PLC
4525 North 40th Street
Arlington, Va 22207

/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