ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 11-1471

SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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SEPTEMBER 10, 2012

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

All parties before this Court, and those that appeared before the agency, are identified in the Petitioner's brief.

B. Rulings Under Review:

1. "Order on Paper Hearing and Request for Rehearing," *Southern California Edison Co.*, 131 FERC ¶ 61,020 (April 15, 2010), JA 1;

2. "Order Accepting and Suspending Proposed Rates and Establishing Hearing and Settlement Judge Proceedings," *Southern California Edison Co.*, 133 FERC ¶ 61,269 (Dec. 29, 2010), JA 48;

3. "Order Accepting and Suspending Proposed Formula Rate Filing and Establishing Hearing and Settlement Judge Procedures," *Southern California Edison Co.*, 136 FERC ¶ 61,074 (Aug. 2, 2011), JA 62; and

4. "Order on Rehearing and Clarification," *Southern California Edison Co.*, 137 FERC ¶ 61,016 (Oct. 6, 2011), JA 74.

C. Related Cases:

This case has not previously been before this Court or any other court. A related case, seeking review of orders in an earlier, related proceeding, is pending before this Court in *Public Utils. Comm'n of California v. FERC*, No. 08-1261 (filed Aug. 8, 2008). By order issued on December 13, 2011, the Court held that

appeal in abeyance pending the outcome of the instant appeal. Undersigned counsel is not aware of any other related case.

/s/ *Samuel Soopper*
Samuel Soopper
Attorney

September 10, 2012

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Canadian Ass'n	*Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 293 (D.C. Cir. 2001)
Edison	Petitioner Southern California Edison Company
Incentives Order	*Southern California Edison Co.*, 121 FERC ¶ 61,168 (2007)
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Kentucky Pub. Serv. Comm'n	*Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1007 (D.C. Cir. 2005)
Rehearing Order	"Order on Rehearing and Clarification," *Southern California Edison Co.*, 137 FERC ¶ 61,016 (Oct. 6, 2011), JA 74

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BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission (Commission or FERC) reasonably exercised its regulatory discretion in deciding to set the base rate of return on equity for certain of Southern California Edison Company's (Edison's) transmission projects at the median of the zone of reasonableness.

2. Whether the Commission appropriately considered Edison's argument against applying well-established agency policy to update its rate of return within the zone of reasonableness based on the most recently available financial data.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF FACTS

I. INTRODUCTION

Edison is an investor-owned public utility which, among other things, transmits electric energy in interstate commerce and sells such energy at wholesale. Edison is a member of the California Independent System Operator, which operates the regional transmission system that includes Edison's facilities.

This case arises from an earlier administrative proceeding in which Edison sought incentive rate treatment for the construction of three particular transmission projects. (The three transmission projects are the Devers-Palo Verde II Project, the Tehachapi Project and the Rancho Vista Project.)

In an order issued on November 16, 2007, the Commission granted various rate incentives to encourage construction of the three projects. *See Southern California Edison Co.*, 121 FERC ¶ 61,168 (2007) (Incentives Order), *reh'g denied*, 123 FERC ¶ 61,293 (2008). The Incentives Order granted several types of beneficial rate treatment to Edison for the cost of the projects, including specific

additions – incentive adders – to the base rate of return of the projects.[1]

In the proceeding at issue on appeal, Edison subsequently proposed an increase in its transmission rate for the three projects, including a base return on equity, reflecting its estimated costs of securing equity capital for each of the three projects.

In the first order on review, "Order on Paper Hearing and Request for Rehearing," *Southern California Edison Co.*, 131 FERC ¶ 61,020 (April 15, 2010), JA 1 (Paper Hearing Order), the Commission concluded, as relevant here, that Edison's base rate of return should be set at the median rather than the midpoint of the range of numbers within the range of reasonable returns for the projects. The median is the central data point of the range, while the midpoint is the average of the highest and lowest data points. *See Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1007 (D.C. Cir. 2005) (*Kentucky Pub. Serv. Comm'n*).

Additionally, the Commission found that the rate of return at issue, which was in effect for a ten-month locked-in period from March 1, 2008, through

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[1]Those orders are on appeal to this Court in *Public Utils. Comm'n of California v. FERC*, No. 08-1261 (filed Aug. 8, 2008). By order issued on December 13, 2011, the Court held that appeal in abeyance pending the outcome of the instant appeal. Thus, the Commission's orders granting incentive adders to Edison's rate of return for these transmission projects are not on review here, but are relevant only in that they provide context for this case.

December 31, 2008, should be updated to reflect the most recently available financial data. Paper Hearing Order P 99, JA 41. Therefore, the Commission applied its "well-established" policy to perform this updating "based on the change in average yields on ten-year constant maturity U.S. Treasury bonds." *Id.* P 100, JA 41.

In two later orders on review, the Commission likewise held that Edison's base rate of return for the three transmission projects should be set at the median, rather than the midpoint, of the zone of reasonableness. "Order Accepting and Suspending Proposed Rates and Establishing Hearing and Settlement Judge Proceedings," *Southern California Edison Co.*, 133 FERC ¶ 61,269 (Dec. 29, 2010), JA 48; and "Order Accepting and Suspending Proposed Formula Rate Filing and Establishing Hearing and Settlement Judge Procedures," *Southern California Edison Co.*, 136 FERC ¶ 61,074 (Aug. 2, 2011), JA 62.

In the final order on review, "Order on Rehearing and Clarification," *Southern California Edison Co.*, 137 FERC ¶ 61,016 (Oct. 6, 2011), JA 74 (Rehearing Order), the Commission rejected Edison's requests for rehearing of these orders on the two issues presented on appeal: (1) the Commission affirmed that the median, rather than the midpoint, of the zone of reasonableness was the proper measure for Edison's base rate of return; and (2) the agency rejected Edison's contention that it should forgo updating the rate of return for the relevant

period due to the economic situation at that time.

II. STATUTORY AND REGULATORY BACKGROUND

The Federal Power Act charges the Commission to employ its authority "to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *New York v. FERC*, 535 U.S. 1, 6 (2002) (quoting *Gulf States Util. Co. v. FPC*, 411 U.S. 747, 758 (1973)). A primary purpose of the Act is "to encourage the orderly development of a plentiful supply of electricity . . . at reasonable prices." *Public Utils. Comm'n of California v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)).

Section 201(b) of the Federal Power Act confers upon the Commission jurisdiction over all rates, terms and conditions of electric transmission service and sales at wholesale by public utilities in interstate commerce. 16 U.S.C. § 824(b). Section 205 of the Act prohibits unjust and unreasonable rates and undue discrimination "with respect to any transmission or sale subject to the jurisdiction of the Commission," *id*. §§ 824d(a)-(b), while section 206 gives the agency the power to correct any such unlawful practices. *Id*. § 824e(a).

This case involves the regulatory mechanism for the recovery by Edison of the cost of the three particular transmission projects in its transmission rates. As this Court has explained, cost-based rates, such as those at issue here, include a

return on equity component:

> Each year that a durable utility asset is in use imposes on the utility the annual cost of the capital used for its construction (net of amounts already recovered in depreciation charges). In order to attract capital, a utility must offer a risk-adjusted expected rate of return sufficient to attract investors. This return to investors is the cost to the utility of raising capital.

Canadian Ass'n of Petroleum Producers v. FERC, 254 F.3d 289, 293 (D.C. Cir. 2001) (*Canadian Ass'n*). Because utility companies are often not publicly traded, the Commission employs estimates to determine a company's reasonable rate of return. *Id. See also Kentucky Pub. Serv. Comm'n*, 397 F.3d at 1006-07.

Here, the Commission employed its customary Discounted Cash Flow method to calculate a zone of reasonable returns based on the rates of return of publicly-traded companies selected as a proxy group. *See Canadian Ass'n*, 254 F.3d at 293-94 (explaining this method). The Commission then determined the appropriate point within that zone at which to set the return on equity. *See id.* at 294.

In this appeal, Edison challenges neither the Commission's selection of the proxy group nor the range of reasonable returns derived from that group. Rather, Edison contests the method by which the Commission set the return on equity within the zone of reasonableness, as well as its decision to update the number based on more recent financial data than was available when Edison made its rate filing.

Edison's rate filing implemented certain rate incentives that it had been granted by the Commission. As part of the Energy Policy Act of 2005, Congress added new section 219 to the Federal Power Act, which directed the Commission to promulgate a rule that would, in relevant part, promote capital investment in the enlargement and improvement of the electric transmission system by specifically requiring the Commission to "provide a return on equity that attracts new investment in transmission facilities[.]" 16 U.S.C. § 824s(b)(2). The Commission subsequently promulgated a rule which set forth processes by which a public utility could seek transmission rate incentives in accordance with Federal Power Act section 219. *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

This Court has, on several occasions, affirmed the Commission's application of incentive adders to a utility's rate of return, at least as applied to a utility member of an Independent System Operator or a Regional Transmission Organization. *See Connecticut Dept. of Pub. Util. Control v. FERC*, 593 F.3d 30 (D.C. Cir. 2010); *Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 287-90 (D.C. Cir. 2006); *Pub. Utils Comm'n of Cal. v. FERC*, 367 F.3d at 928-29.

III. THE PROCEEDINGS BEFORE THE COMMISSION

A. Events Leading To Edison's Base Rate Of Return Filing

In response to Order No. 679, Edison made a filing with the Commission on May 18, 2007 (amended August 16, 2007), requesting approval of proposed incentive rate treatment for the three transmission projects at issue. In the Incentives Order, the Commission found that Edison's proposals for the construction of the transmission projects were consistent with the goals of Order No. 679. *See* Incentives Order P 39. Thus, the Commission granted certain rate incentives to Edison for the three projects, including the recovery of 100 percent of its Construction Work in Progress costs in its rate base for all three facilities,[2] as well as incentive adders of 125 basis points on the return on equity of the Devers-Palo Verde II Project and the Tehachapi Transmission Project, and 75 basis points for the Rancho Vista Project. *Id.* PP 57, 129.

As we indicated above, in the present case, Edison has no quarrel with the incentive adders granted by the Commission for the three transmission projects. Edison objects only to the Commission's determination of the base rate of return,

[2]Construction Work in Progress is a rate method by which public utilities recover in their current rates carrying charges incurred during the construction of facilities. *See Construction Work in Progress for Public Utilities; Inclusion of Costs in Rate Base*, Order No. 298, FERC Stats. & Regs. ¶ 30,455 at 30,491 (1983), *order on reh'g*, Order No. 298-B, FERC Stat. & Regs. ¶ 30,524 (1983).

to which the adders will be applied.

B. Edison's Base Rate of Return Filing

On December 21, 2007, Edison made a filing with the Commission to reflect proposed changes to its transmission revenue requirement and customer transmission rates, to implement the rate incentives the Commission had authorized for the three transmission projects at issue. Record (R) 1, Joint Appendix (JA) 93.

In its filing, Edison presented testimony by its witness Dr. Hunt that recommended a base rate of return of 11.50 percent. *Id.* at 7-8, JA 100-101 (citing Exhibit SCE-7, JA 119). Dr. Hunt employed the midpoint of his estimated range of reasonable returns to select Edison's return on equity.

Several parties, including the California Public Utilities Commission, submitted filings arguing, on various grounds, that Edison's proposed 11.50 percent rate of return was excessive. *See* Notice of Intervention, Protest and Request for a Hearing of the Public Utilities Commission of the State of California, R 9, JA 159-175.

On February 29, 2008, the Commission issued an order, *Southern California Edison Co.*, 122 FERC ¶ 61,187 (2008), R 13, JA 176 (2008 Hearing Order), accepting Edison's tariff revisions and suspending them for a nominal period, so that they became effective March 1, 2008, subject to refund and subject to the

outcome of a paper hearing established by the order.

On the rate of return issue, the Commission found that "a reasonable range of returns on equity" for Edison "appears to be from 7.97 percent to 13.67 percent." 2008 Hearing Order P 27, JA 186. "Thus," the agency concluded, "SoCal Edison's proposed overall [returns on equity] (including the incentive adders) of 12.75 percent" for one of the projects, and 13.25 percent for the other two, "fall within the upper end of this zone." *Id.*

The Commission nonetheless set for a paper hearing the range of reasonableness of Edison's base return on equity, "in order to give all parties an opportunity to present evidence to rebut" the company's proposal. 2008 Hearing Order P 27, JA 187.

Subsequently, Edison and the other parties in the proceeding filed briefs and evidence on the issue. Edison specifically defended Dr. Hunt's use of the midpoint of the zone of reasonableness, rather than the median. R 28 at 22-30, JA 348, 375-383. Edison also argued that the Commission should not apply its standard practice of updating the rate of return using more recent Treasury bond data. R 36 at 14-21, JA 456, 474-481.

C. The Paper Hearing Order

In its April 15, 2010 Paper Hearing Order, the Commission confronted the issue of whether the midpoint or the median of the zone of reasonableness

provided the appropriate rate of return in this case.

The Commission rejected Edison's arguments that the median would provide a less reliable measure of an electric utility's cost of capital. Paper Hearing Order P 85, JA 36. Rather, the agency observed, it had previously "explained the benefits of using the median rather than the midpoint to set the [return on equity] for a company of average risk." *Id.* & n.178 (citing *Transcontinental Gas Pipe Line Corp.*, 84 FERC ¶ 61,084 (1998), *order on reh'g*, 85 FERC ¶ 61,323 (1998), *petition for review denied, N.C. Pub.Utils.Comm'n v. FERC*, 203 F.3d 53 (D.C. Cir. 2000)).

The Commission also relied on its decision in *Northwest Pipeline Corp.*, 99 FERC ¶ 61,305 (2002) (on remand from *Canadian Ass'n*), in which the agency affirmed its policy that "the median is preferable to the midpoint or mean" of the range of reasonable returns for a company of average risk "because it aids the Commission in its effort to treat all companies that face average risk equally." *Id.* P 86, JA 36. (The mean is the average of all the data numbers in the set, while, as indicated previously, the median is the central data point of the range and the midpoint is the average of the highest and lowest data points.)

The Paper Hearing Order distinguished the Commission's policy of using the median for the rate of return of a single electric utility of average risk, from its use of the midpoint "when determining a generic [return on equity] for a diverse

group of electric transmission owners," such as members of the regional Midwest Independent System Operator. *Id.* P 90, JA 39 (citing *Midwest Indep. Transmission Sys. Operator*, 106 FERC ¶ 61,302 PP 8-15 (2004) (affirmed in *Kentucky Pub. Serv. Comm'n*)). Thus, while the agency would continue to use the midpoint in the latter circumstance, "the median is appropriate" in this case "because it is the most accurate measure of central tendency for a single utility of average risk, such as SoCal Edison." *Id.* P 93, JA 40.

The application of the median resulted in a base return on equity for Edison of 10.55 percent. Paper Hearing Order P 94, JA 40.

The Commission observed that the base rate of return would be in effect for the locked-in period of March 1, 2008 (the effective date set by the earlier Hearing Order) thorough December 31, 2008 (the last date before the base rate of return was superseded by a new base return on equity that became effective January 1, 2009). Paper Hearing Order P 21, JA 10. The Commission determined that it had been appropriate to establish Edison's base return on equity using data from the six-month period ending November 30, 2007, which was the most recent data available at the time of the company's December 2007 rate filing. *Id.*

However, the Commission explained that under its "well-established" policy, "because market conditions often change substantially between the time a utility files its case-in-chief and the date the Commission issues a final decision,

we update the return on equity." Paper Hearing Order P 100, JA 41 (citing agency cases). FERC performs this updating for a "locked-in period based on the change in average yields on ten-year constant maturity U.S. Treasury bonds." *Id.*

Therefore, the Commission revised Edison's rate of return using data actually available for the ten-month period the rate would be in effect (March 1, 2008 to December 31, 2008). Applying this routine updating resulted in a downward adjustment of the base rate of return to 9.54 percent. Paper Hearing Order P 101, JA 42.

Edison filed a request for rehearing of the Paper Hearing Order (R 56, JA 495-656), raising two issues: (1) that it was discriminatory for the Commission to use the median for setting the return on equity for an individual member of an Independent System Operator, while using the midpoint for joint rate filings by such members (R 56 at 7, JA 501); and (2) that the Commission erred in applying its updating policy during a period of "unprecedented" economic conditions in which U.S. Treasury Bonds were not a suitable proxy for the change in Edison's cost of equity (R 56 at 18, JA 512). In support of the latter point, Edison submitted an affidavit by its witness Dr. Hunt. JA 525.

D. Edison's Subsequent Rate Filings And The Resulting Orders

On October 29, 2010, Edison filed further revisions to its Transmission Owner Tariff to reflect certain proposed changes to its transmission revenue

requirement, updating its Construction Work in Progress expenditures for two of the transmission projects for calendar year 2011. R 64, JA 657.

On December 29, 2010, the Commission accepted and suspended Edison's proposed 2011 rate changes. *Southern California Edison Co.*, 133 FERC ¶ 61,269 (2010), JA 48. In this order, the Commission accepted Edison's range of reasonable returns (from 7.33 percent to 15.67 percent), but again applied the median, rather than the midpoint, to set the rate of return within the zone of reasonableness. *Id.* P 21, JA 55-56. Edison subsequently filed a request for rehearing on the midpoint/median issue, on the grounds set forth in its earlier rehearing request of the Paper Hearing Order. R 86, JA 672.

On June 3, 2011, Edison filed further tariff revisions to implement a formula rate to recover its revenue requirement, including a base return on equity. On August 2, 2011, the Commission accepted and suspended the company's formula rate filing. *Southern California Edison Co.*, 136 FERC ¶ 61,074 (2011), JA 62. As relevant here, the Commission again rejected Edison's proposal to use the midpoint, in favor of the median, to set the rate within the zone of reasonableness. *Id.* P 30, JA 71. Edison filed a request for rehearing, which again incorporated by reference its prior arguments that the midpoint, rather than the median, is the appropriate measure for fixing its base rate of return within the zone of reasonableness. R 121, JA 708.

There is no updating issue in these subsequent rate cases.

E. The Rehearing Order

In the Rehearing Order, the Commission denied rehearing in all proceedings of the issues on appeal.

At the outset, the Commission rejected Edison's proffer of the Hunt testimony, coming as it did at the rehearing stage of the proceeding. Rehearing Order P 11, JA 78-79 (citing agency cases).

The Commission went on to reject Edison's contention that the agency had improperly applied the median to the Discounted Cash Flow analysis for determining the company's return on equity. Rehearing Order P 17, JA 81. To the contrary, the Commission reiterated its policy to "appl[y] the median in the context of setting [a return on equity] for an individual applicant of average risk because the median is the most accurate measure of central tendency," as opposed to setting the rate of return for a group of utilities, where use of the midpoint is more appropriate. *Id.* P 18, JA 81-82.

The Commission also fully considered and rejected Edison's request that "the Commission should forgo updating the [return on equity] in this proceeding." Rehearing Order P 26, JA 85. The Commission concluded that the economic downturn during the relevant period did not require that "Edison's base [return on equity] calculation should be exempt from the updating procedures" governed by

"more than 25 years" of precedent, "during which time the U.S. economy has experienced many fluctuations." *Id.* PP 31-32, JA 87-88. In this regard, the Commission was cognizant that Edison's updated rate of return remained within the range of reasonable returns for the company, and found that Edison's situation was not so anomalous as to justify a one-time departure from its objective practice. *Id.* P 33, JA 88-89.

This appeal followed.

SUMMARY OF ARGUMENT

1. The Commission reasonably exercised its discretion in determining that Edison's rate of return should be set at the median of the zone of reasonableness. That exercise here is entirely in accord with the agency's consistent policy for the rate of return of a single electric utility of average risk.

In applying this policy, the Commission explained that, statistically, the median is the most accurate measure of the central tendency of the numerical range of the proxy group, which is the most important consideration in that situation. Because the Court is particularly deferential to such rate determinations by the Commission, the agency's rational decision should be sustained.

Edison's argument that the Commission's orders run afoul of the Court's decisions in *Kentucky Pub. Serv. Comm'n* and *Canadian Ass'n* is simply incorrect. In the former, the Court not only upheld the Commission's use of the midpoint to

determine the rate of return for a diverse group of utilities, but specifically recognized the Commission's distinction for setting the rate of return for a single utility at the median. In the latter decision, the Court remanded because the Commission had failed to address a rate of return issue raised by petitioner, which is not the situation here. In neither opinion did the Court give any indication that it intended to disavow its traditional policy of special deference to the Commission's ratemaking decisions.

Edison's claim that the Commission policy discriminates against a single utility cannot be sustained. A group of diverse utilities filing for a rate of return is not similarly situated to one company making such a filing. The Commission reasonably explained the statistical basis for distinguishing between a diverse group of utilities making a rate filing (when the midpoint is appropriate) and a single utility making a rate filing (where the median is appropriate).

Edison tries to upset the Commission's reasonable distinction by asserting that the agency failed to find its proposal to use the midpoint unjust and unreasonable. To the contrary, the Commission has established a policy in its case law that the choice of the median is just and reasonable for a single electric utility of average risk, and applied it here. Moreover, contrary to Edison's view, the Commission has consistently applied this policy to electric utilities since 2008 (and

to natural gas utilities much longer), and found no compelling or case-specific reason not to apply it here.

2. Edison claims that the Commission's rejection of Dr. Hunt's evidence against updating the rate of return at the rehearing stage of the proceeding violated its due process rights. However, Edison knew or should have known that the Commission would apply its updating policy throughout the case and had an opportunity to argue that the updating policy should not be applied here. In any event, the Commission addressed Edison's argument on this point.

There is no surprise here; the Commission reasonably exercised its procedural discretion. The Commission explained that Edison had demonstrated no reason to get a waiver of its updating policy, which was based on 25 years of precedent. The agency concluded that Treasury bonds remained an appropriate measure for updating a rate of return within the zone of reasonableness established in the case, regardless of economic fluctuations during the period in question.

The merits of Edison's claim fare no better. The Commission explained that because the updated rate of return remained within the range of reasonable returns established by the record (which is not contested by Edison), the agency was not required to deviate from its longstanding updating policy, applying the objective criteria of Treasury bond rates to update the rate of return within this range. In this regard, the Commission relied on both agency and court precedent. The agency

reasonably expressed concern that failure to apply its updating policy in this circumstance would lead to substantial administrative uncertainty and difficulty in future cases. This Court's decision in *Union Electric*, on which petitioner heavily relies, actually supports the Commission's position that updating the return of equity within the zone of reasonableness based on Treasury bond rates is an appropriate action for the agency to take.

ARGUMENT

I. STANDARD OF REVIEW

Under the familiar arbitrary and capricious standard, the Court will "affirm the Commission's orders so long as FERC examine[d] the relevant data and articulate[d] a . . . rational connection between the facts found and the choice made." *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010) (quoting *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009)).

"The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions." *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 613 (2008); *see also, e.g., Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004).

This Court has emphasized the deferential nature of its review of a Commission decision determining the appropriate level of the rate of return. Thus,

in *Kentucky Pub. Serv. Comm'n*, the Court "recognized that 'agency ratemaking is far from an exact science,'. . . and that it involves 'complex industry analyses'. . . and 'issues of rate design [that] are fairly technical.'" 397 F.3d at 1006 (quoting *Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 163 (D.C. Cir. 1995); *Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996); and *Town of Norwood v. FERC*, 962 F.2d 20, 22 (D.C. Cir. 1992)). "For these reasons," the Court concluded, "and because ratemaking 'involves policy determinations in which the agency is acknowledged to have expertise, our review thereof is particularly deferential.'" *Id.* (quoting *Time Warner*, 56 F.3d at 163).

II. THE COMMISSION REASONABLY SET EDISON'S RATE OF RETURN AT THE MEDIAN OF THE ZONE OF REASONABLENESS.

A. The Court Should Defer To The Commission's Reasonable Exercise Of Its Regulatory Discretion.

In the contested orders, the Commission applied its policy of using the median, rather than the midpoint, of the range of returns in setting the return on equity for a company of average risk. Paper Hearing Order PP 85-87, JA 36-37; Rehearing Order PP 18-19, JA 81-82. The Commission explained that the median provides "the most accurate measure of [the] central tendency" of the numerical range of the proxy group by giving greater "consideration to more of the companies in the proxy group, rather than only those at the top and bottom." Rehearing Order P 18 & n.32, JA 82 (citing Paper Hearing Order P 93, JA 40).

This is because it "will lessen the impact of any single proxy company whose [return on equity] is atypically high or low." *Id.* & n.33 (citing Paper Hearing Order P 85, JA 36 (quoting *Transcontinental Gas*, 84 FERC at 61,427)).

Thus, "[t]he laws of statistics support the Commission's use of the median in setting [the return on equity] for a company facing average risk." Paper Hearing Order P 86 & n.183, JA 36 (quoting *Northwest Pipeline*, 99 FERC at 62,276, and citing statistical treatises); *see also* Rehearing Order PP 19-20, JA 82-83 (citing additional agency cases).

The Commission distinguished its use of the midpoint of the range of returns when considering a joint filing by a diverse group of utilities. There, the Commission explained, because the return on equity "would apply across-the-board" to multiple transmission owners operating within a regional system rather than only to a single company of average risk, the Commission needs to consider "the full range of risks and business profiles of all the companies" within the region, *i.e.*, "a group of utilities with differing risks and business rankings." Rehearing Order P 22, JA 84 (quoting *Midwest ISO*, 106 FERC ¶ 61,302 PP 9-10) (internal quotation marks omitted).

In that situation, the Commission observed, its goal "is not to select the most refined measure of central tendency," as it is with setting the return of a single utility of average risk. Rehearing Order P 23, JA 84. Thus, the agency there "was

not as concerned . . . that the high and low results represent different risks" as with a single company, so that the midpoint, rather than the median, is the more appropriate measure. *Id.* (quoting *Midwest ISO*, 106 FERC ¶ 61,302 P 10).

In sum, the Commission reasonably explained why it chose to employ the median of the zone of reasonableness for Edison's rate of return in this proceeding. Its decision should, therefore, be sustained by this Court in accordance with the deferential standard of review set out in *Kentucky Pub. Serv. Comm'n*.

B. Edison Fails To Demonstrate That The Commission Acted Unreasonably Or Failed To Apply Its Policy Consistently.

Edison reads this Court's decision in *Kentucky Pub. Serv. Comm'n* differently. Because the Court there affirmed "that the midpoint is a just and reasonable measure of [return on equity] for a group of electrical utility [Independent System Operator] members with diverse risk profiles," Edison argues, it is "arbitrary and capricious for FERC to hold that the midpoint is *not* just and reasonable when an individual [Independent System Operator] member of average risk seeks" its own return on equity. Pet. Br. 19 (emphasis original). Thus, Edison contends that *Kentucky Pub. Serv. Comm'n* requires reversal of the Commission's decision here. *Id.* 25; *see also id.* 29-30, 33-34.

Edison's interpretation of the *Kentucky Pub. Serv. Comm'n* decision completely ignores the Court's endorsement of the Commission's distinction "between 'cases in which a [return on equity] is set for one gas pipeline or electric

utility' and cases where 'applicants proposed setting a single [return on equity] for across-the-board application.'" 397 F.3d at 1010 (quoting *Midwest ISO*, 106 FERC ¶ 61,302 at 62,192 (2004)). In fact, the Court agreed with "FERC's reason[ing]" that, in regard to a diverse set of companies, "the range of results becomes as important as the central value," making the midpoint a more appropriate measure because "unlike the other measures of central tendency. . . [it] fully considers that range." *Id.* The Court went on to observe that the agency's justification for using the midpoint in determining the rate of return for a group of utilities "provides a reasoned approach that lends itself to consistent application over a series of cases." *Id.*

Furthermore, the Court referred without criticism to the Commission's "acknowledg[ing] that the median, and not the midpoint, may be 'the most refined measure of central tendency.'" 397 F.3d at 1010 (quoting *Midwest ISO*, 106 FERC at 62,192). Thus, far from forbidding the result reached by the Commission in the contested orders, *Kentucky Pub. Serv. Comm'n* is more fairly read as affirming the distinction made by the Commission here between use of the median to determine the rate of return of a single utility of average risk and use of the midpoint for setting the rate of return within the range of a diverse group of utilities. As the Court recognized, judicial deference to the agency's ratemaking choices and

distinctions is grounded in more than a century of precedent. *Id.* at 1006 (citing *Smyth v. Ames*, 169 U.S. 466, 546 (1898)).

Edison also claims that this Court's decision in *Canadian Ass'n* rejected the Commission's decision to use the median, rather than the mean, for a utility of average risk. Pet. Br. 20, 34-35, 38. But the Court did not reach the merits of the Commission's decision in that case. Rather, the Court reversed the Commission because the agency had "simply dismissed" the proposed use of the mean "in conclusory terms," not because the median was never a legally acceptable option. 254 F.3d at 299.

The Court in *Canadian Ass'n* did opine in passing that the Commission had inaccurately described the midpoint as entirely disregarding the middle numbers of the range. *Id.* at 298. But the decision can hardly be read to forbid the agency's use of the median in calculating rate of return in any circumstances. In fact, the Court specifically acknowledged the possibility that the "median is to be preferred to the average" as a measure of central tendency in rate of return cases in which the distribution is highly skewed, but did not reach this point because "the Commission never offered such an explanation." *Id.* at 299. (On remand from that appeal, the Commission employed the median to fix the rate of return within the zone of reasonableness, using the same analysis it employed in the contested orders. *See Northwest Pipeline*, 99 FERC at 62,276-77.) Nor did *Canadian Ass'n*

express any change in the Court's traditional deferential review of Commission decisions on such ratemaking issues.

Edison goes on to make three further arguments that the Commission's decision to employ the median here must be vacated. None, however, meets the "burden [that] is on the petitioners to show that the Commission's choices are unreasonable and its chosen line of demarcation is not within a zone of reasonableness as distinct from the question of whether the line drawn by the Commission is precisely right." *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002) (citations and internal quotation marks omitted); *see also Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 471 (D.C. Cir. 2008), *rev'd in part on other grounds sub nom. NRG Power Mktg. v. Maine Pub. Utils. Comm'n*, 130 S.Ct. 693 (2010) (same).

First, Edison contends that the Commission's decision here must be vacated because, by applying a different standard to determine the rate of return for a single utility of average risk, as opposed to the rate of return for a diverse group of utilities, the Commission has arbitrarily "treat[ed] similarly situated parties differently without a reasoned explanation." Pet. Br. 28 (citing, *e.g.*, *Burlington Northern & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 776-77 (D.C. Cir. 2005)).

This ignores, of course, the Commission's statistical basis for its differentiating between the rate of return for a single utility and that of diverse utilities filing jointly. *See* Paper Hearing Order PP 86-87, JA 36-37; Rehearing Order PP 18-20, JA 81-83. Edison nonetheless argues that "FERC's approach is particularly arbitrary because it makes the [return on equity] for a given utility depend upon the actions of third parties over which the utility has no control," suggesting various reasons that the company's fellow members of an Independent System Operator may choose "to eschew a joint filing." Pet. Br. 32-33. But Edison did not raise this particular contention in any of its rehearing requests, so that the Court is without jurisdiction to consider it for the first time on review. *See, e.g.*, *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005).

In any event, while Edison's speculation could possibly explain why a single utility might find itself in a different position from a diverse utility group when filing for a rate change, it does not refute the point that a single utility filing for a rate change is not similarly situated to a diverse group making such a filing, and thus appropriately subject to differing regulatory treatment. *See, e.g., Cities of Bethany v. FERC*, 727 F.2d 1131, 1138-39 (D.C. Cir. 1984) (not discriminatory to subject utilities that are not similarly situated to different treatment). Individual utilities and groups of utilities, whatever their motivation may be for making rate filings individually or jointly, are not similarly situated.

Edison's second argument is that the Commission was foreclosed from employing the median in this case because the agency nowhere made an explicit finding that the company's proposal to use the midpoint was not just and reasonable. Pet. Br. 25-26. Having failed to make this finding, Edison maintains that the Commission cannot reject the utility's proposal "simply because it would have preferred that [the company] use the median." *Id.* 27.

This argument disregards the fact that the Commission here applied agency policy established by its precedent that, in determining the rate of return for a single electric utility of average risk, it is just and reasonable to use the median of the zone of reasonableness, and rejecting proposals to use the midpoint as unjust and unreasonable. Paper Hearing Order P 92, JA 39 (citing *Golden Spread Electric Coop. Inc., et al., v. Southwestern Pub. Serv. Co.*, 123 FERC ¶ 61,047 PP 62-64 (2008), and *Virginia Electric and Power Co.*, 123 FERC ¶ 61,098 P 66 (2008)). Thus, the Commission had already established that only the median is just and reasonable in this circumstance; conversely, Edison's proposal to use the midpoint violated this policy and was not just and reasonable.

This Court has recognized the ability of an agency to apply an established policy to change a rate proposed by a company to ensure that the result is just and reasonable. *See Verizon Telephone Cos. v. FCC*, 453 F.3d 487, 495-97 (D.C. Cir. 2006) (upholding an FCC change to a rate filed by a company in contravention of

agency policy). And there can be no doubt, under this Court's longstanding precedent, that the Commission may "formulat[e] policy that will have the force of law. . . through adjudications which constitute binding precedents" *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974); *see also, e.g., Consolidated Edison Co. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) (an agency may "change the established law and apply newly created rules . . . in the course of an adjudication"). To the extent that Edison, at bottom, is questioning the wisdom of the Commission's policy choice, rather than the agency's explanation in support of continued application of its policy, it has offered no legitimate reason to support its plea that the Court "substitute [its] judgment for that of the agency." *FCC v. Fox*, 556 U.S. 502, 530 (2009) (quoting *Motor Vehicle Mfrs. Ass'n. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

This brings us to Edison's third argument, which is that the Commission has not established a consistent policy of applying the median to an individual electric utility of average risk. Rather, Edison maintains, "FERC itself acknowledged . . . that its historical practice was to use the midpoint for electrical utilities." Pet. Br. 36 (citing Paper Hearing Order P 93 & n.54, JA 39). "In fact," according to Edison, "the precedents on which FERC primarily relied in its Rehearing Order were gas cases," and that the agency's policy in electric cases is inconclusive or tilts the other way. *Id.* 36-37 (citing Rehearing Order PP 18-19, JA 81-83).

But there is no such inconsistency. The Commission cited natural gas cases from 1998 on, consistently using the median for an individual utility rate filing. *See* Paper Hearing Order P 85, JA 36 (citing *Transcontinental Gas).* And the Commission cited electric utility cases starting in 2008, consistently using the median for setting an individual utility's return on equity. *See id.* P 92 & nn. 196-197, JA 39 (citing *Golden Spread* and *Virginia Electric and Power Co.*). That the Commission adopted this policy for electric utilities after adopting its policy for natural gas utilities, and did not develop a unified policy of ratemaking for both electric and gas utilities until shortly after Edison initiated this proceeding in 2007, hardly demonstrates the inconsistency or unreasonableness of its policy as applied in the orders on review.

In the orders below, the Commission explained that it had reevaluated its traditional policy – referred to by the Court in *Kentucky Pub. Serv. Comm'n*, 397 F.3d at 1012 – of using "the midpoint for setting the [return on equity] in electric proceedings and the median in gas proceedings." Paper Hearing Order P 93, JA 39. "[W]hen establishing the [return on equity] of an individual utility," the agency reasoned, "there is no longer a sufficient basis for divergent approaches to determining the middle of the range of reasonable returns in the gas and electric industries." *Id.*, JA 39-40. "Rather," the Commission concluded, "the median is appropriate because it is the most accurate measure of central tendency for a single

utility of average risk, such as SoCal Edison." *Id.*

In its 2008 *Golden Spread* order, the Commission used the same analysis as in the contested orders to hold that, with respect to an electric utility, in "determining the just and reasonable [return on equity] for a single utility of average risk . . . [we] find the median to be appropriate for setting the [return on equity]." 123 FERC ¶ 61,047 P 64. Having established this policy, the Commission has consistently applied it in all subsequent cases of this type. *See* Rehearing Order P 20 & n.38, JA 83 (citing *Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152 P 65 (2010); *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281 P 95 (2009), *order on reh'g*, 130 FERC ¶ 61,044 P 40 (2010)). Thus, Edison's reliance (Pet. Br. 37) on earlier electric utility cases (such as *Consumers Energy Co.*, 98 FERC ¶ 61,333 (2002)) as evidence of agency inconsistency is misplaced, because the Commission explained in the contested orders that it did not change course on this issue until its *Golden Spread* decision issued in 2008.

Edison objects to the Commission's reliance on *Golden Spread* as it "is still under review," Pet. Br. 39, presumably because the decision remains subject to rehearing by the Commission. But this does not deprive *Golden Spread* of its precedential effect. *See* Federal Power Act, 16 U.S.C. § 825*l*(c) (filing of an application for rehearing "shall not . . . operate as a stay of the Commission's

order" unless specifically so ordered by the Commission or a reviewing court). In any event, the other cases cited by the Commission are not subject to further review, and the Commission has continued to consistently apply this policy. *See RITELine Illinois, LLC*, 137 FERC ¶ 61,039 P 73 & n.91 (2011); *Duke Energy Carolinas, LLC*, 137 FERC ¶ 61,058 P 23 & n.24 (2011).

III. THE COMMISSION REASONABLY APPLIED ITS WELL-ESTABLISHED UPDATING POLICY, HAVING FULLY CONSIDERED EDISON'S CONTRARY ARGUMENT.

Edison challenges another of the Commission's ratemaking policies – to update the utility's return on equity based on more recent financial information following the submission of the utility's rate filing. This challenge can be no more successful than its challenge to the Commission's midpoint/median policy. Having made a rate adjustment that remains within the zone of reasonableness, the only remaining question is whether, in the words of this Court, the Commission has "play[ed] fair"; if so, its ratemaking judgment is entitled to deference. *Kentucky Pub. Serv. Comm'n*, 397 F.3d at 1006.

Edison claims that the Commission has not been procedurally fair. But its due process objection must fail, as: (1) Edison knew or should have known, throughout the proceeding, that the Commission would apply its updating policy; (2) Edison had an opportunity to argue that the Commission should decide not to apply its updating policy in the particular circumstances of this case; and (3) the

Commission satisfied its responsibility to respond to the waiver argument made by Edison.

A. Edison Had Notice Of The Commission's Updating Policy And An Opportunity To Respond.

In the Paper Hearing Order, the Commission stated that its "policy is to update the [return on equity] by adjusting for the yields on 10-year constant maturity U.S. Treasury bonds in determining the appropriate [return on equity]." Paper Hearing Order P 99 & n.205, JA 41 (citing court and agency cases). The basis of this "well-established" updating policy, the Commission explained, is that "market conditions often change substantially between the time a utility files its case-in-chief and the date the Commission issues a final decision." *Id.* P 100, JA 41 (footnote and citations omitted).

In the Rehearing Order, the Commission rejected Edison's argument that it should not apply its established updating policy. Rehearing Order PP 30-36, JA 87-90. "[D]espite the economic downturn during the ten-month period of 2008 that SoCal Edison's base [return on equity] was in effect," the Commission was not persuaded "that SoCal Edison's base [return on equity] calculation should be exempt from the updating procedures" routinely applied by the agency in such cases. *Id.* P 31, JA 87.

The Commission observed that its "precedent requiring updating [returns on equity] has been applied over the course of more than 25 years, during which time

the U.S. economy has experienced many fluctuations." Rehearing Order P 32, JA 87-88 (citing agency cases). While acknowledging that the ten-year bond yield may not "capture every short-term variation in the costs of equity," the Commission nonetheless found that it "continues to be a reliable barometer of overall market conditions." *Id.* P 33, JA 88 (citation and internal quotation marks omitted).

Finally, the Commission concluded that because this updating procedure follows its precedent "that generally supports placing the updated [return on equity] within the zone of reasonableness established in the record, we do not agree that we are required to establish a specific, mathematical correlation for the updating adjustment, as asserted by SoCal Edison." Rehearing Order P 33 & nn.61 & 62, JA 88-89 (citing agency cases).

Edison frames its attack on the Commission's application of its updating policy as a deprivation of due process, arguing that the agency unfairly "refused to even consider" the evidence it submitted demonstrating that the change in Treasury bond yields was not a reliable proxy for the change in equity costs for the company during the period at issue. Pet. Br. 40. The Commission could not take official notice of the Treasury bond rate, Edison maintains, without providing the company with an opportunity to dispute the applicability of the rate during the period in question. *Id.* 41 (citing *Union Electric Co. v. FERC*, 890 F.2d 1193 (D.C. Cir.

1989)).

Edison's due process argument is without foundation. The company certainly knew, or should have known, of the Commission's decades-old policy to update the rate of return for a locked-in period based on the most recently available Treasury bond rate within the zone of reasonableness. Thus, the Commission's application of the policy in the Paper Hearing Order cannot reasonably be said to have taken the company by surprise, necessitating a last minute evidentiary proffer.

Indeed, as revealed in the parties' pleadings before the agency, the updating issue was actually raised early in this case. On May 5, 2008, the California Public Utilities Commission filed a brief opposing various aspects of Edison's proposed rate of return. R 27, JA 238. One of its contentions was that the rate of return should be updated using more recent market conditions. *Id.* at 28-30, JA 270-272. On May 20, 2008, Edison filed its reply brief with the Commission, arguing both that the rate of return should not be updated, R 36 at 14-16, JA 474-476, and that, in any event, ten-year Treasury bonds should not be used to measure changes in the company's return on equity. *Id.* 18-21, JA 478-481. Indeed, Edison there based its argument on the very disparity between interest rates on corporate bonds and risk-free Treasury bonds that is the central thesis of Dr. Hunt's affidavit accompanying its later rehearing request. *Id.* at 19-20, JA 479-480. Thus, the record demonstrates that Edison was aware of this issue, and was able to make its case-

specific argument, almost two years before its attempt to introduce untimely new evidence on the issue in its May 17, 2010 rehearing request.

Edison thus had full opportunity to argue that the Commission should not apply its updating policy based on 2008 financial events, once these events became known, not just at the rehearing stage. In this regard, this case is unlike the situation in *Kentucky Pub. Serv. Comm'n*, where the Court remanded in part because the agency had changed its rules and injected a new issue (adding a 50 basis point incentive adder to the return on equity) at the very end of the proceeding, without prior notice. *See* 397 F.3d at 1012-13.

In this context, the Commission cannot be faulted for rejecting Edison's proffer of Dr. Hunt's affidavit based on the firmly-established procedural rule that "generally does not allow the introduction of new evidence at the rehearing stage of a proceeding." Rehearing Order P 11 & n.21, JA 78-79 (citing cases). This is because, the agency reasonably explained, "we cannot resolve issues finally and with any efficiency if parties attempt to have us chase a moving target." *Id.* n.21, JA 79 (quoting *Ocean State Power II*, 69 FERC ¶ 61,146 at 61,548 & n.64 (1994)). (The Commission's concern for procedural fairness at the rehearing stage, when the proceeding approaches its conclusion, is particularly appropriate and even-handed, as it does not allow the parties to file answers to rehearing requests. *See* 18 C.F.R. § 385.713(d)(1).) Thus, this action by the Commission was well within

"the broad discretion" the courts afford an agency in determining the "terms of its procedures." *Mobil Oil Exploration v. United Distribution Cos.*, 498 U.S. 211, 230 (1990).

In any event, while the Commission rejected Dr. Hunt's untimely affidavit, the Commission went on to address Edison's argument on the merits, explaining that the disparity between Treasury bonds and Edison's return on equity did not upset the agency's conclusion that the setting of Edison's return on equity within the established zone of reasonableness fairly reflected Edison's specific risks and costs. *See* Rehearing Order P 31, JA 87 (recognizing economic downturn during 2008, but remaining unpersuaded "that SoCal Edison's base [return on equity] calculation should be exempt from the updating procedures" the agency applies in similar proceedings). In these circumstances, the Commission's decision not to offer a one-time waiver from its consistent updating policy hardly rises to the level of "abuse of discretion" necessary to upset its decision. *See United Gas Pipe Line Co. v. FERC,* 707 F.2d 1507, 1511 (D.C. Cir. 1983); *see also National Ass'n of Reg. Util. Comm'nrs v. FERC,* 475 F.3d 1277, 1284 (D.C. Cir. 2007) (absence of discussion of a particular affidavit offering a particular empirical conclusion not fatal when Commission could conclude that there was "no specific basis for undermining the Commission's long-held understanding" of policy).

Therefore, Edison's argument that it was deprived of due process in the

administrative proceeding here is mistaken. The company has no legitimate due process claim because it "was heard in this case; it had an opportunity to submit its objections, and FERC carefully considered them." *Blumenthal v. FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010).

B. The Commission Reasonably Applied Its Updating Policy In This Case.

On the merits of Edison's claim, the Commission fully explained its decision to apply its longstanding policy of updating a company's rate of return within the zone of reasonableness based on Treasury bond rates.

First, the Commission explained that "[w]hile there may be some short-term positive or negative variations in the ten-year bond yield as compared to the utilties' cost of equity over certain limited periods, over time the ten-year bond index continues to be a 'reliable barometer of overall market conditions.'" Rehearing Order P 33 & n.60, JA 88 (quoting *Union Electric Co.*, 40 FERC ¶ 61,046 at 61,138 (1987)). As long as the updated rate of return on equity remains within the zone of reasonableness established in the record, mathematical precision (or even correlation) between the Treasury bond rate and the utility's rate of return is not necessary. *Id.* & n.61, JA 88 (citing *South Carolina Generating Co.*, 44 FERC ¶ 61,008 at 61,039 (1988) (footnotes omitted).

The Commission also expressed concern that giving Edison a policy waiver here would compel the agency to consider rate of return updating on a case-by-case

basis whenever a party claimed that such an economic anomaly had occurred. Rehearing Order P 34, JA 89. If the Commission did so, it explained, it "would be confronted with having to determine what defines a unique circumstance on a case-by-case basis, a determination that would be highly subjective," rather than "efficiently apply[ing]" established "objective standards," *i.e.*, updating by use of Treasury bond data within the zone of reasonableness. *Id.*

This is a valid concern, as an agency is entitled to find value in applying objective criteria. *See Kentucky Pub. Serv. Comm'n*, 397 F.3d at 1010 (FERC may offer a justification "that lends itself to consistent application over a series of cases"); *see also Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1967) (quoting *Bowles v. Willingham*, 321 U.S. 503, 517 (1944)) ("[C]onsiderations of feasibility and practicality are certainly germane" to setting just and reasonable rates); *Boroughs of Ellwood City v. FERC*, 731 F.2d 959, 969 (D.C. Cir. 1984) ("eminently reasonable" for the Commission, in considering allegation of price squeeze, not to consider utility's motives but "to focus instead on objective criteria").

Finally, the Commission relied on the decision of the First Circuit in *Boston Edison Co. v. FERC*, 885 F.2d 962 (1st Cir. 1989) (Breyer, J.), where the court sustained the Commission's updating based on ten-year Treasury bonds against an argument that Treasury bonds were not a valid measure of rate of return at the

time. Rehearing Order P 35, JA 89. In support of its position, the agency quoted the court's conclusion that "even if we assume, for the sake of argument, that changes in reasonable utility share returns do not exactly track changes in bond interest rates, the Supreme Court has made clear that 'infirmities' in Commission methodology are 'not . . . important,' provided that the 'result reached,' the 'impact of the rate order,' cannot 'be said to be unjust and unreasonable.'" *Id.* P 35 & n.65, JA 89 (quoting 885 F.2d at 967 and *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944)).

Edison's brief does not discuss any of the precedent relied on by the Commission, and refers to *Boston Edison* (Pet. Br. 44) only in passing. Instead, Edison's argument that the Commission should not have updated its rate of return relies almost entirely on this Court's decision in *Union Electric*. Pet. Br. 41-45. However, a fair reading of *Union Electric* reveals that it actually supports the Commission's position.

In *Union Electric*, like here, the Commission rebuffed the petitioner's attempt to introduce evidence to demonstrate that the Treasury bond rate was not a reasonable measure for updating a company's cost of equity. There, the Court explained, "[i]nstead of responding to Union on the merits, the Commission dismissed its claim out of hand" based on its "past precedent" with respect to updating. 890 F.2d at 1204

The fundamental reason for the Court faulting the Commission's action was that "the precedent on which the Commission relied . . . involv[ed] only adjustments within a range of reasonableness based on the record." 890 F.2d 1204. But that precedent (including *South Carolina)* was inapplicable, the Court explained, because the agency had neglected to set any zone of reasonableness in the orders at issue in *Union Electric*. *Id.*

The Court went on to emphasize that its "quite limited" decision "does not draw in question the Commission's past practice of making post-hearing adjustments within a range of reasonableness previously determined on the record." 890 F.2d at 1205. (On this point, the Court cited *Boston Edison.*) Because the Commission update of the return on equity remained within the zone of reasonableness for Edison – which does not challenge the parameters of that zone – the agency's practice here is completely in accord with *Union Electric*. *See Town of Norwood,* 80 F.3d at 535 ("*Union Electric* holds that the Commission may not depart from the zone of reasonableness without giving parties an opportunity to reopen the record.")

CONCLUSION

For the reasons stated, the Court should deny the petition for review and affirm the Commission's orders in all respects.

Respectfully submitted,

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September 10, 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 9,418 words, not including the tables of contents and authorities, the certificates of counsel and the addenda.

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September 10, 2012

ADDENDUM

STATUTES
AND
REGULATIONS

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

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f) 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 re-

spect 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 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.

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

for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

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

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

Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

(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

FERC RULEMAKING ON LONG-TERM TRANSMISSION RIGHTS IN ORGANIZED MARKETS

Pub. L. 109–58, title XII, §1233(b), Aug. 8, 2005, 119 Stat. 960, provided that: ''Within 1 year after the date of enactment of this section [Aug. 8, 2005] and after notice and an opportunity for comment, the [Federal Energy Regulatory] Commission shall by rule or order, implement section 217(b)(4) of the Federal Power Act [16 U.S.C. 824q(b)(4)] in Transmission Organizations, as defined by that Act [16 U.S.C. 791a et seq.] with organized electricity markets.''

§ 824r. Protection of transmission contracts in the Pacific Northwest

(a) Definition of electric utility or person

In this section, the term ''electric utility or person'' means an electric utility or person that—

(1) as of August 8, 2005, holds firm transmission rights pursuant to contract or by reason of ownership of transmission facilities; and

(2) is located—

(A) in the Pacific Northwest, as that region is defined in section 839a of this title; or

(B) in that portion of a State included in the geographic area proposed for a regional transmission organization in Commission Docket Number RT01–35 on the date on which that docket was opened.

(b) Protection of transmission contracts

Nothing in this chapter confers on the Commission the authority to require an electric utility or person to convert to tradable or financial rights—

(1) firm transmission rights described in subsection (a) of this section; or

(2) firm transmission rights obtained by exercising contract or tariff rights associated with the firm transmission rights described in subsection (a) of this section.

(June 10, 1920, ch. 285, pt. II, §218, as added Pub. L. 109–58, title XII, §1235, Aug. 8, 2005, 119 Stat. 960.)

§ 824s. Transmission infrastructure investment

(a) Rulemaking requirement

Not later than 1 year after August 8, 2005, the Commission shall establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

(b) Contents

The rule shall—

(1) promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities;

(2) provide a return on equity that attracts new investment in transmission facilities (including related transmission technologies);

(3) encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of the facilities; and

(4) allow recovery of—

(A) all prudently incurred costs necessary to comply with mandatory reliability standards issued pursuant to section 824*o* of this title; and

(B) all prudently incurred costs related to transmission infrastructure development pursuant to section 824p of this title.

(c) Incentives

In the rule issued under this section, the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization. The Commission shall ensure that any costs recoverable pursuant to this subsection may be recovered by such utility through the transmission rates charged by such utility or through the transmission rates charged by the Transmission Organization that provides transmission service to such utility.

(d) Just and reasonable rates

All rates approved under the rules adopted pursuant to this section, including any revisions to the rules, are subject to the requirements of sections 824d and 824e of this title that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.

(June 10, 1920, ch. 285, pt. II, §219, as added Pub. L. 109–58, title XII, §1241, Aug. 8, 2005, 119 Stat. 961.)

§ 824t. Electricity market transparency rules

(a) In general

(1) The Commission is directed to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.

(2) The Commission may prescribe such rules as the Commission determines necessary and appropriate to carry out the purposes of this section. The rules shall provide for the dissemination, on a timely basis, of information about the availability and prices of wholesale electric energy and transmission service to the Commission, State commissions, buyers and sellers of wholesale electric energy, users of transmission services, and the public.

(3) The Commission may—

(A) obtain the information described in paragraph (2) from any market participant; and

(B) rely on entities other than the Commission to receive and make public the information, subject to the disclosure rules in subsection (b) of this section.

(4) In carrying out this section, the Commission shall consider the degree of price transparency provided by existing price publishers and providers of trade processing services, and shall rely on such publishers and services to the maximum extent possible. The Commission may establish an electronic information system if it determines that existing price publications are

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

(b) *Nature of briefs on exceptions and of briefs opposing exceptions.* (1) Any brief on exceptions and any brief opposing exceptions must include:

(i) If the brief exceeds 10 pages in length, a separate summary of the brief not longer than five pages; and

(ii) A presentation of the participant's position and arguments in support of that position, including references to the pages of the record or exhibits containing evidence and arguments in support of that position.

(2) Any brief on exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A short statement of the case;

(ii) A list of numbered exceptions, including a specification of each error of fact or law asserted; and

(iii) A concise discussion of the policy considerations that may warrant full Commission review and opinion.

(3) A brief opposing exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A list of exceptions opposed, by number; and

(ii) A rebuttal of policy considerations claimed to warrant Commission review.

(c) *Oral argument.* (1) Any participant filing a brief on exceptions or brief opposing exceptions may request, by written motion, oral argument before the Commission or an individual Commissioner.

(2) A motion under paragraph (c)(1) of this section must be filed within the time limit for filing briefs opposing exceptions.

(3) No answer may be made to a motion under paragraph (c)(1) and, to that extent, Rule 213(a)(3) is inapplicable to a motion for oral argument.

(4) A motion under paragraph (c)(1) of this section may be granted at the discretion of the Commission. If the motion is granted, any oral argument will be limited, unless otherwise specified, to matters properly raised by the briefs.

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver.* If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver.* If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver.* Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule.* If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument.* When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review.* After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability.* (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file.* A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request.* Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled ''Statement of Issues,'' listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers.* (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay.* Unless otherwise ordered by the Commission, the filing of a request for rehearing does not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification under this section does not suspend the proceeding.

Southern California Edison Co. v. FERC **Docket Nos. ER08-375*, et al.***
D.C. Cir. No. 11-1471

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 10th day of September 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:

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