

ORAL ARGUMENT SCHEDULED FOR APRIL 8, 2011

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

No. 10-1104

GEORGE JEPSEN, ATTORNEY GENERAL FOR THE STATE OF CONNECTICUT, AND
THE CONNECTICUT OFFICE OF CONSUMER COUNSEL,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

Michael A. Bardee
General Counsel

Robert H. Solomon
Solicitor

Beth G. Pacella
Judith A. Albert
Senior Attorneys

For Respondent Federal Energy
Regulatory Commission
Washington, D.C. 20426

March 3, 2011

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties

All parties appearing before the Commission and this Court are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *ISO New England Inc.*, 129 FERC ¶ 61,299 (2009) (“Initial Order”), JA 233;
2. *ISO New England, Inc.*, 130 FERC ¶ 61,236 (2010) (“Rehearing Order”), JA 261.

C. Related Cases:

This case has not previously been before this Court or any other court. The Commission's orders reviewing ISO New England's 2009 executive compensation proposal were affirmed by this Court in *Blumenthal v. FERC*, 613 F.3d 1142 (D.C. Cir. 2010).

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

March 3, 2011

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE ISSUE.....	1
STATUTORY AND REGULATORY PROVISIONS.....	2
INTRODUCTION.....	2
STATEMENT OF FACTS.....	3
I. Statutory And Regulatory Background.....	3
II. ISO New England.....	4
A. ISO New England’s Formation.....	4
B. ISO New England’s Annual Revenue Requirement Procedure.....	6
III. ISO New England’s Proposal To Recover Its Estimated 2010 Administrative Costs.....	7
A. ISO New England’s Pre-Filing/Stakeholder Process.....	7
1. ISO New England Initial Flat Budget Proposal.....	7
2. Stakeholder And Board Approval Of Revised Budget.....	8
B. ISO New England’s Filing.....	10
1. Shortage Of Critical Talent In The Utility Industry.....	10
2. Surveys Of Compensation Offered By Companies Competing For Same Talent Pool.....	12

TABLE OF CONTENTS

	PAGE
3. Merit And Promotion Increase Budget.....	12
4. Annual Mercer Comparability Review.....	14
IV. The Commission Orders On Review.....	16
SUMMARY OF ARGUMENT.....	20
ARGUMENT.....	22
I. Standard Of Review.....	22
II. The Commission Reasonably Approved ISO New England’s 2010 Executive Compensation Review Requirement Proposal As Just And Reasonable.....	23
A. Neither <i>Blumenthal</i> Nor FERC Precedent Requires That The Mercer Report Again Be Included In The Record.....	23
B. The Commission’s Findings Are Supported By Substantial Evidence.....	26
C. The Proposed Executive Compensation Took Into Account Changed Economic Circumstances.....	29
CONCLUSION.....	31

TABLE OF AUTHORITIES

COURT CASES:	PAGE
<i>Aluminum Co. of America v. BPA</i> , 175 F.3d 1156 (9th Cir. 1999).....	26
<i>Am. Pub. Power Ass’n v. FPC</i> , 522 F.2d 142 (D.C. Cir. 1975).....	4
* <i>Blumenthal v. FERC</i> , 552 F.3d 875 (D.C. Cir. 2009).....	22
* <i>Blumenthal v. FERC</i> , 613 F.3d 1142 (D.C. Cir. 2010).....	2, 3, 23-25, 31
<i>BP West Coast Products, LLC v. FERC</i> , 374 F.3d 1263 (D.C. Cir. 2004).....	3, 4
<i>Braintree Elec. Light Dep’t v. FERC</i> , 550 F.3d 6 (D.C. Cir. 2008).....	4, 5, 22, 24
<i>City of South Bend, Ind. v. STB and United States</i> , 566 F.3d 1166 (D.C. Cir. 2009).....	28
<i>Colo. Interstate Gas Co. v. FERC</i> , 599 F.3d 698 (D.C. Cir. 2010).....	26
<i>EchoStar Commun. Corp. v. FCC</i> , 292 F.3d 749 (D.C. Cir. 2002).....	28
<i>Fla. Mun. Power Agency v. FERC</i> , 602 F.3d 454 (D.C. Cir. 2010).....	28
<i>Me. Pub. Utils. Comm’n v. FERC</i> , 454 F.3d 278 (D.C. Cir. 2006).....	4, 22

*Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES:	PAGE
<i>Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1</i> , 128 S. Ct. 2733 (2008).....	22
<i>Richardson v. Perales</i> , 402 U.S. 389 (1971).....	26
* <i>Wis. Pub. Power, Inc. v. FERC</i> , 493 F.3d 239 (D.C. Cir. 2007).....	3, 22
ADMINISTRATIVE CASES:	
<i>ISO New England, Inc.</i> , 106 FERC ¶ 61,280, <i>order on reh’g</i> , 109 FERC ¶ 61,147 (2004), <i>aff’d sub nom. Me. Pub. Utils.</i> <i>Comm’n v. FERC</i> , 454 F.3d 278 (D.C. Cir. 2006).....	4
<i>ISO New England, Inc.</i> , 125 FERC ¶ 61,392 (2008), <i>order on reh’g</i> , 127 FERC ¶ 61,254 (2009).....	23, 25
<i>ISO New England, Inc.</i> , 129 FERC ¶ 61,299 (2009) (“Initial Order”).....	2, 16-19, 25, 27-30
<i>ISO New England, Inc.</i> , 130 FERC ¶ 61,236 (2010) (“Rehearing Order”).....	3, 16-18, 20, 25-31
<i>Promoting Wholesale Competition Through Open Access Non-</i> <i>discriminatory Transmission Services by Public Utilities and Recovery of</i> <i>Stranded Costs by Public Utilities and Transmitting Utilities</i> , Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), <i>clarified</i> , 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), <i>order on reh’g</i> , Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, <i>order on reh’g</i> , Order No. 888-B, 81 FERC ¶ 61,248, <i>order on reh’g</i> , Order No. 888-C, 82 FERC ¶ 61,046 (1998), <i>aff’d sub nom.</i> <i>Transmission Access Policy Study Group v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000), <i>aff’d sub nom. New York v. FERC</i> , 535 U.S. 1 (2002).....	5

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES:	PAGE
<i>Regional Transmission Organizations,</i> Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), <i>order on reh’g</i> , Order No. 2000-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), <i>petitions for review dismissed,</i> <i>Public Util. Dist. No. 1 of Snohomish County v. FERC</i> , 272 F.3d 607 (D.C. Cir. 2001).....	5
<i>Trunkline Gas Co.,</i> 90 FERC ¶ 61,017 (2000).....	4
STATUTES:	
Federal Power Act	
Section 201(b), 16 U.S.C. § 824(b).....	3
Section 205(a), 16 U.S.C. § 824d(a).....	3
Section 205(c), 16 U.S.C. § 824d(c).....	3
Section 313(b), 16 U.S.C. § 825l(b).....	22
REGULATIONS:	
18 C.F.R. § 35.13(d).....	4
18 C.F.R. § 35.13(d)(1).....	4
18 C.F.R. § 35.13(d)(2).....	4

GLOSSARY

2009 Initial Order	<i>ISO New England, Inc.</i> , 125 FERC ¶ 61,392 (2008)
2009 Orders	<i>ISO New England, Inc.</i> , 125 FERC ¶ 61,392 (2008), <i>order on reh'g</i> , 127 FERC ¶ 61,254 (2009)
2009 Rehearing Order	<i>ISO New England, Inc.</i> , 127 FERC ¶ 61,254 (2009)
Commission	Federal Energy Regulatory Commission
Connecticut	Petitioners Richard Blumenthal, Attorney General for the State of Connecticut, and the Connecticut Office of Consumer Counsel
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Initial Order	<i>ISO New England, Inc.</i> , 129 FERC ¶ 61,299 (2009), JA 233
ISO	ISO New England Inc.
ISO New England	ISO New England Inc.
Mercer	Mercer Human Resources Consulting
Rehearing Order	<i>ISO New England, Inc.</i> , 130 FERC ¶ 61,236 (2010), JA 261

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 10-1104

**GEORGE JEPSEN, ATTORNEY GENERAL
FOR THE STATE OF CONNECTICUT, AND THE
CONNECTICUT OFFICE OF CONSUMER COUNSEL,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“FERC” or “Commission”) reasonably approved the proposal of ISO New England Inc. (“ISO New England” or “ISO”), the operator of the regional transmission network in New England, to recover its estimated 2010 executive compensation costs.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Addendum to this Brief.

INTRODUCTION

Last year, this Court, in *Blumenthal v. FERC*, 613 F.3d 1142 (D.C. Cir. 2010), addressed the Commission's approval of ISO New England's 2009 executive compensation proposal. The Court, employing a deferential standard of review, affirmed the Commission's orders, finding that they rested on substantial record evidence and that all parties -- including Petitioners Richard Blumenthal, Attorney General for the State of Connecticut, and the Connecticut Office of Consumer Counsel (collectively, "Connecticut") -- had a meaningful opportunity to comment on the ISO's 2009 proposal.

The instant case concerns the Commission's treatment and ultimate approval of ISO New England's 2010 proposed executive compensation, which is based on the previously-approved 2009 executive compensation. Connecticut complained to the Commission that the Commission could not approve the ISO's 2010 proposal unless it had the same evidence submitted in support of the ISO's 2009 proposal. The Commission disagreed, finding, again, that there was substantial record evidence to support ISO New England's estimated executive compensation as just and reasonable. *See ISO New England, Inc.*, 129 FERC ¶ 61,299 (2009) ("Initial

Order”), JA 233, *order on reh’g*, 130 FERC ¶ 61,236 (2010) (“Rehearing Order”), JA 261.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Section 201(b) of the Federal Power Act (“FPA”), 16 U.S.C. § 824(b), grants FERC exclusive jurisdiction over the transmission and wholesale sale of electricity in interstate commerce. *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 246 (D.C. Cir. 2007). In accordance with FPA § 205(a), 16 U.S.C. § 824d(a), all rates for or in connection with such transmission and sales must be just and reasonable. *Id.* “To enforce [this] requirement[], Section 205 requires that utilities file tariffs reflecting their rates and service terms with the Commission, which must in turn ensure that those rates and terms are just and reasonable” *Id.* (citing FPA § 205(c), 16 U.S.C. § 824d(c)); *see also Blumenthal*, 613 F.3d at 1143-44 (same).

As this Court has noted, “[s]tandard FERC ratemaking, in its most simple form, involves projecting a revenue requirement.” *Blumenthal*, 613 F.3d at 1146 (citation omitted); *see also BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1307 (D.C. Cir. 2004) (“it is ordinarily impossible for a [utility] to know at the time of filing what its actual costs will be during the effective period of the filed rates, and so the use of a ‘test period’ for calculating the cost of service is

appropriate”) (citation omitted). Thus, the Commission’s regulations provide for the filing of wholesale electric power rates by public utilities (including ISO New England) based on historical or estimated costs. *See* 18 C.F.R. § 35.13(d)(1) and (2); *see also Am. Pub. Power Ass’n v. FPC*, 522 F.2d 142, 143 (D.C. Cir. 1975) (affirming orders promulgating rule); *Trunkline Gas Co.*, 90 FERC ¶ 61,017 at 61,047-48 (2000) (citing 18 C.F.R. § 35.13(d), and explaining that “the rates for electric utilities can be based on actual data for the prior twelve months or prior calendar year . . . or they can be based on estimated (or projected) data for a future twelve months or year” (footnote omitted)). The Court has found that, “[w]hile use of a test period is not perfect, it is a reasonable proxy for actual costs.” *BP*, 374 F.3d at 1307 (citing *Am. Pub. Power*, 522 F.2d 142).

II. ISO New England

A. ISO New England’s Formation

In 1971, New England transmission and generation owners, suppliers, publicly-owned entities, and end-users formed the New England Power Pool. *Braintree Elec. Light Dep’t v. FERC*, 550 F.3d 6, 9 (D.C. Cir. 2008). New England Power Pool operated the unified regional network, which coordinated bulk power transmission and generation facilities. *See ISO New England Inc.*, 106 FERC ¶ 61,280 at P 5, *order on reh’g*, 109 FERC ¶ 61,147 (2004), *aff’d sub nom. Me. Pub. Utils. Comm’n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006). In 1997, in

response to FERC Order No. 888,¹ New England Power Pool obtained FERC approval for the creation of ISO New England, a “non-profit entity to administer New England energy markets and operate the region’s bulk power transmission system.” *Braintree*, 550 F.3d at 9 (citation omitted).

Subsequently, in 2003, ISO New England and the New England Transmission Owners jointly requested approval to establish ISO New England as a Regional Transmission Organization pursuant to FERC Order No. 2000.² The Commission approved the proposal in 2004, finding, among other things, that, as a “not-for-profit entity governed by an independent, non-stakeholder board,” ISO New England satisfied Order No. 2000’s independence requirement. *Braintree*, 550 F.3d at 9; *see also Snohomish*, 272 F.3d at 610-12 (discussing Order Nos. 888 and 2000 rulemakings).

¹ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

² *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), *petitions for review dismissed, Public Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) (“*Snohomish*”).

B. ISO New England’s Annual Revenue Requirement Procedure

“[T]he ISO revises its specific rates each year from a proposed annual Revenue Requirement that has been reviewed through a multi-stage stakeholder process, subjected to a vote of participants, and ultimately approved by its independent Board of Directors” R.1, Transmittal Letter at 7, JA 8. In accordance with Section 12 of its Participants Agreement,³ ISO New England submits a proposed budget to its Budget & Finance Subcommittee no later than 120 days before the start of each calendar year. R.8, Answer to Protest at 3, JA 216. After considering the Subcommittee’s comments, the ISO submits the budget to New England Power Pool’s Participants Committee no later than 75 days before the start of the calendar year. *Id.*

All Participants Committee votes are reported to the ISO’s independent Board of Directors,⁴ which approves the final budget. *Id.* at 3, 4, JA 216, 217; *see also* Transmittal Letter at 7, JA 8 (same). First, specific elements of the budget are reviewed by Board of Director committees with defined responsibilities. For example, compensation matters are reviewed by the Compensation and Human Resources Committee. *Id.* at 9, JA 10. Next, the entire budget is presented to the

³ The Participants Agreement is available at: http://www.iso-ne.com/regulatory/part_agree/participants_agreement.pdf.

⁴ Members of the independent Board of Directors “are selected through a joint nominating committee that includes representatives of market participants, state regulators and the ISO Board.” ISO New England Answer at 4, JA 217.

Board's Audit and Finance Committee for its detailed review and vote. *Id.*

Finally, after receiving feedback from the New England Power Pool, the New England Conference of Public Utilities Commissioners and other stakeholders, the Board itself reviews and votes on the budget. *Id.*; Answer to Protest at 4, JA 217.

No later than 60 days before the start of each calendar year, the ISO must file rates reflecting the budget approved by the Board of Directors. *Id.* at 3, JA 216.

III. ISO New England's Proposal To Recover Its Estimated 2010 Administrative Costs

A. ISO New England's Pre-Filing/Stakeholder Process

1. ISO New England's Initial Flat Budget Proposal

In recognition of the fact that "the region's ratepayers are struggling in the wake of the economic downturn," ISO New England "initially proposed a flat budget for 2010." R.1, Transmittal Letter at 2, 8, JA 8, 9; R.1, Exh. 3, Ludlow Affidavit at 6, JA 55. ISO New England determined that it would have to defer or eliminate several ISO New England projects in order to maintain its 2010 revenue requirement at the 2009 level since certain of its nondiscretionary costs had increased (including pension plan, health care, and liability insurance costs, as well as dues owed to the Northeast Power Coordinating Council) and its interest income (which ISO New England uses to offset expenses) had decreased. R.1, Transmittal Letter at 2, 8, JA 3, 9; Ludlow Affidavit at 10, JA 59.

ISO New England presented its flat budget proposal to the New England Power Pool (of which petitioner Connecticut Office of Consumer Counsel is a member), and state officials at New England Power Pool's June 2009 meeting. R.1, Transmittal Letter at 8, JA 9; ISO Answer at 3, JA 216. Stakeholders expressed concerns about the impact of the deferrals and service cuts required to maintain a flat budget. R.1, Transmittal Letter at 2-3, 8, JA 3-4, 9. ISO New England's management and Board of Directors also were concerned that the cuts would harm the ISO and the region. *Id.* at 3, 8, JA 4, 9. After meeting with various Board committees, management proposed a revised budget that reinstated certain regional priorities. *Id.* at 3, 8, JA 4, 9; Ludlow Affidavit at 6-7, 10-13, JA 55-56, 59-62.

2. Stakeholder And Board Approval Of Revised Budget

ISO New England again consulted with stakeholders (including New England Power Pool officers and Commissioners from the New England State Public Utilities Commissions) to ensure that the revised budget "appropriately balanced concerns about the economy with the priorities of Market Participants, state regulators, ISO management and the Commission." ISO Answer at 3, JA 216; *see also* Transmittal Letter at 3, 8, JA 4, 9 (same); Ludlow Affidavit at 7, JA 56 (same). ISO New England formally submitted the revised budget to the New

England Power Pool Budget and Finance Subcommittee on August 27, 2009. *Id.*

On September 10 and 11, 2009, ISO New England's Board of Directors and Management met with the New England Conference of Public Utilities Commissioners for their input on the budget. R.1, Transmittal Letter at 8, JA 9; ISO New England Answer at 3-4, JA 216-17. No changes to the budget were recommended. R.1, Exh. 3 (RCL-4), Year 2010 Budget Milestones, JA 133.

ISO New England presented the revised budget to the New England Power Pool on September 11, 2009 as well. Ludlow Affidavit at 7, JA 56. ISO New England further explained that, in addition to the broader stakeholder process, "the ISO offered to meet individually with state regulators, consumer advocates and market participants," that "[a] number of stakeholders accepted this offer," and that, "at these meetings, various topics were discussed and additional information was provided." ISO New England Answer at 4, JA 217.

On October 9, 2009, the New England Power Pool Participants Committee overwhelmingly approved a resolution supporting ISO New England's revised budget. Only the Massachusetts Attorney General, the New Hampshire Office of Consumer Advocate, and the Connecticut Office of Consumer Counsel opposed the proposed budget. R.1, Transmittal Letter at 8, JA 9; R.1, Exh. 3, RCL-8, Resolution, JA 153. The ISO's independent Board of Directors unanimously

approved the budget on October 16, 2009. R.1, Transmittal Letter at 9, JA 10.

B. ISO New England's Filing

On October 29, 2009, ISO New England filed its estimated 2010 Revenue Requirement. R.1, JA 1. Among other things, ISO New England's proposal included \$74,056,958 for salaries, payroll taxes and employee benefits, and Board fees and expenses. R.1, Exh. 3, RCL-5 Sched. 2 at 1, JA 135; R.1, Exh. 3, RCL-5 Sched. 3, JA 138. This represented a \$5.6 million net increase from 2009 requirements, including a 2.5% merit and 0.5% promotional increase in salaries (\$ 1,125,000). Ludlow Affidavit at 13, JA 62.

1. Shortage Of Critical Talent In The Utility Industry

ISO New England explained that the objective of its compensation program is to allow it to compete successfully for, and to retain, the highly skilled employees the ISO needs. R. 1, Exh. 4, Dickstein Affidavit at 3, JA 158. It faces two primary challenges to achieving this objective. *Id.*

First, there is a shortage of critical talent in the electric utility industry, with 50 percent of the workforce eligible to retire in the next five years. *Id.* (citing a 2007 Carnegie Mellon study); *see also id.* at 4, JA 159 (citing a September 2009 report by the National Commission on Energy Policy, stating that "the U.S. 'is facing a critical shortage of trained professionals to design, build and operate its

future electric power system,” and “suggest[ing] that the economic downturn may have exacerbated the talent problem and predict[ing] that, when the economy picks up again, tens of thousands of employees will be able to retire”).

Second, “the ISO is competing for this shrinking pool of talent with for-profit utilities,” which “offer[] aggressive compensation to recruit and retain key positions.” Dickstein Affidavit at 3, JA 158 (citing Hay Group report). “This problem is exacerbated by the fact that the ISO cannot offer equity compensation as public for-profit companies do.” *Id.* at 4, JA 159.

Because of these challenges, there is significant turnover in the ISO industry, with executive turnover as high as 33 percent. *Id.* at 4, JA 159. And, while 2009 industry turnover was down, turnover was expected “to rise to these levels and higher as the economy improves.” *Id.* (citing National Commission on Energy Policy report). ISO New England added that it has experienced lower than average turnover in part because it has maintained competitive compensation, which “is ultimately less expensive than high levels of turnover, considering the costs of recruiting, relocation, development time and the disruption of work flow.” *Id.* at 3, JA 158; *see also* Ludlow Affidavit at 14, JA 63 (noting that “the budget for employee relocation and recruitment was cut in anticipation of successful employee retention in 2010”).

2. Surveys Of Compensation Offered By Companies Competing For Same Talent Pool

The ISO also described how it determines the compensation it must offer to remain competitive. It first “identifies the industries with which it competes for talent,” *i.e.*, “the industries from which the ISO recruits, and to which the ISO loses employees. These are other [Independent System Operators] and [Regional Transmission Organizations], for-profit utility companies, and the broader industry (for positions not specific to utilities).” Dickstein Affidavit at 5, JA 160.

Next, ISO New England determines target ranges of compensation within these markets. For executives, this target is the 50th to 75th percentile of the national market. The ISO arrived at the target by considering nationwide recruitment, national shortages of qualified candidates, difficulty in attracting candidates to the location, complexity of responsibilities, alignment with higher salaries paid in the Northeast, and the limited promotional opportunities at the ISO as it is a relatively smaller organization. *Id.* Furthermore, ISO New England explained, it “regularly monitors job-specific salary survey data to determine these targets.” *Id.*

3. Merit And Promotion Increase Budget

The ISO also establishes a merit and promotional increase budget, which establishes annually the amount that management and the Board can distribute to the entire employee base for merit and promotion salary increases. *Id.* at 8, JA

163. The Compensation and Human Resources Committee of the Board of Directors determines this budget annually based on national survey data that projects what other employers will do for these programs in the coming year. *Id.*

ISO New England gathers data from five surveys (by Mercer Human Resources Consulting (“Mercer”), WorldatWork, Hewitt, The Conference Board and the Hay Group) that collectively poll thousands of employers. The surveys provide information on all industries nationwide, as well as the utility industry separately, and are used by most major companies to determine their compensation budgets. Dickstein Affidavit at 8, JA 163; Transmittal Letter at 12, JA 13. The ISO further assesses the data by employee group, reviewing data reported specifically for executives. Dickstein Affidavit at 8-9, JA 163-64.

For merit increases, the 2009 surveys “showed a range of 2.6% to 3.1% for all industries nationwide, and a range of 2.5% to 3.3% for the utility industry.” *Id.* at 9, JA 164. For promotional increases, the surveys “showed a range of 1.0% to 1.2% for all industries nationwide, and a range of 0.8% and 1.2% for the utility industry specifically.” *Id.*

For 2010, the Board’s Compensation Committee reviewed the 2009 data, and “adopted the lowest possible increases that would still keep compensation competitive. Given the economic conditions and management’s recommendation,

the Committee chose the low end of each range of the survey data,” proposing a merit increase budget of 2.5% and a promotional increase budget of 0.5%. *Id.*

ISO New England further explained that, in 2008, employers reduced their compensation budgets given the economic downturn, so survey firms updated their data at the end of the year. After reviewing this data, ISO New England reduced its 2009 compensation budget by \$500,000. *Id.* at 9-10, JA 164-65. ISO New England confirmed that it would again monitor any updates and, if appropriate, would again reduce its budget. *Id.* at 10, JA 165.

4. Annual Mercer Comparability Review

ISO New England also described the additional steps it takes to ensure the reasonableness of its executive compensation.⁵ A committee of the Board of Directors recommends compensation to the Board based on the Chief Executive Officer’s “appraisal of each executive’s experience, responsibilities, performance, specific skill set, and contribution to strategic goal achievement (and, for the CEO, the Chairman[of the Board]’s appraisal of the same factors as related to the CEO), and [ISO New England]’s financial and operational achievement.” Dickstein

⁵ Internal Revenue Service standards require that total executive compensation at a not-for-profit company, such as ISO New England, “fall with a range of competitive practices for total compensation paid by similarly-situated organizations, both taxable and tax-exempt, for functionally comparable positions.” Transmittal Letter at 13, JA 14 (citing Internal Revenue Code § 4958); Dickstein affidavit at 10, JA 165.

Affidavit at 11-12, JA 166-67. After review, the Board provides the approved recommendations to a nationally recognized, independent compensation advisor, Mercer, for an opinion on reasonableness. *Id.*; Transmittal Letter at 13, JA 14.

Mercer's annual review compares ISO New England's proposed executive compensation to that of other independent system operators and regional transmission organizations, for-profit utilities, and other companies, considering their organizational character/complexity, geographic location, the executive's role, and the labor market. Dickstein Affidavit at 11, JA 166. "The data for these groups [are] then blended to create a composite market reference as an overall benchmark. This composite reflects the fact that the ISO competes for executive talent in the energy industry, as well as in the broader general industry for positions in areas like legal, finance and human resources." *Id.* "Mercer's most recent reasonableness opinion concludes that the proposed 2009 total compensation for executives was reasonable." *Id.* at 12, JA 167.

ISO New England explained that it would use the same process as in 2009 and previous years to determine, and ensure the reasonableness of, its 2010 executive compensation. *Id.* Thus, 2010 executive compensation will be based on and similar to 2009 compensation (with changes necessary to maintain competitiveness), the full Board of Directors will review and approve all 2010 executive compensation, and Mercer will review approved compensation for

reasonableness. *Id.* Furthermore, the total compensation for each executive will be listed in the ISO's Internal Revenue Service Form 990 (which the ISO is required to provide to anyone requesting it), and information regarding the base salary for each officer will be included on page 104 of its annual FERC Form 1. Dickstein Affidavit at 13, JA 168.

IV. The Commission Orders On Review

On November 19, 2009, Connecticut intervened and protested, challenging ISO New England's "requested executive compensation and salary structure as well as its depreciation rates and schedules." R.7, Protest at 1, JA 202. ISO New England filed an answer to the protest. R.8, JA 214.

The Commission found ISO New England's proposed revenue requirement, including proposed compensation, adequately supported and just and reasonable. Initial Order at PP 25-31, JA 242-44; Rehearing Order PP 4-12, JA 262-65.

First, ISO New England justified the need for merit and promotion increases as necessary to enable it to compete for the shrinking pool of highly skilled talent necessary to fulfill its mission. Initial Order at P 25, JA 242. Budgeting for merit and promotional increases, the Commission agreed, is ultimately less expensive than the costs associated with employee/executive turnover. Initial Order at P 25, JA 242; *see also id.* at n.48, JA 242 (noting the historically high turnover,

particularly for executives, in the ISO industry and that turnover is expected to be as high or higher as the economy improves).

Furthermore, the Commission found that ISO New England appropriately based the proposed merit and promotional increase budget on survey data from five national compensation consultants, and accounted for current economic conditions by setting the budget increase at or below the low end of the surveys' recommended ranges of increases. Initial Order at P 25, JA 242; Rehearing Order P 7, JA 263. In fact, the Commission noted, the proposed budget increase (2.5 percent for merit and 0.5 percent for promotions) was lower than the 2009 budget increase (3.5 percent for merit and 1.0 percent for promotions). Initial Order at n.47, JA 242.

In addition, the Commission found that ISO New England assures the reasonableness of its executive compensation by having Mercer, a nationally recognized, independent consulting firm, annually review the proposed compensation for comparability with similarly situated entities. Initial Order P 26, JA 242. While ISO New England could not determine the exact levels of its 2010 executive compensation by the time it was required by the Participants Agreement to present its proposed budget for stakeholder and Commission review and approval, it confirmed that 2010 executive compensation would be based on and similar to 2009 executive compensation, which Mercer had determined was

comparable to that offered by similarly situated entities. Initial Order PP 26, 28, JA 242-44; *see also* Rehearing Order P 9, JA 263 (“The Commission accepted the resulting opinion of the independent consulting firm that [ISO New England]’s proposed executive compensation is within a reasonable range of competitive practices for functionally comparable positions among similarly situated entities. Moreover, [ISO New England] represented that it was proposing increases on the lower end of the range.”).

The Commission also relied on the fact that the proposed budget was overwhelmingly approved during an extensive stakeholder process and then, after considering stakeholder feedback, unanimously approved by ISO New England’s independent Board of Directors. Initial Order at P 25, JA 242; Rehearing Order P 7, JA 263.

In addition, the Commission noted that in 2009 ISO New England had reviewed end-of-year updated compensation survey information provided by its consultants and, based on that information, reduced its merit and promotion increase budget by \$500,000. Initial Order P 30, JA 244. ISO New England again committed to review end-of-year updated compensation survey information and, if appropriate, reduce its 2010 budget before the increases are finalized, as was done in 2009. *Id.* at PP 29 and 30, JA 244; Rehearing Order P 10, JA 264. The Commission “expect[ed] that such updated information would reflect further

changes in the business climate and global economy.” Initial Order at P 30, JA 244.

“Accordingly, based on the information filed, the Commission conclude[d] that [ISO New England] ha[d] justified its proposed executive compensation and [found] that the stakeholder-approved limits on executive compensation [were] reasonable.” Initial Order at P 30, JA 244. ISO New England “ha[d] balanced its need to attract and retain skilled employees with the realities of the current economic conditions.” *Id.* at P 25, JA 242.

To ensure that all interested parties would be aware of any updated survey information and any action ISO New England would take in response to the information, the Commission required ISO New England to file a report with the Commission within 30 days of receiving the updated information summarizing any updated survey results and explaining any resulting compensation level revisions. Initial Order at P 31, JA 244.

The ISO submitted its informational filing on January 27, 2010. R.11, JA 247. Four of the five national compensation consulting firms had updated their surveys on merit increase budgets; none of the firms had updated its promotional survey information. *Id.* at 2, JA 248. The new survey information made minor changes to the range of merit increase budgets for utilities, from the initially reported range of 2.5 percent to 3.3 percent to the newly reported (narrower) range

of 2.63 percent to 3.1 percent. *Id.* Budgets for general industry merit increases also changed slightly, from a range of 2.6 percent to 3.1 percent to a range of 2.5 percent to 2.8 percent. *Id.* The Compensation and Human Resources Committee of the Board of Directors “concluded that, while there were slight reductions in the updated survey data, the reduced merit budget figures still generally exceed [ISO New England]’s approved 2010 merit increase budget of 2.5%. Given this information, the Committee decided to retain the previously-determined merit increase budget for 2010.” *Id.* at 3, JA 249.

The Commission found that the updated survey information, which showed that merit salary increases in both the utility industry and industry in general dropped only slightly by year’s end, confirmed that ISO New England’s proposed compensation was supported and just and reasonable. Rehearing Order P 12, JA 264-65. No further information was required for the Commission to appropriately review the proposal’s reasonableness. *Id.*

SUMMARY OF ARGUMENT

The Commission appropriately found ISO New England’s 2010 proposed executive compensation just and reasonable. Substantial evidence in the record supported the Commission’s finding here, just as substantial evidence supported the Commission’s approval of ISO New England’s 2009 executive compensation proposal.

Connecticut claims that this Court's opinion last year in *Blumenthal*, 613 F.3d 1142, affirming the Commission's approval of the ISO's 2009 compensation proposal under a deferential standard of review, and the Commission orders underlying that opinion, require submission of the full Mercer report. But the ISO is not compelled to produce, and the Commission is not compelled to review, precisely the same information every time; the sufficiency of record evidence necessarily depends on the facts and circumstances presented. While ISO New England chose to submit the Mercer report as part of the evidence supporting its 2009 revenue requirement filing, nothing in the orders and opinion issued regarding that filing establish a requirement that the Mercer report be submitted in all subsequent revenue requirement filings.

Moreover, even if submission of the Mercer report, or any other piece of evidence, was necessary in the 2009 compensation proceeding, that would not mean submission was again required in this proceeding. The Commission already had rejected Connecticut's challenges to the Mercer methodology in the 2009 proceeding, and already had found 2009 compensation, upon which 2010 compensation was to be based, reasonable.

Furthermore, the record shows that ISO New England accounted for current economic circumstances in determining its proposed executive compensation. ISO New England proposed compensation increases at or below the low-end of ranges

provided in national surveys. In addition, ISO New England reviewed end-of-year survey updates to ensure that its proposed compensation remained at the lowest level necessary to maintain its competitiveness in the current economic environment.

ARGUMENT

I. Standard Of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *Braintree*, 550 F.3d at 10. Under that standard, the Commission must make “a reasoned decision based upon substantial evidence,” and “the path of its reasoning [must be] clear.” *Id.* The Commission's factual findings are conclusive if supported by substantial evidence in the record. FPA § 313(b), 16 U.S.C. § 825l(b).

The Court “recogniz[es] that ‘matters of rate design . . . are technical and involve policy judgments at the core of FERC’s regulatory responsibilities. Hence, the court’s review of whether a particular rate design is just and reasonable is highly deferential.’” *Wis. Pub. Power*, 493 F.3d at 256 (quoting *Me. Pub. Utils. Comm’n*, 454 F.3d at 287); *see also Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (“the statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions”) (quoting *Morgan Stanley Capital Group*,

Inc. v. Pub. Util. Dist. No. 1, 128 S. Ct. 2733, 2738 (2008)). In affirming the Commission’s assessment of ISO New England’s proposed 2009 executive compensation proposal, the Court last year in *Blumenthal*, applying its “deferential standard of review,” and noting that “the proper level of executive compensation is more art than science,” concluded that the Commission’s analysis did not “jum[p] the rails of reasonableness.” 613 F.3d at 1143, 1146-47.

II. The Commission Reasonably Approved ISO New England’s 2010 Executive Compensation Proposal As Just And Reasonable

A. Neither *Blumenthal* Nor FERC Precedent Requires That The Mercer Report Again Be Included In The Record

Connecticut contends that, because the record did not include the Mercer report, there was neither due process in the underlying proceeding nor substantial evidence to support FERC’s findings. Br. at 21-32. This contention is based on Connecticut’s assertion that *Blumenthal*, 613 F.3d 1142, and the Commission Orders underlying that opinion (*ISO New England, Inc.*, 125 FERC ¶ 61,392 (2008) (“2009 Initial Order”), *order on reh’g*, 127 FERC ¶ 61,254 (2009) (collectively, “2009 Orders”)), require submission of the Mercer report. *See* Br. 15-17 (repeatedly arguing that same detailed studies supporting 2009 executive compensation proposal are “necessary” to informed review of 2010 plan). Connecticut is mistaken.

As in any case under the FPA, the Commission's determination here must be based on substantial evidence. *Braintree*, 550 F.3d at 10; *see also* Connecticut Br. at 20, 27 (same). *Blumenthal* did not alter this basic standard, nor did it define or otherwise limit the filings necessary to satisfy it in future ISO revenue requirement proceedings. Rather, *Blumenthal* simply addressed the issues and the record before it. That record happened to include the Mercer report, as ISO New England chose to submit it as part of its evidentiary support in that proceeding.

Likewise, nothing in the Commission's earlier 2009 Orders dictates that ISO New England submit the Mercer report, or any other particular piece of information, in this new proceeding. While Connecticut correctly notes that the 2009 Orders state that the Commission relied on information ISO New England provided in its Answer in that proceeding, Br. at 21-23, that Answer included numerous affidavits and exhibits, not just the Mercer report. Among the affidavits was one by Janice Dickstein, Vice President/Human Resources, explaining that the Mercer report found ISO New England's 2008 executive compensation reasonable and providing information from other surveys and sources. The Mercer report was an exhibit attached to the Dickstein affidavit.

Even assuming the Mercer report was required in the 2009 executive compensation proceeding, it does not follow that it was required in this later proceeding as well. In the 2009 proceeding, ISO New England chose to submit the

Mercer report in response to Connecticut's protest, Connecticut raised various challenges to the validity of the report, and the Commission rejected those challenges. *See Blumenthal*, 613 F.3d at 1145-47 (rejecting Connecticut claim of possible Mercer bias and contention that Mercer had used the wrong comparison companies). Thus, when ISO New England made its 2010 revenue requirement filing, the Commission already had determined that the Mercer methodology was reasonable. Likewise, the Commission already had determined that ISO New England's 2009 executive compensation, upon which 2010 executive compensation was to be based, was reasonable. *See Blumenthal*, 613 F.3d at 1147; 2009 Initial Order, 125 FERC at PP 35-36; Initial Order P 28, JA 243; Rehearing Order P 10, JA 264 (same).

The focus of this proceeding, therefore, was whether the proposed 2.5 percent merit and 0.5 percent promotional budget increases, which were set at or below the low end of the ranges of merit and promotional increases for both general industry and the utility industry (and were lower than ISO New England's 2009 merit and promotional budget increases of 3.5 percent and 1.0 percent, respectively, Initial Order n.47, JA 242), were reasonable. Initial Order P 4, 18, 25, JA 234, 239, 242; Rehearing Order P 12, JA 264; Transmittal Letter at 12, JA 13; Dickstein Affidavit at 8-9, JA 163-64; *see* discussion *supra* at 12-14. Neither the ISO, in defending the percentage increases, nor the Commission, in reviewing

them, had to start all over again with respect to base, previously-approved amounts.

In these circumstances, even assuming the Mercer report had been “necessary” in the earlier proceeding, the Commission reasonably concluded that it was not necessary here. Rehearing Order P 12, JA 264. *See Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 704 (D.C. Cir. 2010) (“Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’”) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *see also, e.g., Aluminum Co. of America v. BPA*, 175 F.3d 1156, 1161 (9th Cir. 1999) (agency not obligated to reinvent the wheel and conduct a new independent analysis “when nothing more is offered than evidence and arguments already considered” by the agency).

B. The Commission’s Findings Are Supported By Substantial Evidence

Connecticut also asserts that the Commission lacked substantial evidence to support its findings because the record included Ms. Dickstein’s affidavit referencing the Mercer executive compensation report, Dickstein Affidavit at 12, JA 167, but did not include the report itself. Br. 27; *see also* Br. 25 (contending that in its 2010 budget application, “the ISO failed to include the Mercer Report or any of the other data and information that the Commission relied upon in approving ISO’s 2009 budget application.”). Connecticut is incorrect.

First, the Commission did not rely only on Ms. Dickstein's statement regarding Mercer's opinion in determining that ISO New England's proposed executive compensation was just and reasonable. That statement is only part of the Commission's multi-paragraph explanation for its findings. Initial Order PP 25-31, JA 242-44; Rehearing Order PP 7-11, JA 263-64; *see also* discussion *supra* at 10-16 (describing ISO New England's evidence regarding executive compensation).

The Commission also noted that: (1) 2009 executive compensation would be the base for, and similar to, 2010 compensation (Initial Order P 28, JA 243; Rehearing Order P 10, JA 264); (2) ISO New England's proposed merit and promotional budget increases were determined based on survey data from five national compensation consultants, and were set at or below the low end of the surveys' recommended ranges of increases in light of the current economic conditions (Initial Order P 25, JA 242; Rehearing Order PP 7, 9, JA 263); (3) ISO New England's proposed compensation went through an extensive stakeholder process, was overwhelmingly approved by stakeholders, and was unanimously approved by ISO New England's independent Board of Directors (Initial Order P 25, JA 242, Rehearing Order P 7, JA, 263); (4) ISO New England must attract and retain skilled employees from the shrinking pool of talent in the utility industry to fulfill its mission (Initial Order P 25, JA 242; Rehearing Order P 8, JA 263); (5) it

is ultimately less expensive to budget for merit and promotional increases than to suffer high levels of turnover (Initial Order P 25, JA 242; Rehearing Order P 8, JA 263); (6) ISO New England would submit its proposed executive compensation to Mercer for a comparability review (Initial Order P 26, JA 242; Rehearing Order P 9, JA 263); and (7) the ISO would review year-end survey updates and, if appropriate, reduce the proposed compensation increases (Initial Order PP 29-31, JA 244; Rehearing Order P 10, JA 264).

Furthermore, Ms. Dickstein's affidavit statement -- that Mercer found ISO New England's 2009 executive compensation reasonable -- is a matter about which she, as ISO New England's Vice President of Human Resources, had personal knowledge. Accordingly, it is appropriate evidence in support of the Commission's findings. *See, e.g., Fla. Mun. Power Agency v. FERC*, 602 F.3d 454, 459-460 (D.C. Cir. 2010) (FERC findings supported by substantial evidence consisting of two affidavits); *City of South Bend, Ind. v. STB and United States*, 566 F.3d 1166, 1170 (D.C. Cir. 2009) (affidavit appropriate to support substantial evidence even though affidavit statement not confirmed by entity about which statement made); *EchoStar Commun. Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002) ("administrative agencies may consider hearsay evidence as long as it 'bears satisfactory indicia of reliability;'" "hearsay can constitute substantial evidence if it is reliable and trustworthy") (citation omitted)).

C. The Proposed Executive Compensation Took Into Account Changed Economic Circumstances

Connecticut contends that ISO New England's proposed executive compensation was determined without taking into account the current economic downturn. Br. 27, 29-30. The record establishes otherwise. *See* Initial Order PP 25, 29-31, JA 242, 244; Rehearing Order PP 7-12, JA 263-65; Dickstein Affidavit at 3-12, JA 158-67; *see* discussion *supra* at 13-14, 16-18.

Despite difficult economic times, the job skills that ISO New England requires are in high demand and the ISO must pay its executives at sufficient levels to compete successfully for and retain their services. Specifically, a 2007 Carnegie Mellon study and a 2009 National Commission on Energy Policy study both show that there is a shortage of critical talent in the utility industry. Dickstein Affidavit at 3-4, JA 158-59. Moreover, ISO New England "compet[es] for this shrinking pool of talent with for-profit utilities," which, unlike ISO New England, are able to offer equity compensation. *Id.* Because of these challenges, there is significant turnover in the ISO industry, particularly for executives. Dickstein Affidavit at 4, JA 159. ISO New England explained, and the Commission agreed, that maintaining competitive compensation is ultimately less expensive than having high levels of turnover. Rehearing Order P 8, JA 263; Dickstein Affidavit at 3, JA 158; Ludlow Affidavit at 14, JA 63.

In light of the economic conditions, ISO New England proposed the lowest compensation necessary to maintain its competitiveness. Dickstein Affidavit at 9, JA 164; Initial Order P 30, JA 244. While data from five 2009 nationwide surveys used by most major companies to determine their compensation budgets showed merit increases would range from 2.6 percent to 3.1 percent for all industries nationwide, and from 2.5 percent to 3.3 percent for the utility industry, ISO New England proposed a merit increase budget of only 2.5 percent. Dickstein Affidavit at 9, JA 164. Likewise, while the surveys showed a range of 1.0 percent to 1.2 percent for all industries nationwide, and a range of 0.8 percent to 1.2 percent for the utility industry specifically, ISO New England proposed a promotional increase budget of only 0.5%. *Id.*

Furthermore, ISO New England explained that it would monitor any end-of-year survey updates it expected would be prepared given the economic downturn, and, as it had done in 2009, would reduce its proposed compensation if appropriate in light of the updated information. *Id.* at 9-10, JA 164-65; Rehearing Order P 10-11, JA 264. Because the end-of-year updates showed that ISO New England's planned budget increase was below the updated range for general industry and at the bottom of the updated range for utilities, ISO New England's Compensation and Human Resources Committee reasonably determined that it would retain the

previously-determined budget for 2010. Informational Filing at 2-3, JA 248-49; Rehearing Order P 12, JA 264.

In these circumstances, the Commission had all the information it needed to make an informed judgment. That judgment, based on substantial record evidence, is well within the “deferential standard of review,” *Blumenthal*, 613 F.3d at 1143, applied to executive compensation decisions.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

Michael A. Bardee
General Counsel

Robert H. Solomon
Solicitor

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

Judith A. Albert
Senior Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6048
Fax: 202-273-0901
E-mail: beth.pacella@ferc.gov
judith.albert@ferc.gov

March 3, 2011

CERTIFICATE OF COMPLIANCE

In accordance with Fed.R.App.P.32(a)(7)(C)(i), I certify that the Brief of Respondent contains 6,781 words, not including the tables of contents and authorities, the glossary, the certificate of counsel, and the addendum.

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

Judith A. Albert
Senior Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: (202) 502-6048
Fax: (202) 273-0901
E-mail: beth.pacella@ferc.gov
Judith.albert@ferc.gov

March 3, 2011

**ADDENDUM
STATUTES & REGULATIONS**

TABLE OF CONTENTS

	PAGE
STATUTES	
FEDERAL POWER ACT	
Section 201(b), 16 U.S.C. § 824(b).....	A1-A2
Section 205(a)&(c), 16 U.S.C. §§ 824d(a)&(c).....	A3
Section 313(b), 16 U.S.C. § 825l(b).....	A4
REGULATIONS	
18 C.F.R. §§ 35.13(d)(1)&(2).....	A5

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, 824o, 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, 824o, 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, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

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

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

(g) Books and records

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

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

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

2005—Subsec. (b)(2). Pub. L. 109-58, §1295(a)(1), substituted "Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title" for "The provisions of sections 824i, 824j, and 824k of this title" and "Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title" for "Compliance with any order of the Commission under the provisions of section 824i or 824j of this title".

Subsec. (e). Pub. L. 109-58, §1295(a)(2), substituted "section 824e(e), 824e(f), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title" for "section 824i, 824j, or 824k of this title".

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

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, 78l, and 78m of title 15.

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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.

§ 825l. Review of orders

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

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

ings 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

(3) The names and addresses of persons to whom a copy of the rate change has been posted;

(4) A brief description of the rate change;

(5) A statement of the reasons for the rate change;

(6) A showing that all requisite agreement to the rate change, or to the filing of the rate change, including any agreement required by contract, has in fact been obtained;

(7) A statement showing any expenses or costs included in the cost of service statements for Period I or Period II, as defined in paragraph (d)(3) of this section, that have been alleged or judged in any administrative or judicial proceeding to be illegal, duplicative, or unnecessary costs that are demonstrably the product of discriminatory employment practices; and

(c) *Information relating to the effect of the rate change.* Any utility subject to paragraph (a) of this section shall also file the following information or materials:

(1) A table or statement comparing sales and services and revenues from sales and services under the rate schedule, tariff, or service agreement to be superseded and under the rate change, by applying the components of each such rate schedule or tariff to the billing determinants for each class of service, for each customer, and for each delivery point or set of delivery points that constitutes a billing unit:

(i) Except as provided in clause (ii), for each of the twelve months immediately before and each of the twelve months immediately after the proposed effective date of the rate change, and the total for each of the two twelve month periods; or

(ii) At the election of the utility:

(A) If the utility files Statements BG and BH under paragraph (h) for Period I, for each of the twelve months of Period I instead of for the twelve months immediately before the proposed effective date of the rate change; and

(B) If Period II is the test period, for each of the twelve months of Period II instead of for the twelve months immediately after the proposed effective date of the rate change;

(2) A comparison of the rate change and the utility's other rates for similar

wholesale for resale and transmission services; and

(3) If any specifically assignable facilities have been or will be installed or modified in order to supply service under the rate change, an appropriate map or sketch and single line diagram showing the additions or changes to be made.

(d) *Cost of service information*—(1) *Filing of Period I data.* Any utility that is required under paragraph (a)(1) of this section to submit cost of service information, or that is subject to the exceptions in paragraphs (a)(2)(i) and (a)(2)(ii) of this section but elects to file such information, shall submit Statements AA through BM under paragraph (h) of this section using:

(i) Unadjusted Period I data; or

(ii) Period I data adjusted to reflect changes that affect revenues and costs prior to the proposed effective date of the rate change and that are known and measurable with reasonable accuracy at the time the rate schedule change is filed, if such utility:

(A) Is not required to and does not file Period II data;

(B) Adjusts all Period I data to reflect such changes; and

(C) Fully supports the adjustments in the appropriate cost of service statements.

(2) *Filing of Period II data.* (i) Except as provided in clause (ii) of this subparagraph, any utility that is required under paragraph (a)(1) of this section to submit cost of service information shall submit Statements AA through BM described in paragraph (h) using estimated costs and revenues for Period II;

(ii) A utility may elect not to file Period II data if:

(A) The utility files a rate increase that is less than one million dollars for Period I; or

(B) All wholesale customers that belong to the affected rate class have consented to the rate increase.

(3) *Definitions.* For purposes of this section:

(i) *Period I* means the most recent twelve consecutive months, or the most recent calendar year, for which actual data are available, the last day of which is no more than fifteen months before the date of tender for

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 3rd day of March, 2011, 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:

Daniel R. Simon
Howard H. Shafferman
Ballard Spahr, LLP
601 13th St., NW
Suite 1000 South
Washington, DC 20005-3807

EMAIL

John S. Wright
Michael C. Wertheimer
Office of the Attorney General, State
of Connecticut
Department of Utility Control
10 Franklin Square
New Britain, CT 06051-0000

EMAIL

Joseph A. Rosenthal
Office of Consumer Counsel
10 Franklin Square
New Britain, CT 06051-0000

EMAIL

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: (202) 502-6048
Fax: (202) 273-0901
Email: beth.pacella@ferc.gov