ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 11-1258

TC RAVENSWOOD, LLC,
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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March 19, 2012

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

To counsel's knowledge, the parties, intervenors, and amici before this Court and before the Federal Energy Regulatory Commission ("Commission" or "FERC") in the underlying agency proceeding are as listed in Petitioner's brief.

B. Rulings Under Review:

1. Order on Proposed Mitigation Measures, *New York Independent System Operator, Inc.*, 133 FERC ¶ 61,030 (Oct. 12, 2010) ("Mitigation Order"), R.21, JA 349; and

2. Order on Rehearing, *New York Independent System Operator, Inc.*, 135 FERC ¶ 61,157 (May 19, 2011) ("Rehearing Order"), R.36, JA 411.

C. Related Cases:

This case has not previously been before this Court or any other court.

Three appeals pending in this Circuit have substantially the same parties and similar issues, but the Commission's orders in these cases address a different subset of the markets operated by the New York Independent System Operator: *New York Public Service Commission v. FERC*, Nos. 08-1366, *et al*. (D.C. Cir. filed Nov. 21, 2008 and later); *TC Ravenswood, LLC v. FERC*, No. 11-1305 (D.C. Cir. filed Aug. 25, 2011); and *TC Ravenswood, LLC v. FERC*, No. 12-1008 (D.C. Cir. filed Jan. 6, 2012).

One related case, also involving the same parties and similar issues, is pending before the Commission in *New York Independent System Operator, Inc.*, 131 FERC ¶ 61,169 (May 20, 2010), JA 11, *reh'g pending*. *See infra* at 9-11 (discussing Specified Generators Mitigation Proceeding).

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March 19, 2012

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GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
JA	Joint Appendix
Mitigation Order	*New York Independent System Operator, Inc.*, 133 FERC ¶ 61,030 (Oct. 12, 2010), R.21, JA 349
New York ISO	Intervenor New York Independent System Operator, Inc., operator of the transmission grid in New York and administrator of electricity markets for capacity and energy products
R.	Record citation
Ravenswood	Petitioner TC Ravenswood, LLC or the generating facility that it owns and operates in New York City
Rehearing Order	*New York Independent System Operator, Inc.*, 135 FERC ¶ 61,157 (May 19, 2011), R.36, JA 411
Rest-of-State generators	Generators located in New York but outside of New York City
Rest-of-State Mitigation Measure	New York ISO's proposal to substitute a reference price for a Rest-of-State generator's bid when that generator exercises market power
Specified Generators Mitigation Order	*New York Independent System Operator, Inc.*, 131 FERC ¶ 61,169 (May 20, 2010), JA 11

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Assuming jurisdiction, whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably accepted a tariff amendment submitted by the New York Independent System Operator, Inc. ("New York ISO"), pursuant to section 205 of the Federal Power Act ("FPA"), 16 U.S.C. § 824d, which mitigates the ability of electric generators located outside of New York City to exercise market power when their services are needed for local reliability.

STATUTORY AND REGULATORY PROVISIONS

The Addendum to this brief contains the pertinent statutory provisions.

COUNTERSTATEMENT OF JURISDICTION

Petitioner TC Ravenswood, LLC ("Ravenswood") does not have standing to appeal the orders at issue because it has not suffered, and is not in imminent peril of suffering, any justiciable injury caused by the Commission's approval of a mitigation measure for suppliers with generators located in New York State but outside of New York City (respectively, "Rest-of-State generators" and "Rest-of-State area"). As set forth more fully in Part I of the Argument, *infra*, the record below shows that Ravenswood owns one generating station located in New York City that is not subject to the mitigation measure approved in the challenged orders. Ravenswood has not shown that it owns or operates a Rest-of-State generator that will be subject to the mitigation at issue here or is otherwise injured by the mitigation of prices charged by other generators. Because Ravenswood has failed to show that it will experience the type of direct immediate injury required for standing, *see New York Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586-88 (D.C. Cir. 2011), Ravenswood's petition should be dismissed for lack of jurisdiction.

INTRODUCTION

New York ISO documented the exercise of market power by generators located outside of New York City. It proposed an automatic mitigation measure to apply to three generators that, in less than one month, extracted $2.7 million above

their marginal costs from the market when reliability in discrete locations of the grid was threatened.

In an earlier order approving the mitigation applicable to the three generators, the Commission recognized a more general problem. The existing structural market power problem – that is, the ability of a generator to set its own compensation when it is the only one capable of responding to a local reliability need – applied to all the generators located in the Rest-of-State area. Taking note of the existing stakeholder process on this issue, the Commission encouraged the coordinated development and filing of a mitigation measure applicable to all Rest-of-State generators.

The New York ISO responded by filing the mitigation measure that is the subject of the challenged orders. It applies the same measure that was applied to three specified generators to all generators located outside of New York City. Ravenswood and other wholesale electricity suppliers protested the measure, arguing that market power mitigation would limit their compensation and cause them to recover less than their costs.

In the orders on review, the Commission approved the mitigation measure as a reasonable means of addressing market power in the New York energy market. *New York Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,030 (Oct. 12, 2010) ("Mitigation Order"), R.21, JA 349, *reh'g denied*, 135 FERC ¶ 61,157 (May 19,

2011) ("Rehearing Order"), R.36, JA 411.[1] The Commission found that the protesting suppliers continue to enjoy opportunities to recover their costs and make profits. The Commission also found that the limited change that it approved did not immediately compel broader reform of the New York markets. Because New York ISO stakeholders were already considering the necessity and design of a revised compensation mechanism, the Commission deferred further consideration of compensation issues, in the first instance, to that process and, if necessary, to future agency proceedings.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. The Federal Power Act

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(c) of the FPA, 16 U.S.C. § 824d(c), requires public utilities to file tariff schedules with the Commission providing their jurisdictional rates, terms and conditions of service, and related contracts for service. When those tariff schedules are filed, Sections 205(a)-(b) of the FPA, 16 U.S.C. §§ 824d(a)-(b),

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within an affidavit or a FERC order.

direct the Commission to assure that the rates and services described in the tariff are just and reasonable and not unduly discriminatory.

Section 206(a) of the FPA, 16 U.S.C. § 824e(a), authorizes the Commission to investigate whether existing rates and services are lawful. If the Commission, on its own initiative or on third-party complaint, finds that an existing rate or service is "unjust, unreasonable, unduly discriminatory, or preferential," it must determine and set the new just and reasonable rate or service.

B. Structure Of New York ISO Markets

As the operator of the bulk power transmission system in New York, the New York ISO administers electricity markets for both capacity and energy products in order to provide open access transmission service and maintain system reliability. *See Consolidated Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 966 (D.C. Cir. 2003) (New York ISO "administers competitive, bid-based electricity markets and monitors them for exercises of market power"). These New York ISO markets are familiar to this Court. *See TC Ravenswood, LLC v. FERC*, No. 07-1278, 2009 U.S. App. LEXIS 10014, at *9-10 (D.C. Cir. May 7, 2009) (unpublished) (affirming new compensation for dual-fuel generators in the energy market without added compensation for infrastructure costs); *Consolidated Edison Co. of N.Y. v. FERC*, 510 F.3d 333, 336 (D.C. Cir. 2007) (addressing price spikes in energy market); *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 810 (D.C. Cir. 2007)

(addressing availability in the capacity markets "for both statewide and In-City generation"); *Electric Consumers Res. Council v. FERC*, 407 F.3d 1232, 1235-36 (D.C. Cir. 2005) (upholding new capacity market design that encourages greater investment in generation capacity and reduces price volatility); *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 965 (D.C. Cir. 2005) (remanding issue of automatic mitigation in energy market outside of New York City); *Keyspan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1054 (D.C. Cir. 2003) (addressing recalculation of price cap in capacity markets when pricing methodology changed).

In the New York ISO, "[t]he market for . . . capacity, which is 'the capability to generate or transmit electrical power, measured in megawatts ("MW"),' is distinct from the market for energy, which is 'the quantity of electricity that is bid, produced, purchased, consumed, sold, or transmitted over a period of time, and measured or calculated in megawatt hours.'" *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 2 n.1 (2008) (punctuation removed) (citing New York ISO Tariff); *see also Keyspan-Ravenswood*, 474 F.3d at 806 (distinguishing capacity and energy).

1. Energy Market

The New York ISO's energy market selects generators based on their bids and pays a uniform market-clearing price based on the last bid to clear the market. *Edison Mission Energy*, 394 F.3d at 965 (explaining the difference between "Day-

Ahead" and "Real-Time" hourly market clearing prices). There is an exception to this economic selection process when the bids of generators needed for local reliability are too high to clear in the Day-Ahead auction. *See New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,169 at P 2, JA 12 (2010) ("Specified Generators Mitigation Order"), *reh'g pending*. In that instance, the New York ISO can direct generators to stand ready to operate in the next day. *Id*. It compensates those generators, via guarantee payments, for startup and minimum generation costs not recovered through the next day Real-Time market. *Id*. at PP 2, 79, JA 12, 40. For example, if a generator is committed by the New York ISO after conclusion of the Day-Ahead auction and it does not sell electricity into the next day market, it would normally receive a guarantee payment equal to its bids for operating at its minimum level. *See generally* New York ISO Request for Authority to Apply a Market Power Mitigation Measure to the Rest-of-State Generators Committed or Dispatched for Reliability, at 5-6, R.1, JA 55-56 (filed Aug. 13, 2010) ("Rest-of-State Mitigation Filing") (explaining generator commitment process and guarantee payments); Mitigation Order, 133 FERC ¶ 61,030 at PP 47-48, JA 364-65 (providing other examples of guarantee payments).

Unlike New York ISO capacity markets in which different auctions are held for different geographic regions or zones, the energy market covers the entire New York State area. *See* New York ISO Request for Clarification, at 1-2, R.22, JA

368-69 (filed Oct. 13, 2010) ("New York ISO Clarification"); *see also* Commission Errata Notice, R.23, JA 371 (Oct. 19, 2010) (granting clarification). But, because New York City has persistent "structural market power problems," *Edison Mission Energy*, 394 F.3d at 967, the New York ISO applies more strict mitigation measures inside New York City and less strict mitigation measures outside New York City, the so-called Rest-of-State area. Specified Generators Mitigation Order at P 69, JA 35.

2. Capacity Markets

The New York ISO holds different capacity auctions for each different capacity zone. New York ISO Clarification at 1-2, JA 368-69. Like mitigation in the energy market, the New York ISO applies different mitigation measures for different capacity zones. *See*, *e.g.*, *New York Indep. Sys. Operator, Inc.*,122 FERC ¶ 61,211 at P 2 (2008), *reh'g granted in part*, 124 FERC ¶ 61,301 (2008), *reh'g granted in part*, 131 FERC ¶ 61,170 (2010), *on appeal sub nom. New York Pub. Serv. Comm'n v. FERC*, D.C. Cir. Nos. 08-1366, *et al*. (filed Nov. 21, 2008 and later) (in abeyance awaiting completion of agency proceeding).

In 2007, pursuant to FPA section 206(a), 16 U.S.C. § 824e(a), the Commission established a proceeding to investigate the reasonableness of mitigation in the New York City capacity market. *New York Indep. Sys. Operator*,

122 FERC ¶ 61,211 at P 6. Prior to that investigation and the resulting reforms, New York ISO mitigated only suppliers, not buyers, of capacity. *Id*. at P 4. Based on many factors, including the particular history and structure of the New York City capacity market, *id*. at PP 3-5 & n.10, 101-102, the Commission instituted, for the first time, a minimum bid requirement (i.e., a price floor) for capacity in New York City in order to prevent uneconomic entry. *Id*. at PP 100-107.

Uneconomic entry occurs when a buyer of capacity builds or contracts for a small amount of the total capacity it needs at a price that exceeds the expected market price. *See id*. The buyer then bids that capacity into the market at a low price in order to depress the market clearing price for capacity, thereby lowering its total costs for capacity. *See id*.

II. The Commission Proceedings And Orders

A. Specified Generators Mitigation Proceeding

The New York ISO's tariff requires it to submit a new mitigation measure for Commission approval if it discovers conduct that: (1) departs significantly from conduct that would be expected under competitive market conditions, but does not trigger the mitigation thresholds already in the tariff; and, as relevant here, (2) causes a 100 percent increase in guarantee payments to a generator during any day. Rest-of-State Mitigation Filing, Tariff § 23.3.2.3, JA 84; *see also* Specified

Generators Mitigation Order, 131 FERC ¶ 61,169 at P 5, JA 13 (reproducing relevant tariff provision).

In September 2009, after collecting information on guarantee payments to generators during the prior month, New York ISO sought to implement an automatic mitigation measure applicable to suppliers with three generators located in the Rest-of-State area. Specified Generators Mitigation Order at P 1, JA 11. New York ISO found that guarantee payments to the three generators had increased more than 100 percent for reasons that were not attributable to legitimate competitive bases. *Id*. at P 8, JA 14; *see id*. at P 11, JA 15 (three generators received cumulatively $2.7 million in excess of their estimated marginal costs during the 21 days studied). It also claimed that they had the ability to exercise market power in the energy market because each generator was the only alternative available to solve a local reliability problem. *Id*. at P 12, JA 15; *see id*. at P 77, JA 39 (three "[g]enerators' locations on the grid . . . make them uniquely suited to provide the solutions" to a specific network "voltage support" need or "to cover a possible transmission line outage").

As applied to those three generators, New York ISO proposed to replace a generator's bid with its reference price if a specific generator is committed for local reliability needs outside of the auction process and its energy bids exceed, by certain thresholds, its estimated marginal costs for each bid component. *Id*. at P

12, JA 16; *see Wisconsin Pub. Power Inc. v. FERC*, 493 F.3d 239, 251 (D.C. Cir. 2007) (in mitigation design, a "seller's 'reference level' . . . is based on an estimate of its marginal cost"); *Edison Mission Energy*, 394 F.3d at 965 (explaining that "a 'reference price' . . . may be based on prior bids from a [generating] unit, or some direct calculation of the unit's production costs").

Over objections from suppliers regarding, among other things, fixed cost recovery, the Commission approved, on May 20, 2010, the New York ISO's new mitigation measure for prospective application to the three generators. Specified Generators Mitigation Order at P 1, JA 11. The Commission also expressed concern that other generators in the Rest-of-State area may be able to exercise market power in similar circumstances – that is, when a generator is the sole solution to a local reliability problem and is called outside the energy market's economic selection process to resolve the problem. *Id*. at P 101, JA 48. Noting a proposal pending before the New York ISO stakeholder process for generic application of the mitigation measure, the Commission encouraged New York ISO to continue the stakeholder process and, upon its completion, to file the proposal with the Commission. *Id*. at P 102, JA 48 (directing periodic progress reports if proposal not filed with the Commission).

B. Rest-of-State Mitigation Filing

In response to the Commission's encouragement, the stakeholders concluded their process and the New York ISO filed, on August 13, 2010, the proposal ("Rest-of-State Mitigation Measure") that is at issue here. Rest-of-State Mitigation Filing at 4, JA 54. The stakeholders considered both a generic application of the mitigation for the three specified generators and a proposal for temporarily providing additional compensation to generators unable to recover their "going-forward costs" in New York ISO's markets. *Id*. Because stakeholders could not agree on the need for additional compensation, New York ISO filed the mitigation proposal, as approved by the stakeholder process, without also including a proposal for additional compensation. *Id*.

Contemporaneously, Ravenswood and other suppliers appealed the stakeholder decision to the New York ISO Board. *Id*. at 5, JA 55. Denying the appeals, the Board noted that claims of deficient compensation had "not been substantiated." New York ISO Board of Directors' Decision at 4, JA 123 (July 29, 2010); *see also* Dissenting Opinion of Thomas F. Ryan at 1, JA 126 ("like the majority, I found unpersuasive the appellants' unsupported arguments that certain generators are unable to recover their fixed costs when they are required to operate for reliability"). The Board also noted that the tariff contemplates that generators, which would otherwise retire but instead provide temporary reliability solutions,

"will receive 'full and prompt recovery of all reasonably-incurred costs'" through contracts outside of the New York markets. Board Decision at 4, JA 123 (describing process for providing out-of-market supplemental payments to generators needed for reliability). Nevertheless, the Board directed New York ISO management to work with stakeholders to examine claims of deficient compensation and to review the process by which permanent solutions to specific reliability needs are evaluated and planned for, particularly in terms of timing and cost to consumers. *Id*. at 5, JA 124.

The New York ISO describes the Rest-of-State Mitigation Measure as "almost identical" in structure to the one approved for application to the three specified generators. Rest-of-State Mitigation Filing at 6, JA 56; *see also supra* p. 10 (describing mitigation structure). As relevant here, the only difference is that it "applies to all generators that are located in the New York Control Area [i.e., New York State] that are not located in a 'designated Constrained Area.'" New York ISO Clarification at 1, JA 368. The only designated Constrained Area, at the time of issuance of the challenged orders, was New York City. *Id.* at 2, JA 369 (referring to New York City as "Load Zone J").

C. Challenged FERC Orders

1. Rest-of-State Mitigation Order

On October 12, 2010, the Commission approved the mitigation measure to apply to all generators located in the Rest-of-State area. Mitigation Order, 133 FERC ¶ 61,030, JA 349; Commission Errata, JA 371. Finding the proposed measure "essentially the same" as the Specified Generators Mitigation Measure, the Commission approved the new measure on the same basis that it approved the earlier, more specific mitigation. Mitigation Order at P 43, JA 362.

Because the measure targets generators committed for local reliability needs that have too few or no competitive alternatives, the Commission determined that it is reasonable for the New York ISO to automatically substitute reference prices for generators' bids that exceed their marginal costs by a certain threshold. *Id*. at P 44, JA 363. The Commission rejected Ravenswood's assertion that market power should be measured by whether returns are usury, finding that market power is indicated when, as the New York ISO identified, one generator becomes pivotal because of insufficient competitive alternatives. *See id*. at P 52, JA 366; *see also id*. at P 5, JA 351 (the proposal applies to a Rest-of-State generator that "become[s] a pivotal supplier as a result of being required for reliability, and thus possesses market power").

The Commission rejected suppliers' argument that the mitigation removes the ability for generators to earn a contribution toward their fixed costs. *Id*. at PP 50-51, 53-54, JA 365-66, 366-67. As an initial matter, the Commission found that suppliers did not support their assertion that the mitigation will cause some generators to recover less than their costs. *Id*. at P 54, JA 366. The Commission further found that the mitigation was consistent with market theory as the inclusion of fixed costs in an energy bid is an indication that a bid is not competitive. *Id*. at P 50, JA 365 (citing Specified Generators Mitigation Order, 131 FERC ¶ 61,169 at P 73, JA 37 (explaining that generators without market power maximize their profits by bidding at marginal cost in a uniform clearing-price auction)). Given that the mitigation correctly limits energy bids to marginal costs, and because fixed cost recovery is not instructive as to whether mitigation is just and reasonable, the Commission determined that issues of fixed cost recovery were beyond the scope of the tariff amendment proceeding. *Id*. at PP 50, 54, JA 365, 366.

Nevertheless, the Commission further addressed the compensation issue. It identified opportunities in the energy market and the capacity market for mitigated generators to receive compensation above their marginal costs. *Id*. at P 51, JA 365. The Commission explained that even generators that are frequently committed for reliability outside of the economic selection process have the opportunity to earn revenues above their marginal costs at times of system-wide scarcity. *Id*.

("clearing price will typically exceed the marginal costs of virtually all generators"). In addition, the Rest-of-State capacity market is structured to provide suppliers with an opportunity to recover some of their fixed costs. *Id*.

The Commission concluded that the stakeholder process was, at least initially, the appropriate mechanism to address the additional compensation issue raised by suppliers. *Id*. at P 54, JA 366. In order to remain informed about progress on the issue, the Commission directed the New York ISO to file periodic status reports. *Id*.

2. Rehearing Order

Ravenswood (and others) timely filed a request for rehearing that the Commission denied on May 19, 2011. Rehearing Order, 135 FERC ¶ 61,157, JA 411. The Commission reaffirmed its finding that the proceeding was limited in its scope to consideration of the reasonableness of New York ISO's proposed tariff amendment. *Id*. at PP 24, 26, 30, JA 420, 422.

Addressing alternative methods to mitigate the market power of Rest-of-State generators in the energy market, the Commission found that there may be other just and reasonable methods. *Id*. at PP 30-31, JA 422-23. This included a bid adder for frequently mitigated generators like that used by another regional entity. *Id*. at P 30, JA 422. The Commission rejected these alternatives, however, because the New York ISO had met its burden to show that its proposal was

reasonably suited to its particular markets. *Id*. The Commission pointed to the New York ISO stakeholder process as the appropriate venue, in the first instance, for addressing parties' alternative mitigation suggestions. *Id*. at P 31, JA 423.

The Commission found that Ravenswood's request to delay implementation of the mitigation until New York ISO develops and implements a more balanced mitigation regime in the Rest-of-State capacity market, *id*. at P 22, JA 419, was beyond the scope of the proceeding. *Id*. at P 26, JA 420. It rejected Ravenswood's assertion that it must address issues of cost recovery in the Rest-of-State capacity market at the same time that it approved a measure to limit the exercise of market power by generators in the energy market. *Id*. at PP 24-27, JA 420-21. "If there are deficiencies in the capacity markets, they should be addressed in a separate proceeding and not through the exercise of market power" by Rest-of-State generators in the energy market. *Id*. at P 27, JA 421. The Commission added that the stakeholder process was, in the first instance, the appropriate venue for also addressing any such deficiencies. *Id*. at P 31, JA 423.

This appeal followed.

SUMMARY OF ARGUMENT

The mitigation approved below applies to generators located in the Rest-of-State area outside of New York City. The record here shows that Ravenswood owns a single generating station located in New York City. Because Ravenswood failed to show in its opening brief that it owns or operates a generator that is located in the Rest-of-State area, or how it is injured by selling into a market where other generators are mitigated, it has not demonstrated an injury-in-fact that is actual or imminent and that flows directly from the mitigation approved in the challenged orders. For this reason, the Court should dismiss this appeal for lack of standing.

On the merits, Ravenswood remains displeased with the pace of reform in the New York wholesale electricity markets. In this regard, the instant case closely resembles a 2009 *TC Ravenswood* case, where this Court affirmed the Commission's denial of Ravenswood's claim that the Commission is compelled to address all compensation issues together, at the same time and in the same tariff amendment proceeding. Just as it did before, the Commission here reasonably determined that it is not compelled to immediately resolve compensation issues that are better considered, in the first instance, by New York market participants through the New York ISO stakeholder process.

Ravenswood urges that a revision to the established rules of one of New York ISO's markets (the energy market) requires, in turn, comprehensive reform of a separate and distinct New York ISO market (the capacity market). But as this Court instructed Ravenswood in 2009, the Commission does not have to insist that the New York ISO resolve all problems at one time, much less on the timetable preferred by Ravenswood. Rather, here the Commission reasonably could accept the New York ISO mitigation measure as providing just and reasonable mitigation of market power issues in the energy market, without immediately resolving alleged buyer market power in the Rest-of-State capacity market, especially when allegations are unsupported by evidence.

Ravenswood responds that the Commission failed to address an alternative to New York ISO's proposed mitigation. In fact, the Commission analyzed Ravenswood's scarcity pricing proposal. The Commission reasonably determined that although Ravenswood's alternative may mitigate market power, the New York ISO's proposed measure was better as it was suited to New York ISO's markets and reflected stakeholder preferences. In these circumstances, the Commission's approval of the mitigation measure and its deferral of compensation issues to a stakeholder process satisfy all statutory and regulatory responsibilities and, accordingly, are worthy of judicial respect.

ARGUMENT

I. Ravenswood Has Not Established Article III Standing

To obtain judicial review of a FERC order, a party must meet the requirements of Article III standing. *See, e.g., Public Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2001) (party is not "aggrieved" within the meaning of FPA § 313(b), 16 U.S.C. § 825*l*(b), unless it can establish constitutional and prudential standing). The "irreducible constitutional minimum" of Article III standing requires a petitioner to show it has suffered (1) an "injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that "likely . . . will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and quotation marks omitted).

Ravenswood's claim that it has standing because it is an "object" of the Commission's orders, Br. 33, is without merit. New York ISO is the object of the orders in the adjudication below; Ravenswood is merely a party that participated in the agency proceeding. *See, e.g., PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (petitioner suffers no justiciable injury from FERC rejection of reliability contract to which petitioner was not a party even though

petitioner participated in proceeding and in same relevant market). "[A] party does not acquire such a 'direct stake in a litigation' simply by participating in the antecedent administrative proceedings whence the litigation arises; it must establish its constitutional and prudential standing." *City of Orrville v. FERC*, 147 F.3d 979, 985 (D.C. Cir. 1998).

Ravenswood also has not shown that it is the likely object of the mitigation measure approved below. *See New York Reg'l Interconnect*, 634 F.3d at 586 (no justiciable injury because petitioner "does not have any active proposals for new transmission projects" that are subject to the Commission-approved New York ISO process). In arguing standing, Ravenswood fails to distinguish between potential sales into what it calls "the Rest-of-State energy and capacity markets," Br. 34 (acronym replaced), and energy sales from generators located in the Rest-of-State area. Only the latter are subject to mitigation. *See supra* p. 13; *see also* Br. 19 (same); Request for Rehearing of TC Ravenswood, LLC and TransCanada Power Marketing, Ltd., at 1, R.27, JA 388 (Nov. 10, 2010) ("measures [are] applicable to all generators other than those within the already mitigated in-city constrained area").

It is the rule of this circuit that, "absent good cause shown, . . . a petitioner whose standing is not self-evident should establish its standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto at the first

appropriate point in the review proceeding." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002) (when "petitioner does not submit evidence of those facts [upon which a petitioner relies for its standing to sue] with its opening brief, . . . the respondent is therefore left to flail at the unknown in an attempt to prove the negative"); *see* Cir. Rule 28(a)(7); *see also National Ass'n of Home Builders v. EPA*, No. 10-5341, 2011 U.S. App. LEXIS 24430, at *12 (D.C. Cir. Dec. 9, 2011) (explaining the petitioner's "burden of production"). Ravenswood has failed to meet this requirement as it has not provided any evidence that it sells energy from a generator that is subject to the Commission-approved mitigation measure. *See New York Reg'l Interconnect*, 634 F.3d at 587 (hypothetical future application of Commission-approved process is insufficient to establish injury); *see also Anderson v. FERC*, Nos. 08-1131 & 08-1156, 2009 U.S. App. LEXIS 10304, at **3 (D.C. Cir. May 13, 2009) (unpublished) (petitioner has "no economic stake in the outcome of its challenges" because the rate "schedule [applicable to it] has not changed, so [petitioner] has not been subjected to a higher rate").

Indeed, according to its own statements, Ravenswood owns and operates a generating station that is located in New York City. Motion to Intervene and Protest of TC Ravenswood, LLC and TransCanada Power Marketing, Ltd., at 2, R.12, JA 129 (filed Sept. 3, 2010) ("TransCanada [Power Marketing] is affiliated with entities that own and operate electric generation facilities in New York, . . .

including TC Ravenswood, which owns the approximately 2,500 MW Ravenswood generating station in NYISO Zone J [i.e., New York City]"). Because the mitigation at issue here does not apply to Ravenswood's New York City generating station, the only generation that it owns, according to the record, and because Ravenswood has failed to explain how it is injured by selling into a market where other generators are mitigated, Ravenswood has failed to establish its standing to challenge the mitigation approved in the challenged orders. *See Wisconsin Pub. Power*, 493 F.3d at 267-68 (agreeing that petitioners "cannot satisfy the injury-in-fact requirement because the orders under review did not approve the imposition of any additional charges on them"); *El Paso Natural Gas Co. v. FERC*, 50 F.3d 23, 24 (D.C. Cir. 1995) (petitioner failed to show "a likelihood of imminent injury under the challenged rulings").

Ravenswood, however, is not lacking in other opportunities to pursue, before this Court, its arguments concerning, and interests in, the New York markets. *See TC Ravenswood, LLC v. FERC*, D.C. Cir. No. 12-1008 (filed Jan. 6, 2012) (petition for review of agency orders on the price-setting mechanism in New York ISO's three capacity zones, that is, the Rest-of-State zone, the New York City zone and the Long Island zone); *TC Ravenswood, LLC v. FERC*, D.C. Cir. No. 11-1305 (filed Aug. 25, 2011) (petition for review of agency orders on exemptions from mitigation that imposes minimum bidding requirements in the New York City

capacity market); *New York Pub. Serv. Comm'n v. FERC*, D.C. Cir. Nos. 08-1366, *et al*. (filed Nov. 21, 2008 and later) (intervenor in support of petitions for review of agency orders on comprehensive reform of mitigation measures to apply to the New York City capacity market, including minimum bidding requirements to address uneconomic entry). Nor has Ravenswood missed earlier opportunities to present to this Court its objections to New York ISO market reform. *See supra* pp. 5-6 (citing to 2003, 2007, and 2009 *Ravenswood* appeals).

Moreover, the New York ISO stakeholder process is currently addressing some, if not all, of the issues Ravenswood raises regarding the effect of the mitigation on Rest-of-State generators. *See* Mitigation Order at P 54, JA 366; Board Decision at 5, JA 124. Ravenswood can seek remedies through participation in that ongoing process or through initiation of new subjects for consideration in the stakeholder process. *See* Rehearing Order at P 31, JA 423 ("stakeholders are free to propose modifications to NYISO's existing mitigation measures through NYISO's stakeholder process"). Remaining New York market reform issues, whether presented first to the stakeholder process or to the agency, may result in more Commission orders and still more appeals.

While Ravenswood may be able to demonstrate the requisite standing in upcoming cases, it has failed to show in this appeal that it has suffered an injury, concrete or otherwise, that is in any way actual or imminent, or that is caused by

the Commission's approval of the mitigation applicable to other generators. Thus, it cannot meet constitutional standing requirements. *See Lujan*, 504 U.S. at 560.

II. Standard Of Review

The Court's review of FERC orders is governed by the arbitrary and capricious standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). Under that standard, the Commission's decision must be reasoned and based on substantial evidence in the record. FPA § 313(b), 16 U.S.C. § 825*l*(b); *see, e.g.*, *East Tex. Elec. Coop., Inc. v. FERC*, 218 F.3d 750, 753 (D.C. Cir. 2000).

A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Unless an agency responds meaningfully to "objections that on their face seem legitimate, its decision can hardly be classified as reasoned." *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001).

The Court "recognize[s] 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.'" *Wisconsin Pub. Power*, 493 F.3d at 256 (quoting *Maine Pub.*

Util. Comm'n v. FERC, 454 F.3d 278, 287 (D.C. Cir. 2006)); *see also Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) ("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").

III. The Commission Reasonably Accepted The New York ISO's Mitigation Proposal, Without Immediately Requiring Additional Compensation Opportunities For Mitigated Generators Before Conclusion Of The Stakeholder Process

The Commission accepted New York ISO's proposed tariff amendment under FPA section 205(a)-(b), 16 U.S.C. § 824d(a)-(b), finding that it properly mitigates the market power of generators that are the only solution to a local reliability need in the energy market. *See* Mitigation Order at P 44, JA 363 (citing Specified Generators Mitigation Order at P 78, JA 39). Noting a lack of support for the assertion that mitigated generators are unable to recover their costs, the Commission understandably deferred its consideration of compensation issues until after New York ISO's stakeholders have considered them. *Id*. at P 54, JA 366.

In seeking immediate additional compensation opportunities for generators subject to the new mitigation, Ravenswood makes three arguments. First, it argues that the Commission engaged in improper single-issue ratemaking by not addressing the reasonableness of the total market rate. Second, Ravenswood

argues that the Commission is compelled to consider mitigation in the Rest-of-State capacity market at the same time it considers a change to mitigation in the energy market because the issues are related. Third, it argues that the Commission failed to consider its suggested alternative to the proposed mitigation – that is, scarcity pricing through flexible thresholds for frequently mitigated generators.

The first of these arguments is jurisdictionally barred because Ravenswood did not raise it to the Commission in its rehearing request. All three are without merit, as explained below.

A. The Commission Appropriately Focused On The Specific Tariff Amendment Proposed By The New York ISO

On appeal, Ravenswood repeatedly argues that the Commission violated its own precedents by engaging in single-issue ratemaking. Br. 2, 10, 17, 31, 34-40, 44. By incorporating a supply-side mitigation measure without mitigation to address monopsony (i.e., buyer) market power, Ravenswood asserts that the New York ISO market design is a "piecemeal" rate that fails to satisfy the just and reasonable standard of section 205(a) of the Federal Power Act, 16 U.S.C. § 824d(a). Br. 34-35, 38.

Ravenswood did not make those claims before the Commission in its rehearing request. Nor did Ravenswood raise any of the FERC precedents regarding single-issue ratemaking to the Commission that it raises here. *See* Br. 34-36 & nn.85-90. This deprived the Commission of the opportunity to explain

that its action was not inappropriate single-issue ratemaking and to counter Ravenswood's new assertion that the Commission departed from its policy. *See, e.g.*, Br. 39. Ravenswood is jurisdictionally barred from introducing these new arguments on appeal. *See* FPA 313(b), 16 U.S.C. § 825*l*(b) (argument must be presented in petition for agency rehearing absent "reasonable ground for failure so to do"); *Indiana Util. Regulatory Comm'n v. FERC*, No. 10-1313, 2012 U.S. App. LEXIS 918, at *10-12 (D.C. Cir. Jan. 17, 2012) (argument must be raised with specificity within the "four corners" of the rehearing petition; does not matter if argument was earlier presented to the agency). Ravenswood made the same mistake recently. *See TC Ravenswood*, 2009 U.S. App. LEXIS 10014, at *10 ("court cannot consider objections [Ravenswood] never urged before the Commission without 'reasonable ground' for failure").

In any event, as Ravenswood is well aware, the Commission is not compelled to address all rate issues that may arise when a filing utility seeks to change one aspect of an existing rate in a single FPA section 205 tariff proceeding. *Id*. at *9-10. In *TC Ravenswood*, this Court upheld the Commission's decision to approve a New York ISO tariff amendment to provide incremental variable cost compensation to dual-fuel generators "and to defer consideration of the additional change that Ravenswood sought . . . [until after consideration by] the NYISO stakeholder process." *Id*. at *9. As it does here, Br. 30, 37, 55-56, 58,

Ravenswood argued that the Commission could not defer consideration of compensation for other costs that it contended were related to its compliance with reliability instructions. *TC Ravenswood*, 2009 U.S. App. LEXIS 10014, at *9-10. The Commission, as affirmed by this Court, properly considered the "particular rate revision before it" and reasonably rejected Ravenswood's argument that it must fix all "'defect[s]' in the existing rate" in one proceeding. *Id*. at *10 (citing *New York Indep. Sys. Operator, Inc.*, 121 FERC ¶ 61,039 at 61,149 (2007)).

Nor is the Commission compelled, as Ravenswood asserts, Br. 35-36 & nn.89-90, to address all related rate issues that arise in markets operated by regional entities, such as the New York ISO, at one time. *See Wisconsin Pub. Power*, 493 F.3d at 268. Even when the overall market is undergoing a comprehensive redesign, *id*. at 245-46, the Commission may reasonably "reserve[ ] the issue for future proceedings" and await a "concrete proposal" resulting from a stakeholder process. *Id*. at 268. This is especially true here, where the Commission and the New York ISO are following a more iterative process of market reform – that is, first applying mitigation to three generators with documented market power abuses; then, after the stakeholder process produces a more generic proposal, applying mitigation to all Rest-of-State generators. *See* Specified Generators Mitigation Order, 133 FERC ¶ 61,169 at PP 101-102, JA 48; Mitigation Order at PP 3-4, JA 350-51.

Ravenswood supports its piecemeal ratemaking contention with Commission cases addressing a party's burden under FPA section 206(b), 16 U.S.C. § 824e(b). Br. 36 n.90, 41 n.104; 48-49 nn.123-27. Although Ravenswood is familiar with the differences between sections 205 and 206 of the FPA, *see TC Ravenswood*, 2009 U.S. App. LEXIS 10014, at *10, on appeal here, Ravenswood confuses the different burdens of proof. Under FPA section 205, 16 U.S.C. § 824d, the filing utility has the burden of proving that the change it proposes is just and reasonable – a burden that the Commission found New York ISO met in this case. Rehearing Order at P 30, JA 423; *see also* Mitigation Order at P 43, JA 363.

Ravenswood did not request in the proceeding below that the Commission institute an investigation under FPA section 206, 16 U.S.C. § 824e, of existing tariff rates and terms. *See* Protest at 19-20, JA 146-47 (requesting rejection of filing); Rehearing Request at 9, JA 400 (requesting a "hold [on the Rest-of-State mitigation] until the New York ISO submits and the Commission approves" revisions to the markets). If it had, Ravenswood, or possibly the Commission, would bear the burden of proving that the existing tariff rate was unjust and unreasonable. *See Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (explaining FPA § 206 burden); s*ee also TC Ravenswood*, 2009 U.S. App. LEXIS 10014, at *10 (if FERC ordered requested revision, it would "alter aspects of the existing rate structure that the utility did not itself propose to change and would

therefore have to transform the matter into a [FPA § 206] proceeding); *Western Res. Inc. v. FERC*, 9 F.3d 1568, 1578-79 (D.C. Cir. 1993) (same); *California Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,081 at P 66 (2009) (cited by Ravenswood, Br. 35 n.89) (discussing demonstration required, in a request lodged in FPA § 205 proceeding, for agency to institute FPA § 206 investigation).

Having no evidence that the total market rate was unreasonable, *see* Mitigation Order at P 54, JA 366, and having ample reason to adopt New York ISO's specific proposal to extend the mitigation from three to all Rest-of-State generators, *see id*. at PP 43-44, JA 362-63, the Commission reasonably rejected Ravenswood's requested immediate revisions to New York ISO's market design. Rehearing Order at PP 24-27, JA 420-21.

B. The Commission Is Not Required To Address All Related Issues At The Same Time And In The Same Proceeding

In the challenged orders, the Commission repeatedly emphasized that compensation issues for mitigated generators are best addressed, in the first instance, in the ongoing New York ISO stakeholder process. Mitigation Order at P 54, JA 366; Rehearing Order at P 31, JA 423; *see also TC Ravenswood*, 2009 U.S. App. LEXIS 10014, at *9 (FERC "explained that the NYISO stakeholder process was the appropriate venue for addressing, in the first instance, the necessity and design of a compensation mechanism for the additional infrastructure costs that Ravenswood sought"). In the proceeding below, suppliers did not support their

claim that mitigated generators were unable to recoup their operating costs. Mitigation Order at P 54, JA 366 (no "factual evidence"); *see also* Board Decision at 4, JA 123. Stakeholders also disagreed about the need for additional compensation for mitigated generators. *See* Rest-of-State Mitigation Filing at 4, JA 54. For these reasons, and because the design of any compensation mechanism should be "suited to the particular market" in which it applies, the Commission properly deferred consideration of the issue to future proceedings. Rehearing Order at P 31, JA 423; *see also U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) (agency has "broad discretion to . . . defer consideration of particular issues to future proceedings when it thinks that doing so would be conducive to the efficient dispatch of business").

Ravenswood argues that this delay is inconsistent with Commission precedent. Br. 34-50. In its rehearing request, Ravenswood argued that precedent compels the Commission to address all related compensation issues "in a comprehensive and coordinated parallel basis." Rehearing Request at 3 & n.4, JA 394; *see* Br. 38 n.95 (same). Because the mitigation might reduce the energy market revenues of some generators, Ravenswood argued that the Commission must reject it until the New York ISO files and the Commission approves and implements measures to address uneconomic entry in the Rest-of-State capacity market. Rehearing Request at 6, JA 397.

On rehearing, the Commission again addressed the propriety of opening the proceeding to generic cost recovery issues. Rehearing Order at PP 24-26, JA 420; *see* Specified Generators Mitigation Order at PP 81-82, JA 40-41. It determined that the mitigation proceeding was "not initiated to comprehensively review how all elements of the NYISO markets are contributing to cost recovery." Rehearing Order at P 24, JA 420; *see also id*. at P 26, JA 420 (finding proceeding is "not the appropriate forum . . . because proceeding is dealing with a narrowly defined market power . . . issue").

It understood Ravenswood's argument as a request to allow suppliers to use market power to extract higher payments in the energy market because of perceived deficiencies in the capacity market. *See id*. at P 27, JA 421; *see* Br. 8, 15 (arguing, without support, that a generator with market power does not abuse that market power by bidding in a way that allows return on its investment); *see also id*. at 52 (FERC "failed to . . . ensure that *capacity* prices are ultimately just and reasonable" (emphasis added)); *see also* Protest, Test. of Ravenswood Expert Roger Williams, at 7:7-7:13, 15:11-15:17, JA 154, 162 (requesting uneconomic entry mitigation in Rest-of-State capacity market). The Commission reasonably responded that any deficiencies in the Rest-of-State capacity market, including the lack of uneconomic entry mitigation measures, should be addressed in a separate proceeding concerning that market. *See* Rehearing Order at P 27, JA 421; *see also*

TC Ravenswood, 2009 U.S. App. LEXIS 10014, at *10 ("Commission reasonably determined that infrastructure compensation implicates distinct 'concerns'" not present in the filing before it).

Further, the Commission emphasized that it does not condone the exercise of market power even in situations in which generators are failing to recover their costs. Rehearing Order at P 27, JA 421. A cost recovery problem, if indeed there is a problem, is best addressed first in the stakeholder process and later, if necessary, in a new proceeding before the Commission. *See id*. at P 24, JA 420. And here the Commission (and New York ISO's market expert) had reason to doubt that fixed costs were not covered in the New York ISO's markets. *See* Mitigation Order at P 54, JA 366; Response of New York ISO to Protests, R.18, Attach. A, Aff. of David Patton, P 16, JA 280 (Sept. 23, 2010) ("[g]iven prevailing capacity prices and net revenues available from the energy and ancillary services markets, it would not be surprising if all of the generators that are needed for reliability are more than covering their going-forward fixed costs"); *id*. at PP 19-21, JA 281-82 (describing revenue sources for mitigated generators); *id*., Attach. C, Supplemental Aff. of David Patton, P 15, JA 340 (Oct. 13, 2009) ("None of the [three specified] suppliers in question have presented data showing that the current energy, ancillary services, and capacity markets do not cover the going-forward

fixed costs of the resources in question. . . . [A]rguments regarding fixed cost recovery are theoretical at this point.").

Therefore, the Commission reasonably rejected Ravenswood's request to address market power issues related to uneconomic entry in the proceeding before it. *See* Rehearing Order at P 24, JA 420 ("this proceeding only addresses the . . . energy market"); *id*. at P 27, JA 421 (Rest-of-State "mitigation measures at issue here mitigate the effects of any conduct that would substantially distort competitive outcomes in the . . . energy market," not the capacity markets); *see also supra* p. 9 (explaining that mitigation of uneconomic entry occurs in capacity markets).

Even if the Commission had found, as Ravenswood requested, Rehearing Request at 8, JA 399, that the mitigation measure as applied in the energy market was related to the compensation issues in the capacity market, it still "enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities." *Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991); *see also Tennessee Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) ("agency has broad discretion to determine when and how to hear and decide the matters that come before it"). Thus, its decision here, to defer the issue to a future proceeding, was reasonable, "especially in circumstances like these where it's unclear that additional aspects of a problem even remain to be solved." *TC Ravenswood*, 2009 U.S. App. LEXIS

10014, at *9 ("an incremental approach to a problem is certainly within the scope of the Commission's discretion") (citing *Mobil Oil*).

C. The Commission's Analysis Of Ravenswood's Objection And Preferred Alternative Was Reasonable

Contrary to Ravenswood's claims on appeal, Br. 32, 50-58, the Commission gave serious consideration to Ravenswood's arguments in opposition to New York ISO's mitigation proposal. *See Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 552 (D.C. Cir. 2010) (as long as FERC's "overall explanation provide[s] reasonable responses to petitioners' objections that were neither summary nor dismissive . . . a point-by-point rebuttal is not necessarily required" (citations omitted)). The Commission did not err in failing to address applicable precedent as Ravenswood alleges, *see* Br. 53, because no applicable precedent was put forward. Ravenswood failed to explain below, as it does here, Br. 38 n.5, 53, how the two cases that it cited on rehearing are applicable to its claim, *see* Br. 40-45, that Commission policy requires an increase in compensation opportunities when one avenue of compensation is restricted. *See Tuscarora Gas Transmission Co.*, 120 FERC ¶ 61,022 at PP 13-14 (2007) (holding that Commission policy requires reduced *rates* for natural gas transportation when the quality of *service* is reduced); *Natural Gas Pipeline Co. of Am.*, 102 FERC ¶ 61,326 at P 19 (2003) (same). "The doctrine obliging agencies to address significant comments leaves them free to ignore insignificant ones." *National Ass'n of Regulatory Util. Comm'rs v. FERC*,

475 F.3d 1277, 1285 (D.C. Cir. 2007) (FERC need not address unsupported, nonspecific generalizations).

Ravenswood is no more persuasive in contending that the Commission failed to substantively consider its scarcity pricing alternative. Br. 50, 55 & n.145. On rehearing below, Ravenswood requested "some sort of scarcity pricing mechanism" that it described in one sentence as "[m]itigation thresholds that increase with the frequency of reliability mitigation events. . . ." Rehearing Request at 6-7, JA 397-98; *see id*. at 2, 3, 9, JA 393, 394, 400 (same).

In response, the Commission found that the suggested mitigation, already in use in another regional market, might appropriately control the exercise of market power that was the target of the New York ISO filing. Rehearing Order at P 30, JA 422 (discussing "a bid adder [i.e. increasing mitigation thresholds] for frequently mitigated units"). The New York ISO proposal, however, also is a reasonable means of addressing the identified market power. *Id*. The Commission properly concluded that the reasonable proposal before it was consistent with the current structure of New York ISO's tariff, *id*., and "suited to particular markets and stakeholder preferences" of the New York ISO, *id*. at P 31, JA 423.

The Mitigation Order addressed the suggested scarcity pricing mechanism only to the extent it adopted the reasoning in the Specified Generators Mitigation Order for approving the generic mitigation measure. Mitigation Order at P 43, JA

362. In its 2010 order, the Commission gave a more thorough answer to the more thorough explanation of the suggested alternative. *See* Specified Generators Mitigation Order at P 95, JA 46. Consistent with the opinion of the New York ISO's market expert, it found that adjusting reference prices to include a contribution toward fixed cost for frequently mitigated units would distort market outcomes. *Id*. ("when some suppliers bid above their marginal costs, the generators that are dispatched (i.e., those with the lowest bids) may not be those with the lowest costs"); *see also* Supplemental Aff. of David Patton, PP 10-11, JA 338-39 ("[a]llowing higher offers from . . . generators will not increase energy prices or produce economic signals that reflect the reliability needs of their respective areas, they will simply result in higher guarantee payments").

Thus, to the extent the Commission is required to consider alternatives when a utility proposes a reasonable change to its own tariff under FPA section 205(c), 16 U.S.C. § 824d(c), it met that requirement here. *See United Distribution Cos. v. FERC*, 88 F.3d 1105, 1169 (D.C. Cir. 1996) (that party "may have proposed a reasonable alternative to . . . rate design is not compelling" because "[t]he existence of a second reasonable course of action does not invalidate an agency's determination") (citing *Cities of Batavia v. FERC*, 672 F.2d 64, 84 (D.C. Cir. 1982) ("The billing design need only be reasonable, not theoretically perfect.")).

Insofar as Ravenswood alleges that mitigated generators cannot receive revenues above their marginal costs during times of scarcity, *see* Br. 7 n.12, it misunderstands the application of the new measure. Generators, even those most frequently mitigated by the new measure, can earn revenues above marginal costs when supplies are scarce. Mitigation Order at P 51, JA 365. "During periods of market-wide scarcity, given the nature of NYISO's markets, the market clearing price will typically exceed the marginal costs of virtually all generators, thereby allowing all such generators to receive revenues that contribute to fixed cost recovery." *Id*. (citing, *inter alia*, scarcity pricing provisions of New York ISO's tariff); *see also New York Indep. Sys. Operator, Inc.*, 111 FERC ¶ 61,117 at P 51 (2005) (estimating that periods of market-wide scarcity will occur between 20 and 60 hours per year).

As demonstrated, the approved mitigation does not prevent suppliers from recovering a contribution toward their fixed costs during times of scarcity; rather, suppliers are prevented from exercising market power in order to make a profit. *Cf. Edison Mission Energy*, 394 F.3d at 969 (mitigation "may well do some good by protecting consumers and utilities against price increments caused by the exercise of market power" as long as it does not "curtail[ ] price increments attributable to genuine scarcity"). If Ravenswood continues to believe that its opportunities to recover its costs and earn profits remain limited, then it enjoys the

opportunity to make its case, first to the New York market participants through the stakeholder process and then to the Commission, for additional compensation – just as the New York ISO effectively made its case here to extend market mitigation from three generators to all Rest-of-State generators in the energy market.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of standing. If not, and the Court proceeds to the merits, the petition should be denied and the Commission's orders should be upheld in all respects.

Respectfully submitted,

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January 27, 2012
Final Brief: March 19, 2012

TC Ravenswood, LLC v. FERC **Docket No. ER10-2220**
D.C. Cir. No. 11-1258

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 9,080 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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March 19, 2012

ADDENDUM

STATUTES

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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-

livering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

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

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

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by

[1] See References in Text note below.

the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

LIMITATION ON AUTHORITY PROVIDED

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

STUDY

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

§ 824f. Ordering furnishing of adequate service

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

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

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

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

(b) Request for inventory and cost statements

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

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

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

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 19th day of March 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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