ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 11-1486, *et al.*

ELECTRIC POWER SUPPLY ASSOCIATION, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

DAVID L. MORENOFF
ACTING GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

HOLLY E. CAFER
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

OCTOBER 25, 2012

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and *Amici*

The parties before this Court are identified in the brief of Petitioners Electric Power Supply Association, American Public Power Association, National Rural Electric Cooperative Association, Old Dominion Electric Cooperative, and Edison Electric Institute. Robert Borlick, Joseph Bowring, James Bushnell and other economists appear before this Court as *amici curiae*.

B. Rulings Under Review

1. *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, Final Rule, FERC Stats. & Regs. ¶ 31,322 (Mar. 15, 2011), R. 223, JA 66; and

2. *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745-A, Order on Rehearing and Clarification, 137 FERC ¶ 61,215 (Dec. 15, 2011), R. 266, JA 1.

C. Related Cases

The Electric Power Supply Association, a petitioner here, has filed three petitions for review of agency orders in regional proceedings concerning compliance with the rulemaking orders on review in this case (D.C. Cir. Nos. 12-1306 (with petitioner New England Power Generators Association, Inc.), 12-1368, and 12-1381). In the first two cases, this Court has granted petitioners' motions to hold the cases in abeyance pending the outcome of the instant case. *Electric Power Supply Ass'n v. FERC*, No. 12-1306 (D.C. Cir. Aug. 23, 2012); *Electric*

Power Supply Ass'n v. FERC, No. 12-1368 (D.C. Cir. Sept. 27, 2012). Petitioner Electric Power Supply Association's unopposed motion to hold the third case, No. 12-1381, in abeyance pending the outcome of the instant case, filed October 19, 2012, is pending before the Court.

Counsel is not aware of any other related cases before this or any other Court.

/s/ Holly E. Cafer
Holly E. Cafer
Attorney

October 25, 2012

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GLOSSARY

Amici	Group of economists who submitted a brief as *amici curiae* in support of petitioners, including Robert Borlick, Joseph Bowring, James Bushnell, and others
California	Petitioners California Independent System Operator Corporation and California Public Utilities Commission
Commission or FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Generators	Petitioners Electric Power Supply Association, American Public Power Association, National Rural Electric Cooperative Association, Old Dominion Electric Cooperative and Edison Electric Institute
JA	Joint Appendix
LMP	Locational marginal price: the market clearing price as calculated by a System Operator at particular locations within the System Operator's market footprint
Order No. 719	*Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008), JA 1484
Order No. 719-A	*Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719-A, 74 Fed. Reg. 37,776 (July 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009), JA 1590
Order No. 745	*Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, Final Rule, FERC Stats. & Regs. ¶ 31,322 (Mar. 15, 2011), R. 223, JA 66

Order No. 745-A	*Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745-A, Order on Rehearing and Clarification, 137 FERC ¶ 61,215 (Dec. 15, 2011), R. 266, JA 1
PPL	Jointly, intervenors in support of petitioners, consisting of PPL Brunner Island, LLC; PPL Electric Utilities Corporation; PPL EnergyPlus, LLC; PPL Holtwood, LLC; PPL Maine, LLC, PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; Lower Mount Bethel Energy, LLC; and PJM Power Providers Group
Proposed Rule	*Demand Response Compensation in Organized Wholesale Energy Markets*, Notice of Proposed Rulemaking, 75 Fed. Reg. 15,362 (Mar. 29, 2010), FERC Stats. & Regs. ¶ 32,656 (2010), R. 2, JA 206
R.	Indicates an item in the certified index to the record
Supplemental Proposed Rule	*Demand Response Compensation in Organized Wholesale Energy Markets*, 75 Fed. Reg. 47,499 (Aug. 6, 2010), 132 FERC ¶ 61,094 (2010), JA 182
System Operator	Generally, an Independent System Operator or Regional Transmission Organization

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Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

The Federal Energy Regulatory Commission ("Commission" or "FERC") issued a rulemaking requiring that demand-side resources, like supply-side resources, be compensated for the value of the contributions they make as participants in organized wholesale energy markets. The issues presented for this Court's review are:

1) Whether the Commission's Federal Power Act ("FPA") jurisdiction over wholesale sales of electric energy, as well as practices directly affecting the rates for such sales, permits it to set compensation and other market rules for demand

response resources participating in organized wholesale energy markets. (raised by Generators)

2) Whether the Commission, consistent with its statutory responsibilities and recent congressional policy, adequately demonstrated the need for a rulemaking that removes barriers to demand response participation in organized wholesale energy markets. (raised by Generators and California)

3) Whether the Commission's decision to compensate demand response resources participating in organized wholesale energy markets, under specified conditions, at the same market price offered to traditional generation resources, offers all market participants a reasonable and non-discriminatory rate under FPA sections 205 and 206, 16 U.S.C. §§ 824d-e, and is adequately supported by substantial record evidence. (raised by Generators)

4) Assuming jurisdiction, whether the Commission reasonably required the allocation of costs associated with demand response participation in organized wholesale energy markets to all entities who benefit from lower market prices produced by dispatching demand response. (raised by California)

COUNTER-STATEMENT REGARDING JURISDICTION

Petitioners invoke this Court's jurisdiction under section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). But petitioners California Independent System Operator Corporation and California Public Utilities Commission

(together, "California") raise claims concerning cost allocation that are premature, at best, and should be dismissed for failure to satisfy the jurisdictional prerequisites of ripeness and standing. *See infra* Argument, Pt. III. The Commission's orders announce only a general guideline and defer resolution of California's specific concerns to compliance proceedings, which remain ongoing. Further, petitioners failed properly to preserve two issues for this Court's review. *See infra* p. 29 (impact of the orders on state demand response programs), p. 77 (support for cost allocation guideline). Petitioners have thus deprived the Court of jurisdiction on those issues. *See* 16 U.S.C. § 825*l*(b) (limiting the Court's jurisdiction to only those objections "urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do").

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum. The petitioners seek review of a Commission rulemaking that added the regulation found at 18 C.F.R. § 35.28(g)(1)(v) (demand response compensation in energy markets).

INTRODUCTION

This case arises from a series of Commission initiatives to ensure that rates in organized wholesale markets subject to its jurisdiction are reasonable and non-discriminatory. Its latest initiative, a rulemaking announced in Order No. 745,

removes unduly discriminatory barriers to participation in those markets by demand-side resources and allows those resources to compete on a comparable basis with traditional supply-side, i.e. generation, resources. Both the Commission's statutory responsibilities under the Federal Power Act, and recent congressional policy promoting the development of demand response resources, prompt the Commission's efforts. The orders on review here specifically address demand response, a service whereby electricity consumers reduce their consumption from normal usage levels in response to price signals.

The Commission previously opened Commission-jurisdictional organized wholesale markets to demand response participation while not intruding upon state demand response initiatives. *See Indiana Util. Reg. Comm'n v. FERC*, 668 F.3d 735 (D.C. Cir. 2012) (dismissing in part and denying in part appeal of earlier FERC demand response rules opening markets to aggregators of retail customers, unless prohibited by the retail regulatory authority). Now the Commission requires that when an eligible demand response resource chooses to participate in an organized wholesale energy market, and it satisfies balancing capability and cost-effectiveness tests, the market administrator (known as Regional Transmission Organizations or Independent System Operators, collectively "System Operators") must compensate that resource at the same price generation resources receive, the market price. *Demand Response Compensation in Organized Wholesale Energy*

Markets, Order No. 745, Final Rule, FERC Stats. & Regs. ¶ 31,322 (Mar. 15, 2011) (promulgating 18 C.F.R. § 35.28(g)(1)(v)) ("Order No. 745"), R. 223, JA 66, *on reh'g and clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (Dec. 15, 2011) ("Order No. 745-A"), R. 266, JA 1.

A group of trade associations[1] representing interests of generators and utilities (collectively, "Generators") challenges the Commission's jurisdiction to enact these reforms, as well as the Commission's ultimate selection of the market price as a just and reasonable price. As to jurisdiction, the Generators contend that the Federal Power Act reserves to the States – who do not join the Generators on this issue – exclusive authority to regulate transactions involving demand response resources. But in each of its orders directing reforms to market rules governing demand response, the Commission has made plain that its focus is narrow and that it addresses only wholesale demand response, i.e., demand-side resources that participate directly in organized wholesale markets. Order No. 745 P 9, JA 76. States remain free to authorize and oversee retail demand response programs.

On the merits of demand response compensation reform, petitioners claim that the Commission failed to carry its burden of demonstrating, under section 206 of the Federal Power Act, 16 U.S.C. § 824e, that reform is necessary. Generators

[1] This group consists of the Electric Power Supply Association, American Public Power Association, National Rural Electric Cooperative Association, Old Dominion Electric Cooperative and Edison Electric Institute.

claim that the Commission failed to demonstrate that the new compensation method is just and reasonable and does not unduly discriminate against traditional supply-side resources in the wholesale markets. California claims that the Commission has not demonstrated the need for a new approach to cost allocation. The Commission denied these challenges. Existing barriers to demand response participation in wholesale markets, including inadequate compensation, motivated the Commission to exercise its authority to set new rates. Paying qualified demand response resources the market price, under the balancing and cost-effectiveness conditions defined in the orders, will neither overcompensate demand response resources nor under-compensate generators. Substantial record evidence, including expert studies and testimony, supports the Commission's approach.

Demand response participation in wholesale energy markets also triggers the need for a method to allocate the costs of obtaining demand response resources. Before this rulemaking, the Commission had approved various methods for cost allocation in certain organized wholesale energy markets, including that administered by the California System Operator. In the orders on review, the Commission adopted a general principle that the costs of obtaining demand response resources should be allocated proportionally to all customers who benefit from the reduced prices caused by the dispatch of demand response resources. Order No. 745 P 102, JA 147. California now challenges the Commission's

support for this guideline, and the move toward greater uniformity. But the Commission deferred evaluation of specific cost allocation methods to individual compliance proceedings, for all System Operators. The California System Operator has proposed a revised cost allocation method, and the Commission's proceedings concerning that proposal remain ongoing at this time.

STATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY FRAMEWORK

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 of electric energy at wholesale by public utilities in interstate commerce. 16 U.S.C. § 824(b). This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002). Under section 201(b) of the FPA, 16 U.S.C. § 824(b), the "States retain jurisdiction over retail sales of electricity and over local distribution facilities." *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006).

Under FPA sections 205 and 206, 16 U.S.C. §§ 824d-e, the Commission has an obligation to ensure that all rates by a public utility "for or in connection with" the transmission or sale of electric energy subject to the Commission's jurisdiction are just and reasonable and not unduly discriminatory or preferential. As particularly relevant here, those sections also give the Commission jurisdiction

over all rules, regulations, practices, or contracts "affecting" such jurisdictional rates and services. *Id*.; *see Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009) (affirming FERC's interpretation of practices "affecting" rates as including certain generation-related rules).

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

The FPA generally charges the Commission to employ its authority "to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *New York*, 535 U.S. at 6 (quoting *Gulf States Util. Co. v. FPC*, 411 U.S. 747, 758 (1973)). The Commission's responsibility under the FPA is to recognize and balance supplier and consumer interests; the statute's primary purpose is "to encourage the orderly development" of electricity supplies "at reasonable prices." *Public Utils. Comm'n of California v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)).

II. DEMAND RESPONSE IN ORGANIZED WHOLESALE ENERGY MARKETS

A. Organized Wholesale Energy Markets

This Court is familiar with the Commission's actions in recent years to strengthen competition in wholesale energy markets. Briefly, in its 1996 rulemaking in Order No. 888,[2] the Commission required utilities to unbundle their electricity generation and transmission services and to file new open access tariffs guaranteeing non-discriminatory access to their transmission facilities by competing generators. *See New York*, 535 U.S. at 11-13 (affirming Order No. 888); *cf. Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 536 (2008) ("the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity" and "promote competition in those areas of the industry amenable to competition, such as the segment that generates electric power").

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

With its Order No. 2000[3] rulemaking, the Commission encouraged development of regional System Operators that administer the transmission grid on behalf of transmission-owning members. *See Morgan Stanley*, 554 U.S. at 536. System Operators also run bid-based auction markets for the wholesale sale of energy, capacity and ancillary services. *See id*. at 536-37; *see also*, *e.g*., *New York Regional Interconnect v. FERC*, 634 F.3d 581, 583-584 (D.C. Cir. 2011) (describing System Operator administration of transmission services).

The locational marginal price ("LMP") is the market price used to compensate generators in organized wholesale energy markets. Order No. 745 P 2 n.5, JA 71. This price is "designed to reflect the least-cost of meeting an incremental megawatt-hour of demand at each location on the grid, and thus prices vary based on location and time." *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 524 (D.C. Cir. 2010); *see also* Order No. 745 P 53, JA 112. "There are variations in the way that [System Operators] calculate LMP; however, each method establishes the marginal value of resources in that market." Order No. 745 P 2 n.5, JA 71.

[3] *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), *appeal dismissed sub nom. Public Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

B. Demand Response Participation In Organized Wholesale Markets

The Commission's market reforms have increasingly recognized that a market functions effectively only when both supply and demand can meaningfully participate. *See* Order No. 745 P 1, JA 70. In the Energy Policy Act of 2005, Congress, among many other things, established as "the policy of the United States that . . . unnecessary barriers to demand response participation in energy, capacity, and ancillary service markets shall be eliminated." Pub. L. No. 109-58, § 1252(f), 119 Stat. 594, 965-66 (note 16 U.S.C. § 2642) (2005); *see also id*. ("It is the policy of the United States that time-based pricing and other forms of demand response, whereby electricity customers are provided with electricity price signals and the ability to benefit by responding to them, shall be encouraged.").

Acting pursuant to its duty under the Federal Power Act to ensure just and reasonable and not unduly discriminatory rates, and consistent with federal policy, the Commission has issued several rulemakings to facilitate the participation of demand response resources in providing Commission-jurisdictional services. With its Order No. 890[4] rulemaking in 2007, the Commission adopted reforms to allow

[4] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g and clarification*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

the participation of non-generation resources, including demand response, in providing ancillary services, where appropriate, on a comparable basis with generation resources. Order No. 890 PP 887-88. The Commission also required transmission providers to develop procedures that treat generation, transmission and demand response resources comparably for transmission planning purposes. Order No. 890-A P 216.

In 2008, as part of a package of reforms to improve the operation of organized wholesale electric power markets, the Commission adopted in its Order No. 719 rulemaking[5] reforms to facilitate the participation of demand response resources in those markets. Order No. 719 amended the Commission's regulations to define demand response as "a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy." 18 C.F.R. § 35.28(b)(4).

Prior to Order No. 719, the Commission had approved proposals by some individual System Operators to allow demand response participation in their ancillary services markets. Order No. 719 P 54 n.80, JA 1518. But Order No. 719

[5] *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008), JA 1484, *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37,776 (July 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009), JA 1590, *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

required all System Operators to accept bids from demand response resources in ancillary services markets on a basis comparable to other resources, unless such participation is prohibited by the relevant retail regulatory authority. *Id*. PP 47-49 (promulgating 18 C.F.R. § 35.28(g)(1)(i)(A)) , JA 1515-16. Order No. 719 also required System Operators to permit an aggregator of retail customers to bid demand response on behalf of retail customers directly into the organized wholesale markets, again unless the relevant retail regulatory authority does not permit a retail customer to participate. *Id*. P 154, JA 1571. *See* 18 C.F.R. § 35.28(g)(1)(iii) (aggregator of retail customers).

In a signal that further reforms may be forthcoming, Order No. 719 also required System Operators to study whether additional measures were necessary to eliminate barriers to demand response in organized markets. Order No. 719 P 14, JA 1495. As the Commission explained, "[a]ny reforms must ensure that demand response resources are treated on a basis comparable to other resources." *Id*. On rehearing of Order No. 719, the Commission generally affirmed its jurisdiction, under the Federal Power Act, to establish market rules requiring System Operators to accept demand response bids in organized wholesale markets. Order No. 719-A PP 42-55, JA 1619-29.

This Court first addressed demand response in organized wholesale markets in *Indiana Util. Reg. Comm'n v. FERC*, 668 F.3d 735 (D.C. Cir. 2012). There, the

Court rejected an appeal of FERC orders approving changes to the tariff of PJM Interconnection, L.L.C., a System Operator in Mid-Atlantic and Midwestern states, establishing protocols for aggregators of retail customers to bid demand response into the organized wholesale markets. In so doing, the Court dismissed a related challenge to the Commission's jurisdiction because the petitioning state regulatory authority had not properly preserved that issue for review. *Id*. at 739-40.

III. THE COMMISSION'S PROCEEDINGS ON REVIEW

A. Order No. 745 Rulemaking

Following Order No. 719's requirement for System Operators to report to the Commission on additional reforms necessary to eliminate barriers to demand response participation in wholesale markets, as well as various Commission reports and technical conferences, the Commission issued a notice of proposed rulemaking proposing further reforms. *See Demand Response Compensation in Organized Wholesale Energy Markets*, Notice of Proposed Rulemaking, 75 Fed. Reg. 15,362 (Mar. 29, 2010), FERC Stats. & Regs. ¶ 32,656 (2010) ("Proposed Rule"), R. 2, JA 206. The Proposed Rule identified two ways demand response can generally occur: (1) customers reduce demand by responding to retail rates that are based on wholesale prices; and (2) customers offer demand response as a resource in organized wholesale markets to balance supply and demand. *Id*. P 3, JA 212. The Proposed Rule explained that, as with Order No. 719, the Commission would

address only the second type, demand response participation in wholesale markets. *Id*.

After an initial round of comments, the Commission issued a Supplemental Notice of Proposed Rulemaking and held a technical conference addressing two aspects of compensation reform, the net benefits test and cost allocation. *See* Order No. 745 P 16 (citing *Demand Response Compensation in Organized Wholesale Energy Markets*, 75 Fed. Reg. 47,499 (Aug. 6, 2010), 132 FERC ¶ 61,094 (2010) ("Supplemental Proposed Rule"), JA 83.

On March 15, 2011, the Commission issued the first order on review here, Order No. 745, a final rule amending its regulations regarding demand response compensation in the day-ahead and real-time wholesale energy markets. Order No. 745 P 1, JA 70. Acting under FPA section 206, 16 U.S.C. § 824e, the Commission held that action was necessary to eliminate unduly discriminatory barriers to demand response participation and ensure just and reasonable rates in those markets. As relevant to this appeal, Order No. 745 primarily addressed compensation levels for qualifying demand response resources and allocation of costs associated with compensating demand response resources. It also required System Operators to review their current measurement and verification protocols and propose any changes necessary to ensure that those protocols adequately

capture the performance of participating demand response providers. *Id*. P 94, JA 141.

As to compensation, Order No. 745 required each System Operator in which demand response resources participate to pay those resources the market price for energy, i.e., the locational marginal price, when two conditions are met. First, the demand response resource must have the capability to balance supply and demand as an alternative to a generation resource. *Id*. P 48, JA 108.

Second, dispatch of the demand response resource must be cost-effective as determined by a net benefits test. As the Commission explained, the net benefits test is necessary due to the so-called "billing unit effect" of dispatching demand response. Order No. 745 P 50, JA 109. Wholesale customers are billed for energy based on the units (megawatt hours) of electricity consumed. *Id*. A decrease in total load, resulting from the dispatch of demand response resources, can result in an increase in the cost per unit to the remaining wholesale load. *Id*. The net benefits test ensures that the benefit of the reduced LMP that results from dispatching demand response resources exceeds the cost of dispatching and paying LMP to those resources. *Id*. P 53, JA 112. Using the guidance in Order No. 745, each System Operator will propose a method of calculating a price threshold estimate where customer net benefits would occur. *Id*. PP 79-80, JA 131-33.

The Commission also considered, and would have preferred, an approach that would integrate the billing unit effect into the real-time operation of the wholesale market, because it "has the potential to more precisely identify when demand response is cost-effective." *Id*. P 78, JA 130. But in light of technical barriers to implementation identified by the System Operators, the Commission instead directed the System Operators to study and report to the Commission on the feasibility of adopting this dispatch algorithm. *Id*. PP 78, 84, JA 130, 135.

The difference between the amount owed by the System Operator to resources, including demand response resources, and the revenue it derives from load, results in a negative balance that must be addressed through cost allocation. *Id*. P 99, JA 145. Order No. 745 adopted a general principle to guide each System Operator's development of a specific cost allocation method: Costs associated with demand response compensation must be allocated "proportionally to all entities that purchase from the relevant energy market in the area(s) where the demand response reduced the market price for energy at the time when the demand response is committed or dispatched." *Id*. P 102, JA 147. Each System Operator must make a compliance filing that either demonstrates that its current cost allocation method satisfies this principle, or proposes conforming changes. *Id*.

Finally, in response to comments received on the Proposed Rule, the Commission confirmed its jurisdiction to establish compensation levels for demand

response in organized wholesale energy markets. *Id*. P 112, JA 154. As the Commission had previously explained in Order No. 719-A, the Commission has jurisdiction to regulate the market rules under which a System Operator accepts a demand response offer into a wholesale market, because those offers and the market rules under which they are submitted directly affect wholesale rates. *Id*. PP 112-13 (citing Order No. 719-A PP 47, 52, JA 1623, 1628), JA 154-55.

B. Order No. 745-A Rehearing Order

Numerous entities, offering different perspectives, including competing generators, demand response providers, System Operators, and state regulatory authorities, filed requests for rehearing and/or clarification of Order No. 745. In response, the Commission first confirmed that it has jurisdiction, under FPA section 201, 16 U.S.C. § 824, over rates established in organized wholesale energy markets. Order No. 745-A P 21, JA 11. Demand response participation in those markets, and the governing market rules, fall within the Commission's jurisdiction as practices "affecting" rates under FPA sections 205 and 206, 16 U.S.C. §§ 824d–e, because they directly affect rates in those markets. Order No. 745-A P 35, JA 18. The Commission's rule does not claim jurisdiction over demand response at the retail level. *Id*. P 32, JA 17.

Describing in detail the dispute among experts as to the appropriate compensation level for demand response resources, the Commission affirmed both

the need for reform and its selection of the locational marginal price as the appropriate compensation for demand response resources that satisfy the balancing and cost-effectiveness tests. *Id*. PP 54-70, JA 24-32. The Commission recognized that it had previously allowed a region-specific approach to compensation, but confirmed that varying, inadequate compensation levels and other barriers to demand response participation necessitated adoption of a more uniform approach at this time. *Id.* PP 72-75, JA 32-34.

Both the California System Operator and the California Commission sought rehearing of the Commission's decision to impose a uniform principle requiring allocation of costs to all benefitting market participants. California sought an immediate ruling that its particular cost allocation method could remain in place. *Id*. P 135, JA 54. The Commission responded that it lacked an adequate record to address California's cost allocation method, and that these issues would be addressed in ongoing compliance proceedings. *Id*. PP 140-41, JA 56.

Commissioner Moeller dissented from the orders on review. He expressed a preference for regional approaches to compensation and advocated for a compensation approach for demand response resources that reduces the market price by the avoided retail energy purchase price. *See, e.g.*, Order No. 745-A, Comm'r Moeller Dissent at 1, JA 61.

The Generators' and California's appeals followed.

SUMMARY OF ARGUMENT

The Commission's reforms in the orders on review do nothing more than implement the ordinary ratemaking principles of comparability and non-discrimination. Generators' claims mischaracterize both the operation of organized wholesale markets and the nature of demand response participation in those markets.

First, Generators' claim – made without the support of any State – that the Commission has crossed the federal/state jurisdictional divide in the Federal Power Act rests entirely on the premise that there is only one type of demand response. This is wrong. There are two types of demand response: one occurs at the retail level and the second occurs at the wholesale level. The Commission does not require any demand response resource to participate in Commission-jurisdictional wholesale markets. But when eligible demand response providers choose to participate in those markets, their participation directly affects Commission-jurisdictional wholesale rates. As such, the Commission has both the authority and duty to set just and reasonable market rules governing demand response participation in wholesale markets. The State's authority to regulate retail demand response programs remains undisturbed.

Second, Generators argue that the Commission's requirement that qualified demand response resources be compensated at the market price is a solution in

search of a problem. California makes the same claim, albeit limited to one aspect of the demand response compensation program – the Order No. 745 cost allocation requirement. The Federal Power Act requires that the Commission, before taking corrective action, demonstrate that existing conditions for demand response participation in wholesale markets are unjust, unreasonable and/or unduly discriminatory. Based upon several years of inquiry into demand response participation in wholesale markets, including the Order No. 719 rulemaking proceeding, staff and industry reports on the state of demand response, and, not in the least, the record of comments submitted in the proceedings leading to Order No. 745, the Commission has satisfied this standard. Substantial record evidence supports the Commission's finding that existing, differing compensation methods for demand response participation in organized wholesale energy markets present a barrier to that participation and result in unreasonable and discriminatory rates in those markets.

Next, Generators challenge the Commission's selection of the market price as a just, reasonable, and not unduly discriminatory rate for compensation of demand response resources participating in organized wholesale energy markets. The market price, the Commission has found, accurately reflects the value of the service provided by resources in wholesale energy markets. Demand response resources and supply-side (traditional generation) resources provide the same

service to the market; each can balance supply and demand at the call of the System Operator. Thus, the Commission's orders simply require non-discriminatory compensation at the market price, where demand response resources satisfy both the balancing and cost-effectiveness tests.

Although Generators' expert witnesses, including the *amici* economists, disagree, the Commission's choice is reasoned and warrants deference. The Commission's compensation decision balances the competing interests at stake, and is supported by substantial record evidence. That Generators are able to offer their own evidence, in support of a different compensation level, does not demonstrate the inadequacy or unreasonableness of the Commission's evidence or conclusions based on that evidence.

California alone challenges Order No. 745's broad principle that the costs of obtaining demand response must be allocated proportionally to all benefitting entities. California's claims are premature, but will be heard in the compliance proceedings required by Order No. 745. The Commission's Order No. 745 cost allocation guideline is not sufficiently final, nor does it impose upon California an adequate injury-in-fact. In any event, the Commission adequately demonstrated the need for the new guideline, without addressing specific regional approaches, including California's particular cost allocation mechanism. California

understandably seeks more certainty than provided by the Commission's rule: that certainty will be forthcoming in compliance proceedings.

ARGUMENT

I. STANDARD OF REVIEW

The arbitrary and capricious standard of the Administrative Procedure Act governs judicial review of Commission orders. *See* 5 U.S.C. § 706(2)(A). Under that standard, "FERC must have 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citation omitted)) (affirming FERC's denial of complaint challenging the lawfulness of New England's wholesale electricity market).

Reviewing courts "afford *Chevron* deference to the Commission's assertion of jurisdiction" under the Federal Power Act. *Connecticut*, 569 F.3d at 481 (citing *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984)); *see also Transmission Access*, 225 F.3d at 687 (affirming the Commission's jurisdiction to adopt open access rules for unbundled transmission provided directly to retail customers), *aff'd*, *New York*, 535 U.S. 1. If, in reviewing the statute, "the intent of Congress is clear, that is the end of the matter; for the court,

as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 401 (D.C. Cir. 2004) (quoting *Chevron*, 467 U.S. at 842-43). But if the statutory text is ambiguous, the Court "will defer to the agency's interpretation if it is reasonable." *Id.*; *see also ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002) (requiring only a "permissible construction of the statute" under *Chevron* step two). In other words, *Chevron* "binds [the Court] to defer to Congress's decision to grant the agency, not the courts, the primary authority and responsibility to administer the statute." *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1001 (D.C. Cir. 1987).

In cases involving ratemaking decisions, such as this, "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." *Morgan Stanley*, 554 U.S. at 532. "Because [i]ssues of rate design are fairly technical, and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, [the court's] review of whether a particular rate design is just and reasonable is highly deferential." *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) (internal citations omitted). The question is not "whether the line drawn by the Commission is precisely right," but whether the Commission's decision is "within a zone of reasonableness." *Wis.*

Pub. Power, Inc. v. FERC, 493 F.3d 239, 260 (D.C. Cir. 2007) (quoting *ExxonMobil Gas Mktg. Co.*, 297 F.3d at 1084).

Where, as here, the Commission's decision involves the balancing of competing interests, "[t]he court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968).

The Commission's factual findings, if supported by substantial evidence, are conclusive. *See* 16 U.S.C. § 825*l*(b). The substantial evidence standard "requires more than a scintilla," but "can be satisfied by something less than a preponderance of the evidence." *Florida Mun. Power Ag. v. FERC*, 315 F.3d 362, 365-66 (D.C. Cir. 2003) (citations omitted). Merely pointing to some contradictory evidence is insufficient. *Cogeneration Ass'n of Cal. v. FERC*, 525 F.3d 1279, 1283 (D.C. Cir. 2008) (citing cases). Moreover, in reviewing the Commission's resolution of a dispute among competing expert opinions, "the Court applies a 'particularly deferential standard' of review." *Florida Mun. Power Ag. v. FERC*, 602 F.3d 454, 461 (D.C. Cir. 2010) (quoting *Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 746 (D.C. Cir. 2001)); *see also Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1236 (D.C. Cir. 2005) (same).

II. THE COMMISSION HAS JURISDICTION TO SET MARKET RULES, INCLUDING COMPENSATION, FOR DEMAND RESPONSE RESOURCES IN WHOLESALE ENERGY MARKETS

Order No. 745 establishes compensation levels for demand response resources participating in organized wholesale energy markets that are indisputably subject to the Commission's jurisdiction. Generators alone, without the support of any state regulatory authority, claim that the Commission has encroached impermissibly on state authority over retail transactions, on the premise that all demand response is necessarily retail. Generator Br. 28. This premise is false. Put simply, demand response can occur in both retail and wholesale markets. *See* Order No. 745 P 9, JA 76. The Order No. 745 rulemaking, like its predecessor Order No. 719 rulemaking, addresses only demand response resources offered into wholesale markets. *Id*. P 114, JA 155; Order No. 745-A P 32, JA 17.

A. States Retain Full Authority To Offer Retail Demand Response Programs

No State challenges the Commission's assertion of authority, first in Order No. 719 (which was not appealed) and now in Order No. 745, to address demand response resources bidding into organized wholesale energy markets. Nor does any instrumentality of any State, such as a state retail public service commission or a representative of retail consumers (such as a state attorney general or a state consumer advocate). Generators alone take it upon themselves to challenge what they playfully refer to as the Commission's "power grab." Br. 33. In their

judgment, the Commission has unlawfully intruded into retail transactions and the States' ability to set retail rates. *Id*. at 3-4 (FERC interferes with state regulation of retail transactions), 22 (FERC "directly regulates retail transactions"), 28-32 ("reality" is that FERC "interferes with the States' exclusive authority" by "directly regulat[ing]" retail services).

But there is no such intrusion or interference. As the Commission explained, first in Order No. 719 and then later in Order No. 745, there are two types of demand response programs. *See* Order No. 745 P 9, JA 76. Retail demand response programs remain entirely within the control of the states. The wholesale demand response program at issue here remains subject to Commission regulation as part of its oversight of organized wholesale markets, the terms and conditions of participation in those markets, and the wholesale rates produced by those markets. Order No. 745 applies only to the latter type of demand response program, not the former.

To be sure, the Commission recognizes that "demand response is a complex matter that lies at the confluence of state and federal jurisdiction." Order No. 745 P 114, JA 155; *see also* Order No. 745-A P 32, JA 17. But the Commission does not, as Generators allege, "obliterate" or "conflate" the bounds of federal and state jurisdiction. Generator Br. 31, 37. Nor does it transform a retail transaction into a wholesale transaction. *See* Order No. 745 P 9 (discussing two distinct types of

demand response, retail and wholesale), JA 76. Rather, the Commission's rulemaking here, together with its earlier Order No. 719 rulemaking, opens wholesale markets to demand response participation but does not compel participation. And it does not "require that demand response resources offer into the wholesale market only." Order No. 745-A P 71, JA 32.

Even as to those demand response resources that choose to participate in wholesale energy markets, Order No. 745 recognizes an important role for the States. The Commission, through its approval of market rules, determines whether a market participant is a qualified participant eligible to bid into a System Operator's wholesale markets. Any resource, whether a traditional supply-side resource or a new demand-side resource, must satisfy the numerous measurement, verification, technical and financial eligibility requirements for participating in an organized wholesale market. *See* Order No. 745-A P 121 (measurement and verification requirements for demand response), JA 49; Order No. 745 PP 93-95 (same), JA 140-42; *see generally Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, 133 FERC ¶ 61,060 (2010) (reforming credit policies in organized wholesale markets and requiring minimum criteria for market participation). Yet as described in Order No. 719 and continued in Order No. 745, States also may determine the eligibility of demand response resources within their borders to participate directly in the wholesale markets. *See* 18 C.F.R.

§ 35.28(g)(1)(iii); *see also Indiana*, 668 F.3d at 736. Given the continuing high degree of state involvement and state discretion as to demand response, it is no surprise at all that no State – not even California, which appeals on other issues – joins Generators' jurisdictional objection.

At most, the Commission's actions in Order No. 745 have some incidental effect on state demand response programs. Generators speculate that Order No. 745 may interfere with the development and operation of state level demand response programs, and argue that the Commission failed to address these concerns. Generator Br. 42-44. But Generators failed to preserve this issue for judicial review, leaving the Court without jurisdiction to consider it. *See* 16 U.S.C. § 825*l*(b) (limiting the Court's jurisdiction to only those objections "urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do"); *see also Entergy Servs. v. FERC*, 391 F.3d 1240, 1247 (D.C. Cir. 2004) ("Parties seeking review of FERC orders must petition for rehearing of those orders and must themselves raise in that petition all of the objections urged on appeal.") (citing cases). A group of state representatives did raise this issue on rehearing before the agency in the context of challenging the Commission's jurisdiction; they did not appeal the orders. *See* Midwest States Rehearing Request at 6, R. 233, JA 1235; Generator Br. 44 (citing same).

In any event, with Order No. 745, "[t]he Commission . . . is not regulating retail rates or usurping or impeding state regulatory efforts . . . ." Order No. 745 P 114, JA 155. While "participation in a Commission jurisdictional . . . market may indirectly affect incentives in a state demand response initiative," Order No. 745-A P 32, JA 17, the Commission has a statutory obligation to act to ensure that FERC-jurisdictional rates are reasonable and not discriminatory (*see infra* Pt. III); its exercise of jurisdictional authority cannot await "potential actions that state[s] . . . may or may not take." Order No. 745 P 115, JA 156. Any incidental effect on state jurisdictional demand response programs is insufficient to deprive the Commission of its exclusive jurisdiction to regulate market rules for organized wholesale energy markets. *See, e.g.*, Order No. 745-A P 24, 27, JA 12, 14.

While Generators cite to cases offering "bright line" distinctions between wholesale and retail transactions (Br. 30), they fail to recognize that a retail transaction can have an effect, small or large, on wholesale markets and that, conversely, a wholesale transaction can have an effect on retail markets. There is nothing inherently improper with this. *See Nat'l Ass'n of Reg. Util. Comm'nrs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (the Commission's authority to act within its statutory scope of jurisdiction "may, of course, impinge as a practical matter on the behavior of non-jurisdictional" entities); *Niagara Mohawk*, 452 F.3d at 828 ("in drawing the jurisdictional lines" between retail and wholesale

transactions under the FPA, "some practical accommodation is necessary"). The task for the courts on review of FERC decisions is to determine whether the Commission has acted within its statutory authority. If, as here, it has, that is the end of the court's jurisdictional scrutiny. *See Nat'l Ass'n*, 475 F.3d at 1281-82 (the "assertion of jurisdiction over specified transactions, even though affecting the conduct of the owners(s) with respect to [non-jurisdictional] facilities, is not per se an exercise of jurisdiction over the facility;" court looks for a "close enough relation to FERC's exercise" of its statutory jurisdiction).

The Supreme Court's decision in *New York v. FERC*, 535 U.S. 1, is particularly instructive. There, the Court upheld, over State objections, the Commission's assertion of jurisdiction to require open access service on interstate transmission lines – even those directly serving retail customers. While, at the time of enactment of the Federal Power Act, the "electricity universe was neatly divided into spheres of retail versus wholesale sales," *id*. at 16, more recent technological and regulatory advances have blurred that distinction. Section 201 of the Act, 16 U.S.C. § 824(a), reserving state authority over certain types of transactions, is a "mere policy declaration that cannot nullify a clear and specific grant of jurisdiction" to the Commission. 535 U.S. at 22 (citing earlier Supreme Court cases). Where the Commission acts within its jurisdictional authority – there as to interstate transmission, here as to wholesale sales – an effect, if any, on state

jurisdictional authority is not jurisdictionally meaningful. What is meaningful is the Commission's commitment – as here – to regulate the markets within its statutory authority and to leave to the States the regulation of markets within their authority. *Id*. at 22-23.

B. Demand Response Participation In Wholesale Energy Markets Falls Within FERC Jurisdiction As A Practice "Affecting" Jurisdictional Rates

In Order No. 745, the Commission reasonably determined, invoking its expertise in the operation of jurisdictional organized wholesale energy markets, that demand response has a direct effect on wholesale rates in those markets, and thus falls within the Commission's Federal Power Act jurisdiction as a practice "affecting" rates. Order No. 745 P 112, JA 154; Order No. 745-A PP 24-25, JA 12; *see* FPA §§ 205-206, 16 U.S.C. §§ 824d-e. The Commission has invoked this jurisdiction before, and follows its Order No. 719 precedent here. Only now, when the Commission has required comparable, non-discriminatory compensation for demand response resources, do Generators seek judicial review.

1. Demand response resources participating in wholesale energy markets directly affect wholesale energy rates

The Commission reasonably concluded that demand response participation in organized wholesale markets, as well as the governing market rules, directly affect wholesale energy rates. *See, e.g.*, Order No. 745-A P 23, JA 12. When demand response is offered into the wholesale market, it causes a reduction in

demand, resulting in a lower wholesale price. *Id*. (citing Order No. 719-A P 47, JA 1623), JA 12. Demand response offers "tend to lower the market clearing price [by] placing downward pressure on generator offer strategies by making it more likely that a higher offer from a generator will not be accepted when the market clears." *Id*. Generators do not deny this effect; indeed, it appears to underlie their appeal. *See* Br. 24 (basing standing in part on "direct effect" of Order No. 745 on the "compensation their members receive for generating energy").

In addition to a direct effect on wholesale energy prices, the Commission explained that demand response participation in wholesale markets "helps to mitigate market power and strengthen system reliability." Order No. 745-A P 23, JA 12. System reliability improves because demand response generally can be dispatched with a minimal notice period, which allows System Operators to balance the system in the event of unexpected contingencies. *Id*. Demand response participation in wholesale energy markets also affects FERC-jurisdictional transmission rates by relieving congestion on transmission lines that lead to higher transmission charges. *Id*. P 23 n.51, JA 12.

Generators do not challenge the Commission's factual findings that demand response in wholesale markets and the associated market rules directly affect jurisdictional, wholesale rates. And, in any event, the effect on wholesale rates here is far from "remote." *Cal. Indep. Sys. Operator*, 372 F.3d at 403 (finding, in

contrast, that board selection procedures are not practices "affecting" rates, and therefore not subject to FERC's jurisdiction).

2. The Commission's interpretation of its Federal Power Act jurisdiction is reasonable and consistent with this Court's precedent

The Federal Power Act's reservation of authority to the States to regulate retail sales and generating facilities remains intact after Order No. 745. Generators' claim that the Commission's interpretation of FPA sections 201, 205, and 206, 16 U.S.C. §§ 824, 824d-e, renders this reservation superfluous (Br. 31-32) relies entirely on their mistaken belief that demand response occurs only at the retail level. *See Indiana*, 668 F.3d at 736 n.** (unnumbered footnote) (noting different types of demand response). Order No. 745 regulates wholesale demand response transactions and does not regulate retail transactions of any kind.

Generators next rely (Br. 38) on the principle that the Commission may not do indirectly what it cannot do directly. As applied here, however, this argument would eliminate the specific assignment of authority in the FPA allowing the Commission jurisdiction to regulate practices "affecting" rates. 16 U.S.C. §§ 824d(c), 824e(a). *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (statute must be interpreted as a "coherent regulatory scheme" with "all parts [fit] into a harmonious whole") (internal citations omitted). The Commission does not claim that its jurisdiction to regulate practices "affecting"

rates trumps the express limitation on its authority to regulate non-wholesale sales. Demand response participation in organized wholesale energy markets is not a retail sale, and Generators ignore the Commission's conclusions in that regard.

This Court's precedent supports the Commission's interpretation here. In particular, Order No. 745's compensation rule for demand response in wholesale markets is much like the Commission's capacity charges and requirements that this Court has affirmed as practices "affecting" rates within the Commission's jurisdiction. *See* Order No. 745-A P 25 (citing, *e.g.*, *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009); *Groton v. FERC*, 587 F.2d 1296, 1302 (D.C. Cir. 1978); and *Mississippi Industries v. FERC*, 808 F.2d 1525, 1542 (D.C. Cir. 1987)), JA 13.

In *Connecticut*, this Court recently addressed Commission orders establishing a forward capacity market, where capacity providers, including generators and, among others, demand response resources, competitively bid to meet future capacity needs. *Connecticut*, 569 F.3d at 480-81 (describing capacity market operation). Several state regulatory authorities, including Connecticut, claimed that the Commission crossed the FPA's jurisdictional divide, which precludes the Commission from regulating generation facilities. *Id*. at 481. The Court affirmed the Commission's exercise of authority, holding that "[w]here capacity decisions about an interconnected bulk power system affect FERC-

jurisdictional transmission rates for that system without directly implicating generation facilities, they come within the Commission's authority." *Id*. at 484 (*quoted in* Order No. 745-A P 25, JA 13); *see also Connecticut*, 569 F.3d at 482 ("we see no direct regulation of generation facilities in violation" of the statute).

Generators overlook (Br. 39) the Court's finding that the capacity requirement, because it "help[s] to find the right price," is a practice "affecting" rates. *Id*. at 485 (citing FPA § 206, 16 U.S.C. § 824e(a)). Demand response participation in wholesale markets, like capacity requirements, helps the market to locate the right price. Order No. 745-A P 25, JA 13-14. And Generators offer no basis for distinguishing demand response from capacity, neither of which is referenced explicitly in the general grant of jurisdiction to the Commission in FPA section 201, 16 U.S.C. § 824. Order No. 745-A P 26, JA 14. Just as the capacity target and market in *Connecticut* did not regulate generating facilities, here the Commission's compensation requirement for demand response resources participating in wholesale energy markets does not regulate retail sales. Generators accurately described *Connecticut*, on rehearing before the Commission, as "underscor[ing] the fact that the Commission does, in fact, possess broad jurisdiction to regulate practices affecting rates for wholesale sales." EPSA, *et al*. Rehearing Request at 10, R. 232, JA 1222.

Generators' concern (Br. 37) that Order No. 745 may be designed, in part, to remedy problems originating in retail rate design or the disconnect between retail and wholesale rates is also misplaced. *Connecticut* establishes that whether the Commission's goals include remedying conditions outside its jurisdictional bounds is "irrelevant." *Id*. at 484 (explaining that, in *Groton*, 587 F.2d at 1302, the Court found it "irrelevant that the deficiency charges were 'designed as an incentive' for the purchase or construction of adequate capacity so long as the charges affected transmission rates otherwise within the Commission's jurisdiction"); *see also Connecticut*, 569 F.3d at 482 (explaining that whether Commission action is "for the express purpose of incentivizing construction of new generation facilities" is irrelevant). What is relevant is that the agency establish a connection – here, a direct connection – to rates for FERC-jurisdictional service.

Generators foresee a slippery slope, claiming that the Commission next will seek to regulate any number of inputs to the costs of Commission-jurisdictional generation and transmission. Generator Br. 33. But unlike demand response resources, marketers of steel, cement and fuels such as natural gas and coal are not "direct participants" in Commission-jurisdictional wholesale energy markets. Order No. 745-A P 31, JA 17. In Generators' view, this distinction cannot stand, because "the Commission has brought them [i.e., demand response resources] into the markets." Generator Br. 33. Yet Generators elsewhere have stated that they

"fully support" demand response participation in wholesale energy markets. *See*, *e.g.*, EPSA, *et al*. Rehearing Request at 2, JA 1214.

On this point Generators' error lies with their failure to recognize the Commission's authority to set rates and market rules for all direct participants in those jurisdictional markets, regardless of the participants' jurisdictional status. *See* Order No. 745-A P 27 (a demand response resource "may choose to participate in the . . . organized wholesale energy markets, therefore making it a market participant"), JA 15; *see also id*. P 28, JA 15. In *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520 (D.C. Cir. 2010), for instance, the Court affirmed that the Commission's power to set rates in a jurisdictional market run by the California System Operator extends to assessing charges to non-jurisdictional market participants. *See also Nat'l Ass'n*, 475 F.3d at 1282 (affirming jurisdiction over interconnections involving transmission facilities engaged in both jurisdictional and non-jurisdictional service, when the facilities are included in jurisdictional rates and the transaction facilitates a wholesale sale of energy).

Likewise, in *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1151-54 (D.C. Cir. 1996), the Court upheld the Commission's setting of rules for capacity release on jurisdictional, interstate natural gas pipelines, even for non-jurisdictional municipal local distribution companies. As the Court explained, "the transaction itself controls access to interstate transportation capacity, entirely independent of

the jurisdictional nature of the releasing and replacement shippers." *Id*. at 1154. *See also* Order No. 745-A P 28 n.65 (citing *Transmission Ag. of N. Cal. v. FERC*, 628 F.3d 538, 540 (D.C. Cir. 2010) (finding Commission jurisdiction to regulate interconnections with non-public utilities when these transactions "impact the [System Operator]-controlled grid [and] only a party that chooses to use [that] grid is affected")), JA 16.

Generators misunderstand the Commission's reliance on these cases, which is not to show that the Commission can, of course, approve rates and rules for jurisdictional markets. Generator Br. 39-41. Rather, these cases demonstrate that those rates and rules extend to those who directly participate in those markets, including non-jurisdictional entities and entities that engage in other, non-jurisdictional transactions. (The Commission does not claim, as Generators state (Br. 40), that these cases "eliminated the [FPA's] express exemption of municipal utilities or granted the Commission authority to regulate their rates.") Thus, "the Commission has jurisdiction over the way in which [System Operators run] jurisdictional markets, including the market rules that govern demand response participation in those markets, to assure that the rates resulting from those markets are just and reasonable." Order No. 745-A P 28, JA 16; *see also EnergyConnect, Inc*., 130 FERC ¶ 61,031, P 32 (2010) (same).

Like this Court's precedent, the statement of congressional policy in section 1252(f) of the Energy Policy Act of 2005, 16 U.S.C. § 2642, supports the Commission's construction of its Federal Power Act jurisdiction. *See supra* p. 11. The Commission does not rely on the Energy Policy Act of 2005 as an independent basis of jurisdiction, Order No. 745-A P 34, JA 18; it has no need to in light of its expansive jurisdiction to regulate practices "affecting" rates under the FPA. But Generators omit that the Energy Policy Act declares that "[i]t is the policy of the United States that . . . unnecessary barriers to demand response participation in energy, capacity, and ancillary service markets shall be eliminated." Pub. L. No. 109-58, § 1252(f), 119 Stat. 594, 966 (2005). On rehearing, the Commission explained that the referenced markets, as Congress is well aware, are indisputably subject to the Commission's jurisdiction. Order No. 745-A P 34, JA 18. The Commission's rulemaking advances congressional policy; its reasonable interpretation of the Federal Power Act follows this Court's precedent, and warrants respect. *See Connecticut,* 569 F.3d at 481.

III. CALIFORNIA'S COST ALLOCATION CHALLENGE IS PREMATURE AND SHOULD BE DISMISSED

California alone challenges the cost allocation element of the Commission's Order No. 745 reforms. California Br. 3. But this claim does not pass the jurisdictional thresholds of standing and ripeness. *See Toca Producers v. FERC,* 411 F.3d 262, 265 (D.C. Cir. 2005) (ripeness "may be resolved without first

addressing . . . Article III standing" and the court may "choose among threshold grounds" for dismissal). Order No. 745 enunciates a general approach to allocating the costs of obtaining demand response resources, while allowing regional variation. But it defers ruling on particular methods, including California's, to now-ongoing compliance proceedings. As such, on this issue the Commission's orders are insufficiently final for ripeness purposes, and do not cause California an injury-in-fact. Nevertheless, the Commission addresses California's merits objections to the Commission's cost allocation approach in subsequent sections. *See infra* Pt. IV (need for reform); Pt. V.C (consistency with precedent); Pt. VI (support for the new approach).

With respect to cost allocation, Order No. 745 directed each System Operator to "make a compliance filing . . . that either demonstrates that its current cost allocation methodology appropriately allocates costs to those that benefit from the demand reduction or proposes revised tariff provisions that conform to this requirement." Order No. 745 P 102, JA 147. Consistent with these directives, and as California acknowledges (Br. 20), the Commission on rehearing expressly declined to address the merits of the California System Operator's cost allocation mechanism. Order No. 745-A P 141 ("We cannot determine on this record whether the existing cost allocation in the [California] market meets these criteria."), JA 56.

The California System Operator's Order No. 745 compliance filing sought approval of its existing method as consistent with Order No. 745. *See Cal. Indep. System Op. Corp*., 137 FERC ¶ 61,217 (2011). As California explains (Br. 12), on the same day the Commission issued Order No. 745-A, it also issued a separate order addressing the compliance filing. 137 FERC ¶ 61,217. The Commission found that the California System Operator had not adequately demonstrated compliance with Order No. 745's cost allocation guideline.[6] *Id*. P 45. In response, the California System Operator submitted a revised filing and a request for rehearing of the Commission's order; these remain pending before the Commission.

Dismissal is appropriate on either ripeness or standing grounds. Under the ripeness doctrine, the Court "evaluate[s] both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). As most relevant here, the "fitness of the issue" prong requires an agency's action to be sufficiently final. *Toca Producers*, 411 F.3d at 266. An agency order is final for purposes of appellate review when it "imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process." *Papago Tribal*

[6] California's reliance (*e.g*., Br. 23) before this Court on the Commission's initial order in the compliance proceeding is inappropriate. As it recognizes (Br. 12), that order is not on review here.

Util. Auth. v. FERC, 628 F.2d 235, 239 (D.C. Cir. 1980) (citing cases). Here, the Commission expressly deferred to compliance proceedings consideration of whether California's existing cost allocation method, and the Commission orders approving it, is consistent with Order No. 745. *See Transmission Access*, 225 F.3d at 690 (rejecting as unripe a customer's claim that the Order No. 888 rulemaking conflicted with a contract when FERC and the parties were "still in the process of determining whether the . . . provisions even conflict with Order 888, as well as how to deal with any such inconsistency"). The Commission therefore has not addressed California's specific cost allocation issues, leaving the orders insufficiently ripe for review.

Invoking a similar analysis, Article III standing before this Court requires that a petitioner show an injury-in-fact, but it cannot where an order is "conditional, subject to a further compliance filing, and thus . . . without binding effect on" the petitioner. *DTE Energy Co. v. FERC*, 394 F.3d 954, 960 (D.C. Cir. 2005); *see also New Mexico Attorney General v. FERC*, 466 F.3d 120, 121 (D.C. Cir. 2006) (dismissing on standing grounds an agency order authorizing a new System Operator subject to various compliance filings) (citing cases). It is "not until . . . the Commission accept[s] the compliance filing, that [petitioners can] demonstrate actual injury." *DTE Energy*, 394 F.3d at 961.

California cannot show the requisite injury-in-fact resulting from the cost allocation reforms of Order No. 745. The Commission did not find California's cost allocation method unjust and unreasonable. Rather, Order No. 745 allows significant regional flexibility and requires that existing cost allocation methods be reformed *only* to the extent they do not comply with the articulated cost allocation principle. *See* Order No. 745-A P 140, JA 56.

Indeed, California may yet receive the relief it seeks, either from the Commission in its compliance proceeding, or from a court on review of that proceeding. *See Friends of Keeseville, Inc. v. FERC*, 859 F.2d 230 (D.C. Cir. 1988) ("any judicial relief to which [petitioners] may be entitled is deferred but not denied"). The burden of participating in future compliance proceedings is neither a hardship for ripeness purposes, nor an injury-in-fact for standing purposes. *See Clean Air Implementation Project v. EPA*, 150 F.3d 1200 (D.C. Cir. 1998) (petitioners identified "no great hardship;" rule unripe where "there are too many imponderables"); *PNGTS Shippers' Group v. FERC*, 592 F.3d 132, 138 (D.C. Cir. 2010) ("being forced to confront questions in a future legal proceeding" is not an injury-in-fact). Accordingly, judicial review is premature.

To the extent California challenges the Commission's decision to address regional issues, including California's, in regional compliance proceedings, the Commission's discretion to control its own dockets is dispositive. *See Domtar Me.*

Corp. v. FERC, 347 F.3d 304, 314 (D.C. Cir. 2003) ("The agency . . . alone is cognizant of the many demands on it, its limited resources, and the most effective structuring and timing of proceedings to resolve those competing demands.") (citation omitted). *See also City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989) ("[s]ince agencies have great discretion to treat a problem partially, [the Court] would not strike down the [agency's decision] if it were a first step toward a complete solution, even if [the Court] thought [the agency] 'should' have covered both" issues in the same order) (footnote omitted). The Commission reasonably concluded that, in this generic rulemaking proceeding, it lacked the necessary record to determine whether California's specific cost allocation method meets the new guideline. Order No. 745-A P 141, JA 56. In its opening brief, California did not challenge this determination, and it may not do so on reply.

IV. ORDER NO. 745'S DEMAND RESPONSE REFORMS ARE VITAL TO OVERCOME BARRIERS TO DEMAND RESPONSE PARTICIPATION IN WHOLESALE MARKETS

The Commission has a statutory duty to ensure just and reasonable rates and prevent undue discrimination in the organized wholesale energy markets. Order Nos. 745 and 745-A carry out that duty. Those orders, and the Proposed Rule, each reflect the Commission's findings that existing demand response programs in organized wholesale energy markets are unjust and unreasonable, and unduly discriminatory, because they allow barriers to demand response participation in

those markets to persist. *See* Order No. 745 P 47, JA 107; Order No. 745-A PP 72-75, 140-41, JA 32-34, 56; Proposed Rule P 13, JA 222.

A. The Commission Made The Required Statutory Findings

The Commission's orders include findings, under section 206 of the Federal Power Act, 16 U.S.C. § 824e, that existing demand response programs, including the compensation schemes and related cost allocation methods, are inadequate. *See* Order No. 745 PP 47 ("payment . . . of compensation other than the LMP is unjust and unreasonable"), 100-101, JA 108, 145-46; Order No. 745-A PP 73-75, 140, JA 33-34, 56.

California complains that the Commission failed to make the requisite FPA section 206 findings, at all, as to cost allocation. California Br. 19-20. As explained above (*supra* Pt. III), this claim is premature. But, in any event, California's complaint arises because Order No. 745-A addresses the need for cost allocation reform as part of the rulemaking's overall reforms. Order No. 745-A P 140 (referencing FPA section 206 findings "discussed above"), JA 56. Compensation was the primary issue raised on rehearing, with only California-based entities challenging the Commission's basis for adopting the cost allocation element of the reforms. *See id*. The Commission's emphasis in its orders reflects the emphasis of the parties in their pleadings below.

When taking action in a generic rulemaking applicable to all System Operators, the Commission need not make "specific findings" concerning the justness and reasonableness of each System Operator's demand response program or the particular elements of each such program. *Transmission Access*, 225 F.3d at 688 (citing, *e.g.*, *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1165-68 (D.C. Cir. 1985)), *aff'd*, *New York*. Nor must the Commission "offer empirical proof for all the propositions upon which its order depend[s]" when it remedies undue discrimination in a generic rulemaking proceeding. *Id*.

With respect to cost allocation, Order No. 745 finds existing cost allocation methods inadequate only to the extent they do not comply with the general guideline. Order No. 745-A P 140 ("[A]ny energy market demand response program is unjust and unreasonable if . . . it does not allocate costs appropriately to those parties that benefit from the reduction in LMP occasioned by the demand response."), JA 56. The guideline allows regional variation (*id*. P 115, JA 48), and contemplates that System Operators may choose, in their compliance filings, to demonstrate the adequacy of their existing cost allocation, or to propose changes as necessary. Order No. 745 P 102, JA 147. For this reason, the Commission expressly declined to make specific findings for each System Operator, and California in particular. *See* Order No. 745-A P 141 ("We cannot determine on this record whether the existing cost allocation in the [California] market meets

these criteria."), JA 56. *See also id*. P 115, JA 48. As discussed below, the Commission's generic findings are well supported by the record.

B. Substantial Record Evidence Supports The Commission's Findings As To The Need For Further Reform

Since 2007, the Commission has issued several directives, both in generic rulemakings and in orders specific to certain System Operators, to remove barriers to, and facilitate participation of, demand response in organized wholesale markets. Generators and California insist that the Commission has done enough; that existing compensation levels for demand response resources participating in those markets remain just and reasonable. Generator Br. 61-65; California Br. 15-16.

The Commission disagrees and, in the orders on review and the Proposed Rule, identified the existence of continuing barriers to participation of, and undue discrimination toward, demand response resources in wholesale markets. The Commission's findings are based upon years of analysis, including multiple staff assessments of demand response participation in the markets, testimony and evidence received in this rulemaking proceeding, and the earlier Order No. 719 rulemaking proceeding, and related technical conferences. The Commission's factual findings on this substantial record invoke the Commission's technical expertise and deserve the Court's deference. *See*, *e.g*., *Permian Basin Area Rate Cases*, 390 U.S. at 767 (a "presumption of validity . . . attaches to each exercise of the Commission's expertise"). This is especially so when, as explained earlier at

p. 40 *supra*, the Commission's findings advance federal policy to both "encourage," and eliminate barriers to, demand response. 16 U.S.C. § 2642.

Under the existing, varied demand response programs in organized wholesale energy markets, demand response participation remains relatively low. Order No. 745 P 57, JA 114; Proposed Rule P 9, JA 219; *see also*, *e.g.*, Demand Response Supporters, Reply Comments at 9 n.29 (Aug. 30, 2010) (citing a U.S. Department of Energy calculation that, in 2008, demand side management programs comprised only 2% of the market), R. 149, JA 856; *id*. at 9-10 (citing System Operator reports discussing inadequate demand response participation), JA 856-57. Indeed, one System Operator had no demand response program at all at the time of the Proposed Rule. Proposed Rule P 8, JA 218. Generators fault the Commission for not quantifying the amount of demand response that "is supposed to be enough." Br. 64. But the Commission need not establish a numerical target for any resource, including demand response resources. Order No. 745-A P 60 ("[r]ule not based on a pre-determined . . . amount of demand response that is necessary"), JA 28.

The Commission specifically identified numerous, continuing barriers to demand response in wholesale markets. Order No. 745 P 57 (citing FERC Staff, National Assessment of Demand Response Potential (June 2009), at http://www.ferc.gov/legal/staff-reports/06-09-demand-response.pdf), JA 114; *see*

also Proposed Rule P 19 n.46 (same), JA 227. Barriers identified by commenters in the record include:

> the lack of a direct connection between wholesale and retail prices, lack of dynamic retail prices (retail prices that vary with changes in marginal wholesale costs), the lack of real-time information sharing, and the lack of market incentives to invest in enabling technologies that would allow electric customers and aggregators of retail customers to see and respond to changes in marginal costs of providing electric service as those costs change.

Order No. 745 P 57 (internal citation omitted), JA 114-15. Commission Staff's 2009 National Assessment, in particular, lists 24 barriers, including regulatory, economic and technological barriers. Included among the regulatory barriers at the wholesale level are "[m]arket structures oriented toward accommodating supply side resources." 2009 National Assessment, Table 9, p. 66.

In addition, inadequate compensation is a particular concern and barrier to the participation of demand response resources in wholesale energy markets. The Commission, referencing record evidence, explained that "the inadequate compensation mechanisms in place today in wholesale energy markets fail to induce sufficient investment in demand response resource infrastructure and expertise that could lead to adequate levels of demand response procurement." Order No. 745 P 57 (quoting EnerNOC, Comments at 4 (May 13, 2010), R. 94, JA 627), JA 115; *see also* Viridity Energy, Comments at 4 (May 13, 2010), R. 82, JA 500; Federal Trade Commission, Comments at 2 (May 13, 2010), R. 58, JA 418.

Prior to Order No. 745, several System Operators had implemented specific compensation approaches, including variations on locational marginal pricing, for demand response in organized wholesale energy and ancillary services markets. Order No. 745 P 14, JA 80. But the Commission has observed, and industry participants have testified, that the absence of stable, standardized compensation structures is a detriment to demand response participation in wholesale markets. Proposed Rule P 9 (citing comments), JA 219.

On this point, the Commission highlighted a study by the independent market monitor for PJM Interconnection, the System Operator in Mid-Atlantic and Midwestern states, following changes in PJM's demand response program. Proposed Rule P 10 (citing Monitoring Analytics, Barriers to Demand Side Response at 22 (July 1, 2009), http://www.monitoringanalytics.com/reports/Reports/2009/Barriers_to_Demand_Side_Response_in_PJM_20090701.pdf), JA 220. In 2002, PJM implemented a demand response program that paid LMP to demand response resources when LMP exceeded a threshold price. *Id*. In 2008, that program expired under a sunset provision, and PJM began paying a lower rate (LMP minus the generation and transmission components of the retail rate). *Id.*; *see also PJM Industrial Customer Coalition v. PJM Interconnection, L.L.C.*, 121 FERC ¶ 61,315 P 29 (2007) (rejecting request to prevent program expiration). Following this decrease, PJM's market monitor identified a 36.8 percent reduction

in demand response participation. Proposed Rule P 10, JA 221. As the Commission explained, based on this observation and other evidence, it is

> now concerned that evidence of demand reductions in PJM, and inadequate demand response participation, now and in the future, may be the result of compensation that is no longer just and reasonable, because, as detailed below, the existing and varying levels of compensation generally fail to reflect the marginal value of demand response resources to [regional] energy markets.

Id.

Generators assert that the Commission here aims to remedy perceived inefficiencies and problems in the retail markets. Generator Br. 65. The Commission made plain that its reforms are not intended to usurp or impede state regulatory programs concerning demand response. Order No. 745 P 114, JA 155. Nor is the Commission requiring any action that would violate state law. *Id*. But the Commission's statutory duty cannot await "potential actions that state retail regulatory authorities may or may not take." *Id*. P 115, JA 156. And, in ratemaking, "consideration of the relationship between jurisdictional and nonjurisdictional rate structures is commonplace." *FPC v. Conway Corp*., 426 U.S. 271, 280 (1976).

In addition to its findings as to compensation programs in general, the Commission specifically addressed the need for reform of existing methods for allocating costs of obtaining demand response in organized wholesale energy

markets. Compensating demand response resources offering services into organized wholesale markets triggers the need for cost allocation. Order No. 745 P 99, JA 145; Supplemental Proposed Rule P 12 (noting relationship between cost allocation and compensation), JA 198. Because the market price may vary depending upon transmission constraints, it is necessary that cost allocation methods properly reflect the "degree to which each [market participant] receives benefits." Order No. 745 P 101, JA 146. As it is possible that some pre-Order No. 745 cost allocation methods may satisfy this standard, as discussed above, the Commission logically refrained from making further detailed findings. *See* Order No. 745-A PP 113-20 (deferring a variety of issues regarding cost allocation to compliance proceedings), JA 47-49.

The ability of demand response resources to enter and compete in organized wholesale markets has improved in response to recent reforms. Nonetheless, contrary to Generators' claim (Br. 64), the record here starkly contrasts with that in *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006). The Court found no "evidence of a real problem" in that case, *id*. at 841, but it is plentiful here. Indeed, the Commission found, based on specific examples and the experience and testimony of demand response providers and noted experts, that the identified barriers remain. *See* Proposed Rule P 9, JA 219; Order No. 745, Comm'r Moeller Dissent at 1 n.5 ("Significant barriers do exist which prevent

demand response from reaching its full potential."), JA 172. In these circumstances, the Commission has an obligation to remedy undue discrimination it detects in the wholesale market it regulates. *See New York v. FERC*, 535 U.S. at 26-27 (agency has discretion only as to remedy).

V. FERC'S DIRECTIVE REQUIRING COMPARABLE, NON-DISCRIMINATORY COMPENSATION FOR QUALIFIED DEMAND RESPONSE RESOURCES IS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE

Order No. 745 remedies ongoing, undue discrimination in organized wholesale energy markets by requiring System Operators to treat demand response resources participating in those markets comparably to supply resources in those same markets, upon satisfaction of two eligibility requirements. Generators, supporting intervenors (collectively, PPL) and supporting *amici* overlook or misunderstand the significance of the two mandatory eligibility requirements. Taking these requirements into account, the Commission's decision to require LMP compensation at this time falls within the zone of reasonableness and is supported by substantial record evidence.

A. LMP Is A Reasonable Choice Among Alternative Compensation Approaches

The Commission's selection of the locational marginal price as the preferred, just and reasonable, compensation approach is a reasonable choice; it reflects not only the value of demand response to the wholesale energy markets,

but also the Commission's evaluation of market imperfections, and its balancing of the competing interests at stake. Before the Commission, parties advocated a range of possible rates, above, below, and at LMP. *See* Order No. 745 P 45 (summarizing range of positions), JA 106. Ultimately, the Commission determined that demand response resources should be compensated just like supply-side resources, based on the contribution they make to the wholesale energy markets.

The locational marginal price "represents the marginal value of an increase in supply or a reduction in consumption at each node within" a System Operator's market. Order No. 745-A P 73, JA 33; *see also id*. P 36, JA 19; Order No. 745 P 67 ("payment of LMP represents the marginal value of a decrease in demand"), JA 121. For this reason, "LMP has been the primary mechanism for compensating generation resources clearing in the organized wholesale energy markets since their formation." Order No. 745-A P 73, JA 33. As the Commission explained, "payment of LMP [to demand resources] is appropriate as it represents the value of the contribution of demand to the market during those periods in which demand response provides net benefits." *Id*. P 60, JA 28; *see also, e.g.*, Order No. 745 P 47 ("paying demand response resources the LMP will compensate those resources in a manner that reflects the marginal value of the resource to each" System Operator), JA 108; *see* Order No. 745-A P 54 (same), JA 24. As

addressed in detail below, the two eligibility requirements imposed on demand response resources participating in organized wholesale energy markets ensure that the market receives this value. As such, compensation below the same market price paid to generation resources would be unjust, unreasonable and unduly discriminatory. *See supra* Pt. IV (need for reform).

Before the Commission, Generators and their allies, demand response providers and supporters, state commissions and others advocated varying levels of compensation for demand response resources participating in wholesale energy markets. Some entities supported the Commission's proposal in the Proposed Rule, payment of the market price, in all hours, without qualifying conditions. *See* Proposed Rule P 11, JA 222; *see, e.g.*, Joint Consumer Advocates, Comments at 2 (May 13, 2010) (comments of consumer advocates of Pennsylvania, Ohio, Connecticut and Maryland), R. 66, JA 431; Demand Response Supporters, Comments at 2 (May 13, 2010), R. 104, JA 744. Others advocated for LMP less certain values, including the retail price of energy (frequently abbreviated as "G"). *See, e.g.*, Order No. 745 P 24, JA 89; *see also* Generator Br. 51; PPL Br. 28-31. And still others supported LMP with additional compensation to reflect the additional benefits demand response provides to the wholesale energy markets. A group of steel producers, most notably, championed a rate of "LMP plus a share of the system benefits that are a consequence of the demand response," so-called

"LMP Plus." Steel Producers, Comments at 4 (May 13, 2010), R. 93, JA 617; *see also* Wal-Mart Stores, Inc., Comments at 9 (May 13, 2010), R. 113, JA 771 (supporting LMP as a minimum, particularly in light of the environmental benefits of demand response).

Each of these groups claims the support of economic policy and principles. The Commission's analysis, however, "takes into account both the economic analysis of the markets subject to [its] jurisdiction, and the practical realities of how those markets operate." Order No. 745 P 46 (citing, *e.g.*, *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 872 (D.C. Cir. 1993) ("It is the FERC's established policy to consider equitable factors in designing rates. . . . It is hardly arbitrary or capricious so to temper the dictates of theory by reference to their consequences in practice.")), JA 107. Moreover, the Commission alone, not the parties with competing interests, has "wide discretion to balance competing equities against the backdrop of the public interest." *Id*. (citation omitted).

Nonetheless, commenters representing a variety of perspectives support the Commission's decision to pay LMP under the specified conditions. Order No. 745 P 47 (citing comments), JA 107; *see also*, New York State Public Service Commission, Comments at 4, 7 (explaining that New York market currently compensates at LMP above a threshold price, but participation remains low) (May 13, 2010), R. 44, JA 373, 376; National Grid, Comments at 3-4 (May 13, 2010)

(supporting LMP with net benefits test), R. 92, JA 602-03; NSTAR, Comments at 3 (May 14, 2010) (same), R. 130, JA 810; New York State Consumer Protection Board, Comments at 1 (Sept. 30, 2010) (describing LMP subject to net benefits test as the "middle ground"), R. 173, JA 1149.

Notwithstanding the Commission's caution against relying solely on "textbook economic analysis," Generators continue to do so. Order No. 745 P 46, JA 107; *see* Generator Br. 53; *Amici* Br. 4. In reality, however, "markets are not perfect." *Morgan Stanley*, 554 U.S. at 547. *See also Illinois Brick Co. v. Illinois*, 431 U.S. 720, 743 (1977) ("in the real economic world rather than an economist's hypothetical model, the latter's drastic simplifications generally must be abandoned") (internal citation omitted). Ultimately, and as further demonstrated in the subsequent discussion, the Commission's selection of the locational marginal price as the appropriate compensation for qualified demand response resources represents an informed choice among disputing experts. Alternative approaches, such as that promoted by the dissenting Commissioner, *see* Order No. 745, Comm'r Moeller Dissent at 11, JA 181, are not necessarily unreasonable, nor must the Commission or the Court determine that they are each unreasonable. *See Cogeneration Ass'n of Cal.*, 525 F.3d at 1283 ("the question [the Court] must answer . . . is not whether record evidence supports [the petitioner's] version of events, but whether it supports FERC's"). This is "a classic example of a factual

dispute the resolution of which implicates substantial agency expertise," and thus warrants the Court's deference. *Wisconsin Valley*, 236 F.3d at 746-747 (quoting *Marsh v. Oregon Nat. Resources Council*, 490 U.S. 360, 376 (1989)).

B. Paying LMP To Demand Response Resources That Satisfy The Two Eligibility Requirements Is Appropriate

1. Generators overlook the significance of the balancing and cost-effectiveness tests

Demand response resources participating in wholesale energy markets will receive the locational marginal price only if they satisfy two eligibility requirements. First, demand response resources must have the ability to balance supply and demand in the System Operator's market, just as generation can. Order No. 745 P 47, JA 108. Second, eligible demand response resources must be cost-effective, under a net benefits test outlined in the final rule. *Id*. PP 47-48, JA 108-109. These requirements, described in detail below, ensure that demand response resources are comparable to supply-side resources, and prevent undue discrimination.

First, in order to qualify for compensation at the market price, demand response resources must be able to balance supply and demand in the System Operator's market. *Id*. PP 47-49, JA 107-109. As the Commission explained, "a power system must be operated so that there is real-time balance of generation and load, supply and demand." *Id*. P 49, JA 109. Generators do not appear (Br. 48-49)

to dispute the Commission's finding that the system can be balanced through either an increase in supply or a decrease in demand. *Id*. (citing, *e.g*., Statement of Mr. Ott, PJM Interconnection, LLC, at 1 (Sept. 13, 2010), R. 171, JA 1144), JA 109; *see also id*. P 20 (numerous commenters agree "that an increment of generation is comparable to a decrement of load for purposes of balancing supply and demand in the day-ahead and real-time energy markets") (citing, *e.g*., Demand Response Supporters, Reply Comments, Kahn Reply Aff. at 2, JA 877; Verso, Comments at 3-4 (May 13, 2010), R. 55, JA 407; Occidental, Comments at 11 (May 13, 2010), R. 84, JA 552), JA 86-87. As expert witness Dr. Alfred Kahn explained, because demand response can balance supply and demand just like supply-side resources, "[demand response] is in all essential respects economically equivalent to supply response." Kahn Reply Aff. at 2, JA 877; *see also* Dr. Charles Cicchetti, Comments at 4 (Apr. 27, 2010) (supporting Kahn), R. 6, JA 249. *Amici* economists attempt an analogy to the market for widgets, but fail to acknowledge that the widget market does not require real-time balancing of supply and demand. *See Amici* Br. 18.

Second, to be eligible for LMP compensation, a demand response resource must qualify as cost-effective under the test outlined in Order No. 745. Order No. 745 PP 47-48, JA 107-108. The goal of the cost-effectiveness standard is to ensure that the total cost savings from dispatch of demand response resources exceed the

cost of acquiring those resources. *Id*. PP 50, 53 JA 109, 112. The Commission considered commenters' widely varying proposals for achieving this result, *id*. PP 68-76, JA 122-29, ultimately issuing two, related directives. *Id*. P 78, JA 130. First, it selected a net benefits test using historical data to develop a price threshold for implementation. *Id*. Second, it described a potentially preferable method, incorporation of a cost-effectiveness test into the real-time dispatch algorithm, for which it directed additional study. *Id*.

The net benefits test protects consumers by limiting the period during which demand response resources must be paid LMP to those times when "the nature of the supply curve is such that small decreases in generation being called to serve load will result in price decreases sufficient to offset" the cost of acquiring the demand response. Order No. 745 P 80, JA 132-33. As the Commission explained, "[w]hen demand response produces a sufficient reduction in LMP to cover the increased billing costs imposed on remaining customers, it is beneficial to customers; when the reduction does not cover costs, the demand response is not beneficial." Order No. 745-A P 91, JA 39; *see also* Order No. 745 P 53, JA 112. When this threshold of cost coverage is not met, the System Operator is not

required to pay LMP, but rather follows its existing tariff.[7] Order No. 745-A P 131, JA 53.

2. Qualified demand response resources are similarly situated with supply resources in wholesale energy markets

Demand response resources that satisfy the balancing and cost-effectiveness tests are similarly situated with supply-side resources participating in organized wholesale energy markets. As such, paying these resources the same rate does not result in undue discrimination. Generators and PPL allege differences between the resources, but any such differences are not relevant to the function of the resources in the market.

The Commission does not claim that demand response and generation are identical in every respect. Order No. 745-A P 57, JA 26. Generators err in their understanding of the context. As the Commission explained, the "electric industry requires near instantaneous balancing of supply and demand at all times" and this need can be served by both changes in supply and demand. Order No. 745-A P 56, JA 26; Order No. 745 PP 54-55, JA 1112-13. As it earlier did in Order No. 719, here the Commission found that comparability of demand response resources with

[7] Though its brief is otherwise limited to cost allocation, California challenges this explanation of the role of the threshold with regard to existing tariff provisions. California Br. 24. California faults the Commission for not addressing this "obvious" issue (*id.*), but neither California nor any other party raised this issue on rehearing before the agency. California may not do so now. *See supra* p. 29 (citing 16 U.S.C. § 825*l*(b)).

other resources involves "the technical capacity of a demand response resource to provide a particular service, not . . . whether the performance requirements of [that resource] are identical to a generation resource." *Id*. The market requires services to balance supply and demand, and the Commission found that "both resources are equally able to assist" the System Operators with this service. Order No. 745-A P 57 (citing Order No. 719 P 47, JA 1515), JA 26. To the extent that experts disagree (*see Amici* Br. 16), the Commission's reasoned determination deserves particular deference. *See Florida Mun. Power Ag.*, 315 F.3d at 368.

Contrary to Generators' assertions (Br. 48), the Commission recognized that demand response resources do not create electricity, but this is "not dispositive" in this context. Order No. 745-A P 56, JA 26. Wholesale energy markets do not only require supply resources. The System Operator's responsibility is to balance supply and demand, and both supply and demand resources can serve this need. *Id*. Generators would define the relevant point of comparison differently. But in the Commission's expert view of the market it regulates, the value of resources capable of providing the same service to the market, balancing supply and demand, is the same. *See* Order No. 745 P 47, JA 108; *see also* Order No. 745-A P 54, JA 24. *See "Complex" Consol. Edison Co. of New York, Inc. v. FERC*, 165 F.3d 992, 1013 (D.C. Cir. 1999) (affirming agency's finding of no undue discrimination based upon "relevant, significant" operational circumstances) (citing cases).

Generators also argue that because demand response resources do not bear the same costs as generators, the two types of resources are not similarly situated. Generator Br. 49-50. All resources incur different costs and, as explained below with regard to Generators' preferred compensation method, the Commission does not (in the absence of market power) inquire into resources' costs of production. Order No. 745 P 62, JA 118; Order No. 745-A P 80, JA 35. The costs or benefits of production are not relevant to whether a resource has the capability to provide the service required by the System Operator.

Likewise, PPL (Br. 16) misses the mark in claiming that the two resource types are not similarly situated because demand response resources are not regulated as public utilities, and do not make wholesale sales in the energy markets. Regulatory requirements, which vary among types of generators as well, do not alter a resource's ability to provide balancing services to a System Operator. Moreover, demand response resources that participate in wholesale energy markets are subject to the rules applicable to all market participants, as well as specific demand response measurement and verification requirements not applicable to supply resources. *See* Order No. 745 PP 93-95, JA 140-42.

3. Paying qualified demand response resources LMP does not result in a subsidy or overcompensation

The Commission reasonably concluded that implementation of LMP under the limited conditions described by the balancing and cost-effectiveness tests will

ensure that neither overcompensation nor a subsidy occurs. *See* Order No. 745-A P 64, JA 29. Generators err in arguing (Br. 4) that the agency "largely ignored" compensation issues.

Where demand response resources provide balancing capability to the wholesale energy market and are cost-effective, i.e., they satisfy the net benefits test, prices are determined competitively in the market and there is no overcompensation or subsidy. *See* Order No. 745 P 61, JA 117. The relevant inquiry examines the market, and the service it requires, not the particular costs and benefits of each individual resource.

Using this framework, the Commission examined whether demand response resources are cost-effective in the wholesale energy market and, here, answers yes. *Id*. Dr. Kahn's testimony supports the Commission. As he explained,

> Does this plan involve double compensation, as [Dr.] Hogan asserts, at the expense of power generators — of successful bidders promising to induce efficient demand curtailment and of consumers induced to practice it? Certainly not: the decrease in the revenue of the generators is (and consequent savings by consumers are) matched by the savings in their (marginal) costs of generating that power; the successful bidders for the opportunity to induce that consumer response are compensated for the costs of those efforts by the pool, whose (marginal) costs they save by assisting consumers to reduce their purchases.

Id. P 31 (quoting Kahn Reply Aff. at 10, JA 885), JA 95; *see also* Order No. 745-A P 58 (citing Kahn Reply Aff. at 9-10, JA 884-85), JA 27; Demand Response Supporters, Comments and Protest at 7, Docket No. EL09-68 (Sept. 16, 2009)

(citing affidavits of Drs. Kahn and Woychik), JA 1677.

Generators provide no basis for singling out demand response resources for an examination of costs and benefits of production in relation to compensation. Order No. 745 P 62, JA 118; *see also* Order No. 745-A P 80, JA 35. The retail cost of energy, which Generators claim should be subtracted from any price paid to qualified demand response providers, reflects a demand response provider's cost of production. Order No. 745-A P 65, JA 30. In other words, and as Generators seem to recognize (Br. 53-54), this cost factors into a demand response provider's economic decision of how much demand reduction to produce at what price. Costs of production for supply-side resources likewise vary and may be positive or negative, depending on factors such as fuel costs, location, regulatory requirements and applicable subsidies. Generators do not dispute, as the Commission explained, that a demand response provider's avoided retail purchase functions much like renewable energy certificates or tax credits. Order No. 745-A P 65 n.122 (citing, *e.g.*, Viridity Comments at 8, JA 504), JA 30.

Moreover, the Commission recognized practical and technical difficulties with the proposal to reduce the market price by the retail rate. Order No. 745 P 63 (noting practical difficulties of implementation and potential consumer uncertainty) (citing New York Commission, Comments at 8, JA 377), JA 119. Thus, the Commission adequately responded to Generators' arguments. *See Nat'l*

Ass'n, 475 F.3d at 1285 (finding that Commission need not address testimony directly where it has addressed the issues presented).

The Commission recognized that it has approved different methods of compensation for demand response, including variations on LMP, in different wholesale energy markets, over the past several years. Order No. 745 P 14, JA 80. Generators and supporters rely specifically on *PJM Industrial Customer Coalition*, 121 FERC ¶ 61,315, and accuse the Commission of failing to explain its approval of LMP here in light of its earlier characterization of PJM's particular LMP program as an inappropriate subsidy. *See id*. (denying a complaint to prevent the termination of that program under a sunset provision). *See* Generators Br. 50-51; *Amici* Br. 25; PPL Br. 13-14. To the extent Order No. 745 reflects a change in Commission policy, the Proposed Rule explained that experiences in PJM following that order actually prompted the Commission's rulemaking here.[8] Proposed Rule P 10, JA 220. After *PJM Industrial Customer Coalition*, the Commission observed reduced and inadequate demand response participation in PJM and elsewhere, which it attributed to inadequate compensation. *Id*. (Notably, the PJM Industrial Customer Coalition withdrew its request for rehearing of the

[8] With the Proposed Rule, the Commission terminated a docket involving PJM's proposed revisions to its demand response compensation program (Docket No. EL09-68), and took administrative notice of the record in order to avoid the need for refiling of evidentiary submissions. Proposed Rule P 23, JA 230.

2007 order after PJM proposed an enhanced demand response compensation program. Thus, the Commission never acted on rehearing in that case.)

In any event, the Commission addressed Generators' "subsidy" argument on rehearing, and made clear that its selection of LMP here is conditioned upon satisfaction of the balancing capability and net benefits test. Order No. 745-A P 58, JA 27. Neither *PJM Industrial Customer Coalition* nor other existing or former demand response compensation programs addressed or allowed LMP subject to these particular tests, which form the cornerstone of the Commission's program here. Thus the Commission adequately responded to Generators' concerns that, having previously chosen not to employ or continue variations on LMP compensation in a given regional market, it is precluded from selecting LMP as a just and reasonable compensation method at this time, under these conditions. *See* Order No. 745-A PP 40, 58, JA 20, 26. *See Sacramento Mun. Util. Dist.*, 616 F.3d at 530 (Commission "reasonably responded to the issues raised by" the witness).

Substantial evidence supports the Commission's finding that there is no overcompensation here, and Generators' effort to turn the Commission's weighing of the evidence into an exercise in counting pieces of evidence is contrary to the statute. *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("The substantial evidence inquiry turns not on how many discrete pieces of

evidence the Commission relies on, but on whether that evidence adequately supports its ultimate decision.").

4. Paying qualified demand response resources LMP results in additional benefits to organized wholesale energy markets

The Commission has demonstrated that Order No. 745 provides comparable compensation for comparable resources participating in wholesale energy markets. Comparability is enough. But paying qualified demand response resources LMP will also reduce barriers to demand response participation in wholesale energy markets and, as a result, help to remove identified market imperfections. Generators and their supporters do not seem to dispute these benefits of demand response, but claim that Order No. 745 will induce too much demand response participation and reduce market prices too much. Generator Br. 57; PPL Br. 20; *Amici* Br. 18. Generators again overlook the role of the balancing and cost-effectiveness tests, but, more important, fail to understand the Commission's statutory role.

As the Commission explained, barriers to demand response participation in wholesale energy markets create an inelastic demand curve, resulting in higher wholesale prices than the market would produce with greater demand response participation. Order No. 745-A P 63, JA 28. But, "[p]aying the full marginal value of energy to demand response will provide the proper level of investment resources available for capital improvements," including enabling technologies.

Order No. 745-A P 62 (citing EnerNOC, Comments at 4, JA 627), JA 28; *see also* New York Commission, Comments at 5-6, JA 374-75.

In turn, increased demand response participation in wholesale energy markets will "mov[e] prices closer to the levels that would result if all demand could respond to the marginal cost of energy." Order No. 745 P 59, JA 116. *See also id*. P 10 (citing study showing that demand response can reduce the need for more costly resources during periods of high demand), JA 77. As the Commission earlier explained in the Order No. 719 rulemaking, "enabling demand-side resources, as well as supply-side resources, improves the economic operation of electric power markets by aligning prices more closely with the value customers place on electric power." Order No. 719 P 16, JA 1497; *see also* Order No. 745-A P 61 (paying LMP provides demand response resources that "can respond to price signals with the accurate market price signal for such response"), JA 28. Increased demand response participation helps to achieve the Commission's goals by increasing competition, which will help to produce just and reasonable and, in this case, potentially lower, rates. *See* Order No. 745-A P 61, JA 28.

Increased competition, whether the market ultimately selects demand or supply-side resources, can also limit potential opportunities for market power. Order No. 745-A P 77, JA 35. Generators, however, place undue emphasis on

market power mitigation here. Br. 57-60. While increased competition can limit opportunities for market power, the Commission explained that market power mitigation is not the subject of this rulemaking. Order No. 745-A P 77, JA 35.

Generators essentially complain about the potential for increased competition.[9] *See*, *e.g*., New York Consumer Protection Board, Comments at 3-4 (explaining generators' self-interested economic analysis), JA 1151-52. Under Order No. 745, qualified demand response resources will be treated by the System Operators "in a manner similar to a generation resource that is introduced into a pool of supply-side resources." Order No. 745-A P 67, JA 31. But no evidence suggests that, with increased competition, LMP will no longer reflect "the marginal value of a resource's contribution to the market, regardless of whether that resource provides generation or demand response." *Id*. P 68, JA 31. Nor does evidence suggest that, with increased competition and possibly lower wholesale prices, wholesale supplies will exit the market to such an extent that system reliability will be threatened. (Indeed, demand response resources can provide significant reliability benefits by quickly balancing the grid. Order No. 745 P 10 & nn.19-20 (citing studies on reliability benefits), JA 78.) In the absence of undue

[9] PPL's suggestion (Br. 19-20) of a constitutional takings claim may only be raised in the United States Court of Claims. *See* 28 U.S.C. § 1346(a)(2); Order No. 745-A P 68 n.125 (citing cases), JA 31.

discrimination or preference, as here, Generators' claims fail. Order No. 745-A P 67, JA 31.

Further, the Commission has long held that payment of LMP to supply resources encourages more efficient supply and demand decisions in both the short run and long run. Order No. 745 P 62 (citing *New England Power Pool*, 101 FERC ¶ 61,344 P 35 (2002) (denying request to delay LMP implementation)), JA 118. The same rule applies to demand response compensation, and Generators have not demonstrated otherwise. *Id*.

Moreover, the Commission's statutory obligation is to strike a balance that promotes the (sometimes conflicting) goals of preventing excessive rates and encouraging adequate supply. *See, e.g.*, *Consol. Edison Co. v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) (citing cases); *see also FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956) ("purpose of the power given the Commission by [FPA] section 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities"). The Commission's job is not to protect incumbent market participants from increased competition. *See*, *e.g.*, *FPC v. Conway*, 426 U.S. at 279 (Commission's obligations under the FPA reflect anticompetitive and antitrust concerns) (citing cases).

Rather, the Commission's informed ratemaking choice here reflects its duty to "choose a [ratemaking] method that entails an appropriate 'balancing of the

investor and the consumer interests.'" *Morgan Stanley*, 554 U.S. at 532 (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)). Upon consideration of the competing equities, and taking into account its broad public interest obligation, the Commission determined that the potential for increased competition and lower rates does not render compensation in wholesale energy markets unjust and unreasonable. This expert balance is entitled to respect. *See Blumenthal*, 552 F.3d at 885 (FERC "must be given the latitude to balance the competing considerations and decide on the best resolution"). Generators may disagree with this balance, and prefer a different rate, but that does not render the Commission's ratemaking choice, supported here by substantial evidence, unreasonable or arbitrary. *See OXY USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) (a "just and reasonable" rate "need not be the only reasonable methodology, or even the most accurate").

C. The Commission Adequately Explained Its Decision To Require A More Uniform Approach To Demand Response Compensation

Generators, their supporters, and California claim that the Commission's decision now to require a more uniform approach to demand response compensation in organized wholesale energy markets, including both the compensation level and cost allocation (challenged only by California), cannot be squared with the Commission's prior approvals of demand response programs on a regional basis. Generator Br. 63-64; California Br. 24; PPL Br. 11. California's

specific claims as to cost allocation are premature. *See supra* Pt. III. But, in any event, the Commission's decision is fully supported by the record, and is not inconsistent with precedent, including its earlier Order No. 719 rulemaking. *See* Order No. 745-A P 74, JA 33.

In Order No. 745, the Commission recognized that previously, acting on a case-by-case basis, it had permitted varying methods for demand response compensation in wholesale energy markets. Order No. 745 P 14, JA 80; Order No. 745-A P 74, JA 33. Indeed, the Commission acknowledged the concerns of demand response providers that the lack of standardization itself presents a barrier to demand response participation in wholesale energy markets. Order No. 745 P 43 (citing comments), JA 104; *id*. P 17 ("Based upon the record in this proceeding, the Commission herein requires greater uniformity in compensating demand response resources . . . ."), JA 84.

Order No. 719 set the stage for adoption of the market price for compensation and explicitly left the door open to standardization in the future. First, Order No. 719 required that demand response resources participating in ancillary services markets would receive, as here, the market price. Order No. 745 P 74 (citing Order No. 719 P 47, JA 515), JA 33; *see also* 18 C.F.R. § 35.28(g)(1)(i)(A) (requiring comparable treatment for demand response resources providing ancillary services). Second, Order No. 719 set forth general

guidelines for allowing aggregator participation in wholesale markets, but declined to specifically address a number of issues, including the "double payment" issue identified by California (Br. 25), among others. Order No. 719 P 159, JA 1516.

Moreover, Order No. 719 highlighted the likelihood of further reforms. The Commission specifically found that "[g]iven this regional approach, we do not find that standardized technical issues or a pro forma set of market rules . . . is necessary *at this time*." *Id*. P 160 (emphasis added), JA 1576. And the Commission required System Operators to report to the Commission on "the barriers to comparable treatment of demand response resources," Order No. 719 P 261, JA 1579, including, among other things, "the need for and the ability to standardize terms, practices, rules and procedures associated with demand response." *Id*. P 260, JA 1579; *see id*. P 274 (adopting report requirement), JA 1584.

That the Commission has now moved toward standardization is consistent with, and indeed a logical response to, Order No. 719. *See Indiana*, 668 F.3d at 740 (upholding FERC's interpretation of Order No. 719, in that case, under a "substantial deference" standard). *See also Council of the City of New Orleans v. FERC*, 692 F.3d 172, 176 (D.C. Cir. 2012) (not unreasonable for the agency to do, or not do, something it said it might do in an earlier order).

Finally, Order No. 745 recognizes that further reforms may be appropriate in the future. Order No. 745 directs each System Operator to study the potential for

implementing software to integrate the billing unit effect into the real-time operation of the wholesale market. Order No. 745 PP 78, 84, JA 130, 135; *see supra* p. 17. While the Commission believes that this method may "more precisely identify when demand response resources are cost-effective," it declined to direct implementation at this time, in light of technical issues. *Id*. P 78, JA 130. As the Commission explained on rehearing, it "can assess the feasibility of implementing a dynamic process . . . after it receives the studies." Order No. 745-A P 128, JA 52; *see also* Proposed Rule P 19 ("Given the current barriers to demand response, and the evolving nature of the technology enabling demand response, a perfect solution or payment scheme may not exist."), JA 227-28. *See Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) ("reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the [regulatory] mind.") (internal citation omitted).

The Commission is confident that its compensation program will work as intended, in furtherance of statutory goals. *See Elec. Consumers Res. Council*, 407 F.3d at 1239 ("the court will defer to the Commission's predictive judgment" and the study and reporting requirement ensures the agency "will have the information needed to determine whether the rate design requires modification should [the] predictions fail to be borne out by experience"). If future studies and reports indicate otherwise, the Commission will take additional steps as necessary and

appropriate – as it did in moving from Order No. 719 to Order No. 745 – to improve market conditions. *See* Order No. 745-A P 128, JA 52.

VI. ASSUMING JURISDICTION, ORDER NO. 745'S COST ALLOCATION APPROACH IS REASONABLE AND WELL-SUPPORTED BY THE RECORD

Before this Court, California argues for the first time that the Commission failed to adequately support the cost allocation guideline. California Br. 22-23. As demonstrated above (Pt. III), California lacks jurisdiction to raise this claim as a matter of ripeness or standing. But this claim faces an additional barrier: California failed to preserve it for review, as required by the Federal Power Act. Nonetheless, as explained below, the Commission's orders reasonably reflect the established cost causation principle, and demonstrate that adherence to that principle is appropriate.

On rehearing, the California System Operator and the California Commission argued that: 1) the existing California program is consistent with Order No. 745; and 2) if not, the Commission had inappropriately departed from California-specific precedent and Order No. 719. *See* California Commission, Rehearing Request, R. 241, JA 1394; California System Operator, Rehearing Request, R. 242, JA 1416. Neither party challenged the substance of the cost allocation guideline. Indeed, neither rehearing request uses the phrase "cost

causation," or any similar phrasing. California's failure to preserve this issue deprives the Court of jurisdiction. *See supra* p. 29 (citing 16 U.S.C. § 825*l*(b)).

In any event, as the Commission explained, Order No. 745's approach to cost allocation is consistent with the judicially-endorsed, "unremarkable principle" that costs generally follow benefits. Order No. 745 P 100 (citing cases), JA 146. California is correct that the Commission "is not bound to reject any rate mechanism that tracks the cost-causation principle less than perfectly." California Br. 22-23 (citing *Sithe/Independence Power Partners, L.P. v. FERC*, 285 F.3d 1, 5, (D.C. Cir. 2002)). But it does not follow that the Commission cannot choose to follow the cost causation principle more closely in appropriate circumstances. *See* Order No. 745 P 100 (citing *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (assessing compliance with the principle by "comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party"); and *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009) (same)), JA 146. *See also Transmission Access*, 225 F.3d at 708 (affirming Commission's reliance on cost causation).

Order No. 745 details, with discussion of the technical characteristics of the transmission system, why adherence to the cost causation principle is particularly appropriate here. As the Commission explained, the identification of customers benefitting from lower prices induced by dispatch of demand response depends

upon transmission constraints. Order No. 745 P 100, JA 145-46. Transmission constraints, or variations in or the absence of such constraints, cause the market price to vary by zone or other geographic area, and may depend on the time of day as well. *Id*. Accordingly, the Commission reasoned that the cost allocation method should reflect the degree to which market participants receive benefits from lower market prices. *Id*. P 101, JA 146.

California's claim that the Commission "fail[ed] to articulate a rational connection between the facts found and the choice made" (Br. 22) ignores Order No. 745's discussion, invoking its technical expertise, that transmission constraints and related price differentials require that allocation more closely track benefits. *See, e.g.*, *Northern States Power Co.*, 30 F.3d at 180 (applying a highly deferential standard of review to technical matters). Accordingly, if the Court reaches the merits of this issue, the Commission should be affirmed.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied, to the extent not dismissed for lack of jurisdiction, and the orders on review should be upheld in their entirety.

Respectfully submitted,

David L. Morenoff
Acting General Counsel

Robert H. Solomon
Solicitor

/s/ Holly E. Cafer
Holly E. Cafer
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, D.C. 20426
Phone: (202) 502-8485
Fax: (202) 273-0901
Email: holly.cafer@ferc.gov

October 25, 2012

Electric Power Supply Association, *et al*. v. FERC **Docket No. RM10-17**
D.C. Cir. No. 11-1486, *et al*.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 17,883 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum.

/s/ Holly E. Cafer
Holly E. Cafer
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, D.C. 20426
Phone: (202) 502-8485
Fax: (202) 273-0901
Email: holly.cafer@ferc.gov

October 25, 2012

ADDENDUM

STATUTES
AND
REGULATIONS

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 703. Form and venue of proceeding

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

lished by paragraphs (11) through (13) of section 2621(d) of this title, the reference contained in this subsection[1] to November 9, 1978, shall be deemed to be a reference to August 8, 2005. In the case of the standard established by paragraph (14) of section 2621(d) of this title, the reference contained in this subsection[1] to November 9, 1978, shall be deemed to be a reference to August 8, 2005. In the case of each standard established by paragraph (15) of section 2621(d) of this title, the reference contained in this subsection[1] to November 9, 1978, shall be deemed to be a reference to August 8, 2005.

(Pub. L. 95–617, title I, § 124, Nov. 9, 1978, 92 Stat. 3131; Pub. L. 109–58, title XII, §§ 1251(b)(3)(B), 1252(i)(2), 1254(b)(3)(B), Aug. 8, 2005, 119 Stat. 963, 967, 971.)

AMENDMENTS

2005—Pub. L. 109–58, § 1254(b)(3)(B), inserted at end ''In the case of each standard established by paragraph (15) of section 2621(d) of this title, the reference contained in this subsection to November 9, 1978, shall be deemed to be a reference to August 8, 2005.''

Pub. L. 109–58, § 1252(i)(2), inserted at end ''In the case of the standard established by paragraph (14) of section 2621(d) of this title, the reference contained in this subsection to November 9, 1978, shall be deemed to be a reference to August 8, 2005.''

Pub. L. 109–58, § 1251(b)(3)(B), inserted at end ''In the case of each standard established by paragraphs (11) through (13) of section 2621(d) of this title, the reference contained in this subsection to November 9, 1978, shall be deemed to be a reference to August 8, 2005.''

SUBCHAPTER IV—ADMINISTRATIVE PROVISIONS

§ 2641. Voluntary guidelines

The Secretary may prescribe voluntary guidelines respecting the standards established by sections 2621(d) and 2623(b) of this title. Such guidelines may not expand the scope or legal effect of such standards or establish additional standards respecting electric utility rates.

(Pub. L. 95–617, title I, § 131, Nov. 9, 1978, 92 Stat. 3131.)

§ 2642. Responsibilities of Secretary

(a) Authority

The Secretary may periodically notify the State regulatory authorities, and electric utilities identified pursuant to section 2612(c) of this title, of—

(1) load management techniques and the results of studies and experiments concerning load management techniques;

(2) developments and innovations in electric utility ratemaking throughout the United States, including the results of studies and experiments in rate structure and rate reform;

(3) methods for determining cost of service;

(4) any other data or information which the Secretary determines would assist such authorities and utilities in carrying out the provisions of this chapter; and

(5) technologies, techniques, and rate-making methods related to advanced metering and communications and the use of these technologies, techniques and methods in demand response programs.

(b) Technical assistance

The Secretary may provide such technical assistance as he determines appropriate to assist the State regulatory authorities in carrying out their responsibilities under subchapter II and as is requested by any State regulatory authority relating to the standards established by subchapter II.

(c) Appropriations

There are authorized to be appropriated to carry out the purposes of subsection (b) of this section not to exceed $1,000,000 for each of the fiscal years 1979 and 1980.

(d) Demand response

The Secretary shall be responsible for—

(1) educating consumers on the availability, advantages, and benefits of advanced metering and communications technologies, including the funding of demonstration or pilot projects;

(2) working with States, utilities, other energy providers and advanced metering and communications experts to identify and address barriers to the adoption of demand response programs; and

(3) not later than 180 days after August 8, 2005, providing Congress with a report that identifies and quantifies the national benefits of demand response and makes a recommendation on achieving specific levels of such benefits by January 1, 2007.

(Pub. L. 95–617, title I, § 132, Nov. 9, 1978, 92 Stat. 3131; Pub. L. 109–58, title XII, § 1252(c), (d), Aug. 8, 2005, 119 Stat. 965.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (a)(4), was in the original ''this title'', meaning title I (§ 101 et seq.) of Pub. L. 95–617, Nov. 9, 1978, 92 Stat. 3120, which enacted subchapters I to IV of this chapter and section 6808 of Title 42, The Public Health and Welfare, and amended sections 6802 to 6807 of Title 42. For complete classification of title I to the Code, see Tables.

AMENDMENTS

2005—Subsec. (a)(5). Pub. L. 109–58, § 1252(c), added par. (5).

Subsec. (d). Pub. L. 109–58, § 1252(d), added subsec. (d).

DEMAND RESPONSE ASSISTANCE

Pub. L. 109–58, title XII, § 1252(e), (f), Aug. 8, 2005, 119 Stat. 965, 966, provided that:

''(e) DEMAND RESPONSE AND REGIONAL COORDINATION.—

''(1) IN GENERAL.—It is the policy of the United States to encourage States to coordinate, on a regional basis, State energy policies to provide reliable and affordable demand response services to the public.

''(2) TECHNICAL ASSISTANCE.—The Secretary [of Energy] shall provide technical assistance to States and regional organizations formed by two or more States to assist them in—

''(A) identifying the areas with the greatest demand response potential;

''(B) identifying and resolving problems in transmission and distribution networks, including through the use of demand response;

''(C) developing plans and programs to use demand response to respond to peak demand or emergency needs; and

[1] So in original. Probably should be ''section''.

''(D) identifying specific measures consumers can take to participate in these demand response programs.

''(3) REPORT.—Not later than 1 year after the date of enactment of the Energy Policy Act of 2005 [Aug. 8, 2005], the [Federal Energy Regulatory] Commission shall prepare and publish an annual report, by appropriate region, that assesses demand response resources, including those available from all consumer classes, and which identifies and reviews—

''(A) saturation and penetration rate of advanced meters and communications technologies, devices and systems;

''(B) existing demand response programs and time-based rate programs;

''(C) the annual resource contribution of demand resources;

''(D) the potential for demand response as a quantifiable, reliable resource for regional planning purposes;

''(E) steps taken to ensure that, in regional transmission planning and operations, demand resources are provided equitable treatment as a quantifiable, reliable resource relative to the resource obligations of any load-serving entity, transmission provider, or transmitting party; and

''(F) regulatory barriers to improve customer participation in demand response, peak reduction and critical period pricing programs.

''(f) FEDERAL ENCOURAGEMENT OF DEMAND RESPONSE DEVICES.—It is the policy of the United States that time-based pricing and other forms of demand response, whereby electricity customers are provided with electricity price signals and the ability to benefit by responding to them, shall be encouraged, the deployment of such technology and devices that enable electricity customers to participate in such pricing and demand response systems shall be facilitated, and unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated. It is further the policy of the United States that the benefits of such demand response that accrue to those not deploying such technology and devices, but who are part of the same regional electricity entity, shall be recognized.''

§ 2643. Gathering information on costs of service

(a) Information required to be gathered

Each electric utility shall periodically gather information under such rules (promulgated by the Commission) as the Commission determines necessary to allow determination of the costs associated with providing electric service. For purposes of this section, and for purposes of any consideration and determination respecting the standard established by section 2621(d)(2) of this title, such costs shall be separated, to the maximum extent practicable, into the following components: customer cost component, demand cost component, and energy cost component. Rules under this subsection shall include requirements for the gathering of the following information with respect to each electric utility—

(1) the costs of serving each electric consumer class, including costs of serving different consumption patterns within such class, based on voltage level, time of use, and other appropriate factors;

(2) daily kilowatt demand load curves for all electric consumer classes combined representative of daily and seasonal differences in demand, and daily kilowatt demand load curves for each electric consumer class for which there is a separate rate, representative of daily and seasonal differences in demand;

(3) annual capital, operating, and maintenance costs—

(A) for transmission and distribution services, and

(B) for each type of generating unit; and

(4) costs of purchased power, including representative daily and seasonal differences in the amount of such costs.

Such rules shall provide that information required to be gathered under this section shall be presented in such categories and such detail as may be necessary to carry out the purposes of this section.

(b) Commission rules

The Commission shall, within 180 days after November 9, 1978, by rule, prescribe the methods, procedure, and format to be used by electric utilities in gathering the information described in this section. Such rules may provide for the exemption by the Commission of an electric utility or class of electric utilities from gathering all or part of such information, in cases where such utility or utilities show and the Commission finds, after public notice and opportunity for the presentation of written data, views, and arguments, that gathering such information is not likely to carry out the purposes of this section. The Commission shall periodically review such findings and may revise such rules.

(c) Filing and publication

Not later than two years after November 9, 1978, and periodically, but not less frequently than every two years thereafter, each electric utility shall file with—

(1) the Commission, and

(2) any State regulatory authority which has ratemaking authority for such utility,

the information gathered pursuant to this section and make such information available to the public in such form and manner as the Commission shall prescribe. In addition, at the time of application for, or proposal of, any rate increase, each electric utility shall make such information available to the public in such form and manner as the Commission shall prescribe. The two-year period after November 9, 1978, specified in this subsection may be extended by the Commission for a reasonable additional period in the case of any electric utility for good cause shown.

(d) Enforcement

For purposes of enforcement, any violation of a requirement of this section shall be treated as a violation of a provision of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.] enforceable under section 12 of such Act [15 U.S.C. 797] (notwithstanding any expiration date in such Act) except that in applying the provisions of such section 12 any reference to the Federal Energy Administrator shall be treated as a reference to the Commission.

(Pub. L. 95–617, title I, § 133, Nov. 9, 1978, 92 Stat. 3132.)

REFERENCES IN TEXT

The Energy Supply and Environmental Coordination Act of 1974, referred to in subsec. (d), is Pub. L. 93–319,

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

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with re-

spect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term ''sale of electric energy at wholesale'' when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term ''public utility'' when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),[1] 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

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

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

(g) Books and records

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

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

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

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

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

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

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

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

§ 1344. Election disputes

The district courts shall have original jurisdiction of any civil action to recover possession of any office, except that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, where in it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude.

The jurisdiction under this section shall extend only so far as to determine the rights of the parties to office by reason of the denial of the right, guaranteed by the Constitution of the United States and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

(June 25, 1948, ch. 646, 62 Stat. 932.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(15) (Mar. 3, 1911, ch. 231, § 24, par. 15, 36 Stat. 1092).

Words ''civil action'' were substituted for ''suits,'' in view of Rule 2 of the Federal Rules of Civil Procedure.

Words ''United States Senator'' were added, as no reason appears for including Representatives and excluding Senators. Moreover, the Seventeenth amendment, providing for the popular election of Senators, was adopted after the passage of the 1911 law on which this section is based.

Changes were made in phraseology.

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

(June 25, 1948, ch. 646, 62 Stat. 933.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1341, 1342, 1354, and 1359 of this title.

Words ''civil actions, suits or proceedings'' were substituted for ''suits of a civil nature, at common law or in equity'' in view of Rules 2 and 81(a)(7) of the Federal Rules of Civil Procedure.

Word ''agency'' was inserted in order that this section shall apply to actions by agencies of the Government and to conform with special acts authorizing such actions. (See definitive section 451 of this title.)

The phrase ''Except as otherwise provided by Act of Congress,'' at the beginning of the section was inserted to make clear that jurisdiction exists generally in district courts in the absence of special provisions conferring it elsewhere.

Changes were made in phraseology.

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall

(d)(1) of this section must demonstrate that:

(i) It incurred costs to provide service to a retail customer that obtains retail wheeling based on a reasonable expectation that the utility would continue to serve the customer; and

(ii) The stranded costs are not more than the customer would have contributed to the utility had the customer remained a retail customer of the utility.

[Order 888–A, 62 FR 12460, Mar. 14, 1997]

§ 35.27 Authority of State commissions.

Nothing in this part—

(a) Shall be construed as preempting or affecting any jurisdiction a State commission or other State authority may have under applicable State and Federal law, or

(b) Limits the authority of a State commission in accordance with State and Federal law to establish

(1) Competitive procedures for the acquisition of electric energy, including demand-side management, purchased at wholesale, or

(2) Non-discriminatory fees for the distribution of such electric energy to retail consumers for purposes established in accordance with State law.

[Order 697, 72 FR 40038, July 20, 2007]

§ 35.28 Non-discriminatory open access transmission tariff.

(a) *Applicability*. This section applies to any public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce and to any non-public utility that seeks voluntary compliance with jurisdictional transmission tariff reciprocity conditions.

(b) *Definitions*—(1) *Requirements service agreement* means a contract or rate schedule under which a public utility provides any portion of a customer's bundled wholesale power requirements.

(2) *Economy energy coordination agreement* means a contract, or service schedule thereunder, that provides for trading of electric energy on an ''if, as and when available'' basis, but does not require either the seller or the buyer to engage in a particular transaction.

(3) *Non-economy energy coordination agreement* means any non-requirements service agreement, except an economy energy coordination agreement as defined in paragraph (b)(2) of this section.

(4) *Demand response* means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy.

(5) *Demand response resource* means a resource capable of providing demand response.

(6) *An operating reserve shortage* means a period when the amount of available supply falls short of demand plus the operating reserve requirement.

(7) *Market Monitoring Unit* means the person or entity responsible for carrying out the market monitoring functions that the Commission has ordered Commission-approved independent system operators and regional transmission organizations to perform.

(8) *Market Violation* means a tariff violation, violation of a Commission-approved order, rule or regulation, market manipulation, or inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies.

(c) *Non-discriminatory open access transmission tariffs.*

(1) Every public utility that owns, controls, or operates facilities used for the transmission of electric energy in interstate commerce must have on file with the Commission a tariff of general applicability for transmission services, including ancillary services, over such facilities. Such tariff must be the open access pro forma tariff contained in Order No. 888, FERC Stats. & Regs. ¶ 31,036 (Final Rule on Open Access and Stranded Costs), as revised by the open access pro forma tariff contained in Order No. 890, FERC Stats. & Regs. ¶ 31,241 (Final Rule on Open Access Reforms) and further revised in Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (Final Rule on Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities), or such other open access tariff as may be approved by the Commission consistent with Order No. 888, FERC Stats. & Regs ¶ 31,306, Order No. 890, FERC Stats. & Regs. ¶ 32,241, and Order No. 1000, FERC Stats. & Regs. ¶ 31,323.

have to comply with the requirements of this paragraph.

(4) A public utility subject to the requirements of this paragraph pertaining to the Final Rule on Small Generator Interconnection may file a request for waiver of all or part of the requirements of this paragraph, for good cause shown. An application for waiver must be filed either:

(i) No later than August 12, 2005, or

(ii) No later than 60 days prior to the time the public utility would otherwise have to comply with the requirements of this paragraph.

(g) *Tariffs and operations of Commission-approved independent system operators and regional transmission organizations.*

(1) *Demand response and pricing.*

(i) *Ancillary services provided by demand response resources.*

(A) Every Commission-approved independent system operator or regional transmission organization that operates organized markets based on competitive bidding for energy imbalance, spinning re serves ,supplemental reserves, reactive power and voltage control, or regulation and frequency response ancillary services (or its functional equivalent in the Commission-approved independent system operator's or regional transmission organization's tariff) must accept bids from demand response resources in these markets for that product on a basis comparable to any other resources, if the demand response resource meets the necessary technical requirements under the tariff, and submits a bid under the Commission-approved independent system operator's or regional transmission organization's bidding rules at or below the market-clearing price, unless not permitted by the laws or regulations of the relevant electric retail regulatory authority.

(B) Each Commission-approved independent system operator or regional transmission organization must allow providers of a demand response resource to specify the following in their bids:

(*1*) A maximum duration in hours that the demand response resource may be dispatched;

(*2*) A maximum number of times that the demand response resource may be dispatched during a day; and

(*3*) A maximum amount of electric energy reduction that the demand response resource may be required to provide either daily or weekly.

(ii) *Removal of deviation charges.* A Commission-approved independent system operator or regional transmission organization with a tariff that contains a day-ahead and a real-time market may not assess charge to a purchaser of electric energy in its day-ahead market for purchasing less power in the real-time market during a real-time market period for which the Commission-approved independent system operator or regional transmission organization declares an operating reserve shortage or makes a generic request to reduce load to avoid an operating reserve shortage.

(iii) *Aggregation of retail customers.* Each Commission-approved independent system operator and regional transmission organization must accept bids from an aggregator of retail customers that aggregates the demand response of the customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, and the customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, where the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an aggregator of retail customers. An independent system operator or regional transmission organization must not accept bids from an aggregator of retail customers that aggregates the demand response of the customers of utilities that distributed more than 4 million megawatt-hours in the previous fiscal year, where the relevant electric retail regulatory authority prohibits such customers' demand response to be bid into organized markets by an aggregator of retail customers, or the customers of utilities that distributed 4 million megawatt-hours or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an aggregator of retail customers.

(iv) *Price formation during periods of operating reserve shortage.*

(A) Each Commission-approved independent system operator or regional transmission organization must modify its market rules to allow the market-clearing price during periods of operating reserve shortage to reach a level that rebalances supply and demand so as to maintain reliability while providing sufficient provisions for mitigating market power.

(B) A Commission-approved independent system operator or regional transmission organization may phase in this modification of its market rules.

(v) *Demand response compensation in energy markets.* Each Commission-approved independent system operator or regional transmission organization that has a tariff provision permitting demand response resources to participate as a resource in the energy market by reducing consumption of electric energy from their expected levels in response to price signals must:

(A) Pay to those demand response resources the market price for energy for these reductions when these demand response resources have the capability to balance supply and demand and when payment of the market price for energy to these resources is cost-effective as determined by a net benefits test accepted by the Commission;

(B) Allocate the costs associated with demand response compensation proportionally to all entities that purchase from the relevant energy market in the area(s) where the demand response reduces the market price for energy at the time when the demand response resource is committed or dispatched.

(2) *Long-term power contracting in organized markets.* Each Commission-approved independent system operator or regional transmission organization must provide a portion of its Web site for market participants to post offers to buy or sell power on a long-term basis.

(3) *Market monitoring policies.*

(i) Each Commission-approved independent system operator or regional transmission organization must modify its tariff provisions governing its Market Monitoring Unit to reflect the directives provided in OrderNo. 719, including the following:

(A) Each Commission-approved independent system operator or regional transmission organization must include in its tariff a provision to provide its Market Monitoring Unit access to Commission-approved independent system operator and regional transmission organization market data, resources and personnel to enable the MarketMonitoring Unit to carry out its functions.

(B) The tariff provision must provide the Market Monitoring Unit complete access to the Commission-approved independent system operator's and regional transmission organization's databases of market information.

(C) The tariff provision must provide that any data created by the Market Monitoring Unit, including, but not limited to, reconfiguring of the Commission-approved independent system operator's and regional transmission organization's data, will be kept within the exclusive control of the Market Monitoring Unit.

(D) The Market Monitoring Unit must report to the Commission-approved independent system operator's or regional transmission organization's board of directors, with its management members removed, or to an independent committee of the Commission-approved independent system operator's or regional transmission organization's board of directors. A Commission-approved independent system operator or regional transmission organization that has both an internal Market Monitoring Unit and an external Market Monitoring Unit may permit the internal Market Monitoring Unit to report to management and the external Market Monitoring Unit to report to the Commission-approved independent system operator's or regional transmission organization's board of directors with its management members removed, or to an independent committee of the Commission-approved independent system operator or regional transmission organization board of directors. If the internal market monitor is responsible for carrying out any or all of the core Market Monitoring Unit functions identified in paragraph (g)(3)(ii) of this section, the

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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 25th day of October 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:

Cynthia S. Bogorad EMAIL
William S. Huang
Spiegel & McDiarmid LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Kriss E. Brown EMAIL
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

Adrienne E. Clair EMAIL
Stinson Morrison Hecker LLP
1775 Pennsylvania Ave., NW, Suite 800
Washington, DC 20006

Roger E. Collanton EMAIL
Nancy J. Saracino
Daniel Shonkwiler
California Independent System Operator Corp.
250 Outcropping Way
Folsom, CA 95630

Ransom E. Davis — US MAIL
Public Service Commission of Maryland
6 Saint Paul St.
Baltimore, MD 21202-6806

Paul M. Flynn — EMAIL
Barry S. Spector
Wright & Talisman, PC
1200 G St., NW, Suite 600
Washington, DC 20005-1200

Marvin T. Griff — EMAIL
Husch Blackwell LLP
750 17th St., NW, Suite 900
Washington, DC 20006

Charlyn A. Hook — US MAIL
Frank R. Lindh
California Public Utilities Commission
505 Van Ness Ave.
San Francisco, CA 94102

Owen J. Kopon — EMAIL
Brickfield Burchette Ritts & Stone PC
1025 Thomas Jefferson St., NW
8th Floor, West Tower
Washington, DC 20007-5201

Jeffrey A. Lamken — EMAIL
Molo Lamken LLP
The Watergate
600 New Hampshire Ave., NW
Washington, DC 20037

Mary F. McKenzie — EMAIL
California Public Utilities Commission
Suite 4300A
505 Van Ness Avenue
San Francisco, CA 94941

Ashley C. Parrish EMAIL
David G. Tewksbury
King & Spalding, LLP
1700 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006-4706

Jonathan G. Mermin EMAIL
Preti, Flaherty, Beliveau & Pachios LLP
P.O. Box 9546
Portland, ME 04112-9546

Miles H. Mitchell EMAIL
Public Service Commission of Maryland
16th Floor
6 Saint Paul St.
Baltimore, MD 21202-6806

Jodi L. Moskowitz EMAIL
PSEG Services Corporation
80 Park Plaza T5G
Newark, NJ 07102-4194

Gary J. Newell EMAIL
Rebecca L. Sterzinar
Thompson Coburn LLP
1909 K St., NW, Suite 600
Washington, DC 20006-1167

David B. Raskin EMAIL
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, DC 20036-1795

Harvey L. Reiter EMAIL
Stinson Morrison Hecker LLP
1775 Pennsylvania Ave., NW, Suite 800
Washington, DC 20006

Sandra E. Rizzo — EMAIL
Bracewell & Giuliani LLP
2000 K St., NW, Suite 500
Washington, DC 20006-1872

Joseph D. Shelby — EMAIL
Stevens & Lee PC
51 South Duke Street
Lancaster, PA 17602

John L. Shepherd, Jr. — EMAIL
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., NW
Washington, DC 20005

Donald J. Sipe — US MAIL
Preti, Flaherty, Beliveau & Pachios LLP
45 Memorial Circle, P.O. Box 1058
Augusta, ME 04332-1058

Robert A. Weishaar, Jr. — EMAIL
McNees, Wallace & Nurick
777 N. Capitol St., NE, Suite 401
Washington, DC 20002-0000

Vickie Lynn Patton — EMAIL
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80304

/s/ *Holly E. Cafer*
Holly E. Cafer
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel: (202) 502-8485
Fax: (202) 273-0901
Email: holly.cafer@ferc.gov