ORAL ARGUMENT NOT SCHEDULED

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

No. 11-1442

CITIES OF ANAHEIM, AZUSA, BANNING, COLTON, AND RIVERSIDE, CALIFORNIA,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF September 20, 2012

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

To counsel's knowledge, the parties before this Court and before the Federal Energy Regulatory Commission in the underlying agency proceeding are as listed in Petitioners' brief.

B. Rulings Under Review:

1. Order on Rehearing, *Cal. Indep. Sys. Operator Corp.*, 121 FERC ¶ 61,193 (Nov. 20, 2007) ("Second Order"), R. 269, JA 1-63; and

2. Order Denying Rehearing, *Cal. Indep. Sys. Operator Corp.*, 136 FERC ¶ 61,197 (Sept. 16, 2011) ("Third Order"), R. 282, JA 64-75.

C. Related Cases:

This case has not previously been before this Court or any other court. Counsel is not aware of any other related cases pending before this Court or any other court.

/s/ Karin L. Larson
Karin L. Larson
Attorney

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GLOSSARY

ALJ	Administrative Law Judge
ALJ Decision	ALJ's Initial Decision, *Cal. Indep. Sys. Operator Corp.*, 113 FERC ¶ 63,017 (2005), R. 225, JA 325-388
Cities	Petitioners, the Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California
Commission or FERC	Federal Energy Regulatory Commission
Compliance Filing	Operator's December 20, 2007 filing, in Docket Nos. ER04-835-009 and EL04-103-004, complying with the Commission directive that the Operator modify the Criteria to accommodate South of Lugo as zonal, R. 272.
Compliance Order	*Cal. Indep. Sys. Operator Corp.*, 136 FERC ¶ 61,198 (2011), R. 281, JA 574-585
Criteria	Criteria developed to guide the allocation of minimum load costs, which were included in the California Independent System Operator's May 11, 2004 Tariff Filing as "Attachment E."
Edison	Southern California Edison Company
First Order	Order on Initial Decision, *Cal. Indep. Sys. Operator Corp.*, 117 FERC ¶ 61,348 (2006), R. 253, JA 400-453
JA	Joint Appendix
Operator	California Independent System Operator
Order on Tariff Filing	Order on Tariff Amendment No. 60, *Cal. Indep. Sys. Operator Corp.*, 108 FERC ¶ 61,022 (2004), R. 53, JA 140-181

P	Paragraph number in a FERC order
Path	The South of Lugo transmission path located in the SP15 zone.
R.	Record citation
Second Order	Order on Rehearing of Initial Decision, *Cal. Indep. Sys. Operator Corp.*, 121 FERC ¶ 61,193 (2007), R. 269, JA 1-63
SP15 zone	One of three congestion zones that comprise the Operator's zonal model for managing transmission congestion. The SP15 congestion zone encompasses most of Southern California including the Los Angeles basin and San Diego.
South of Lugo	The South of Lugo transmission path located in the SP15 zone.
Tariff	California Independent System Operator's Tariff
Tariff Filing	California Independent System Operator's May 11, 2004 petition to amend its tariff, R. 1, JA 72-126
Third Order	Order Denying the Cities' Request for Rehearing, *Cal. Indep. Sys. Operator Corp.*, 136 FERC ¶ 61,197 (2011), R. 282, JA 64-75

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

The issue presented for review is whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably allocated the cost of relieving constraints on the South of Lugo transmission path to all transmission users that contribute to the constraints or benefit from their relief.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are set out in the Addendum.

INTRODUCTION

This case concerns a discrete rate design issue – the allocation of costs incurred by the California Independent System Operator ("Operator") to relieve constraints on the South of Lugo transmission path ("South of Lugo" or the "Path"). As part of a substantial tariff amendment, the Operator proposed to revise the cost allocation methodology for a subset of costs related to a now defunct must-offer regime – minimum load costs. The proposed methodology allocated costs either locally, zonally or system-wide. (The broader the allocation, the greater the number of entities responsible for sharing in the costs.) The Operator proposed that costs related to the Path should be allocated zonally.

The Commission initially found that the proposed cost allocation methodology had not been shown to be appropriate and, accordingly, set the matter for hearing. *Cal. Indep. Sys. Operator Corp.*, 108 FERC ¶ 61,022, at P 63 (2004) ("Order on Tariff Filing"), R. 53, JA 140-181. After a hearing, both the administrative law judge ("ALJ") and the Commission found that, under the proposed cost allocation methodology, the Path's costs should be allocated locally. *Cal. Indep. Sys. Operator Corp.*, 113 FERC ¶ 63,017 (2005) ("ALJ Decision"), R. 225, JA 325-388; *Cal. Indep. Sys. Operator Corp.*, 117 FERC ¶ 61,348 (2006) ("First Order"), R. 253, JA 400-453.

Subsequently, on rehearing, the Commission reevaluated the actual operational characteristics of the Path and changed its prior determination regarding the allocation of the Path's minimum load costs. *Cal. Indep. Sys. Operator Corp.*, 121 FERC ¶ 61,193 (2007) ("Second Order"), R. 269, JA 1-63; *Cal. Indep. Sys. Operator Corp.*, 136 FERC ¶ 61,197 (2011) ("Third Order"), R. 282, JA 64-75. Specifically, the Commission held that a "local" classification of the Path would fail to allocate the costs to all users that benefit from relief of the Path's constraints. Accordingly, the Commission directed the Operator to revise the cost allocation tariff provisions to allocate the Path's costs zonally. The Commission explained that allocating the Path's costs zonally is consistent with its long-standing cost causation ratemaking standard, which allocates cost responsibility to those entities that cause the costs to be incurred or benefit from their incurrence. *See* Third Order at P 15, JA 70.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

The Federal Power Act gives the Commission exclusive jurisdiction over the rates, terms and conditions of service for wholesale sales of electric energy in interstate commerce. 16 U.S.C. § 824; *New York v. FERC*, 535 U.S. 1 (2002). Section 205 of the Federal Power Act provides that "[a]ll 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 . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 16 U.S.C. § 824d(a).

To enforce these requirements, Federal Power Act section 205 requires that utilities file tariffs reflecting their rates and service terms with the Commission, which must in turn ensure that those rates and terms are just and reasonable and not unduly discriminatory. *Id.* at § 824d(c); *see also Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 246 (D.C. Cir. 2007). Further, "no change shall be made by any public utility in any such rates, charges, classification, or service" without approval by the Commission. 16 U.S.C. § 824d(d).

II. THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR AND THE MUST-OFFER OBLIGATION

The Operator independently manages the transmission system throughout most of California and is responsible for coordinating and controlling that portion of the electric transmission grid. It does so pursuant to the terms and conditions and rate schedules set forth in its Commission-approved tariff ("Tariff").

In 2001, California experienced severe system disruptions and sharp increases in wholesale and retail electricity prices. In response, the Commission imposed on the Operator's control area what is known as the "must-offer obligation." *See City of Anaheim v. FERC*, 558 F.3d 521, 522 (D.C. Cir. 2009) (noting that the must-offer obligation was in place for a limited number of years).

Under the must-offer regime, most generating units serving California markets were required to offer all of their electrical capacity during all hours, unless the electricity was subject to a contract. *Id.* Some must-offer generators were required to operate at "minimum load" to ensure that they would be available for the Operator to call upon for energy in real time, if needed. First Order at P 3, JA 404. Minimum load is the minimum operating level at which a generating unit can operate at a continuous sustained level.

The Operator must compensate must-offer generating units for the costs of operating at minimum load. Order on Tariff Filing at P 7, JA 142. In turn, the Operator recovers these costs from market participants pursuant to the terms of its Commission-approved Tariff. At issue here is the allocation of these minimum load costs among market participants, specifically the costs incurred relieving constraints on the South of Lugo transmission path during the locked-in period the must-offer regime was in place. *See Cal. Indep. Sys. Operator Corp.*, 136 FERC ¶ 61,198, at P 26 (2011) (the tariff provisions at issue were superseded in 2009) ("Compliance Order"), R. 281, JA 583.

III. THE OPERATOR'S TARIFF FILING

The proceeding on appeal began on May 11, 2004, when, under section 205 of the Federal Power Act, 16 U.S.C. § 824d, the Operator filed substantial modifications to the tariff provisions related to the must-offer regime. Amendment

No. 60 to the California Independent System Operator's Tariff, Docket No. ER04-835-000 (filed May 11, 2004) ("Tariff Filing"), R. 1, JA 76-126. Only one tariff modification is relevant to this proceeding: the revised allocation methodology for costs associated with generating units operating at minimum levels (referred to in the Commission orders as "minimum load cost compensation" or "MLCC").

Specifically, the Operator proposed to allocate minimum load costs using a three-bucket rate design. The three buckets are local, zonal and system. This case involves the local and zonal buckets. The local bucket includes minimum load costs incurred when a must-offer generating unit is operated for local reliability reasons. Local costs are allocated exclusively to the transmission owner in whose service area the must-offer unit is located. Order on Tariff Filing at P 54, JA 157. The zonal bucket includes minimum load costs incurred when a must-offer unit is operated to provide zone-wide benefits or to manage inter-zonal congestion; i.e., units operated for broader, regional requirements. *Id.* Zonal costs are allocated to all users that requested power in the affected zone. *Id.* The Operator designed the three bucket allocation methodology to better reflect cost causation principles. *See* Tariff Filing at 32, JA 107.

The Operator included as Attachment E to its Tariff Filing certain criteria to help determine whether a particular must-offer generating unit was being operated to meet a local, zonal or system requirement (the "Criteria"). *See* Tariff Filing at

35 and Attachment E, JA 110 and 123-126. In very basic terms, the Criteria for local versus zonal designation delineates, respectively, between intra-zonal and inter-zonal constraints. Intra-zonal constraints are constraints on transmission facilities that are not part of a path between congestion zones and, thus, under the Criteria, fall within the "local" bucket. *See* Tariff Filing at 32-33, JA 107-108. Inter-zonal constraints consist of transmission paths between the Operator's three designated congestion zones (NP15, ZP26, and SP15), which are defined in the Tariff as an "inter-zonal interface." The South of Lugo transmission path lies within the SP15 zone, which comprises most of Southern California. ALJ Decision at P 65 n.34, JA 355. The Commission set for hearing the appropriateness of this minimum load cost allocation methodology. Order on Tariff Filing at P 63, JA 160.

In testimony in support of its cost allocation methodology, the Operator proposed to exclude the South of Lugo Path from the local bucket. Exhibit ISO-22 at 23:1-7, R. 304, JA 224. The Operator stated that, although the Path falls within the Criteria's definition of an intra-zonal constraint, the Path should be classified as zonal because it affects a broader, regional area. Specifically, the Operator stated that the Path brings power into the SP15 zone and transfers power between multiple service areas within that zone. *Id.* at 26:5-11, JA 227; *see also* ALJ

Decision at P 67 n.38, JA 356. Thus, according to the Operator, relief of constraints on the Path provides a regional benefit rather than a local one. *Id.*

IV. ORDERS ON THE SOUTH OF LUGO COST ALLOCATION PROPOSAL

A. ALJ Decision

The ALJ found the three-bucket, minimum load cost allocation methodology to be "generally just, reasonable and not unduly discriminatory," provided that the Criteria were incorporated into the Operator's Tariff. ALJ Decision at P 60, JA 352. Applying the cost causation principle, the ALJ determined that the proposed methodology matches both local and regional costs to responsible customers by (1) identifying the specific underlying local and regional constraints imposing the costs, and (2) allocating the costs to the local service territory or regional zone which is the predominant contributor to, or beneficiary of, the cost incurrence. *Id.* at P 62, JA 353.

With respect to the classification of the Path, the ALJ strictly applied the Criteria and found that the Path satisfied the Criteria's local definition. *Id.* at PP 91, 96 n.58 (concluding that "South of Lugo's local categorization is dictated by the [C]riteria . . . not by design"), JA 367, 370. The ALJ left for the Commission to decide whether categorizing the Path as local creates an unjust, unreasonable, or unduly discriminatory result. *Id.* at PP 96 n.58, 116 n.80, JA 370, 381.

B. First Order

The Commission "summarily affirmed" the ALJ's finding that the three bucket allocation method is just, reasonable, and not unduly discriminatory. First Order at P 25, JA 415 (finding the allocation methodology satisfied the Commission's cost causation and benefits derived standard). The Commission also agreed that the Criteria were an integral part of the proposed rate design and directed the Operator to revise its Tariff to incorporate the Criteria. *Id.*

In addition, the Commission affirmed the ALJ's findings regarding the Path. *Id.* at PP 31, 39, JA 418, 421 (affirming that the Path satisfies the local Criteria). Classifying the Path as local placed cost responsibility associated with the relief of the Path's constraints entirely on Southern California Edison Company ("Edison") because the must-offer units used to relieve constraints on the Path are located within Edison's service area. The Commission did not consider the issue, raised by the ALJ, of whether classification of the Path as local resulted in an unjust, unreasonable, or unduly discriminatory cost allocation.

C. Second Order

Edison sought rehearing of the Commission's denial of the Operator's proposal that South of Lugo be classified as a "zonal" constraint. Request for Rehearing of Edison (filed Jan. 26, 2007), R. 259, JA 454. On rehearing, the Commission considered whether allocating the Path's minimum load costs

"locally" based on a strict application of the Criteria created an unjust and unreasonable result. Second Order at P 17, JA 8.

The Commission reviewed the record evidence and, agreeing with Edison, concluded that the Path's actual operational characteristics show that it provides regional reliability benefits that are more consistent with a "zonal" classification. *Id.* at P 25, JA 13. The Commission based this conclusion primarily on its finding that the Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California (collectively, "Cities") and other load-serving entities contribute to the constraints on the South of Lugo Path and that resolution of constraints on the Path provides a regional benefit to these other entities (as well as to Edison). *See id.* at PP 25-26 (citing record exhibits), JA 13-14.

Thus, the Commission determined that the minimum load cost allocation rate design was unjust and unreasonable unless modified to accommodate the Path as a zonal constraint. *See id.* Accordingly, the Commission ordered the Operator to modify the zonal Criteria in its Tariff to accommodate the Path. *Id.* at P 26, JA 14. The effect of classifying the Path as "zonal" spreads the cost responsibility to all users within the SP15 zone, which includes the Cities.

D. Third Order

The Cities sought rehearing of the classification of the Path as zonal. *See* Request for Rehearing on Behalf of the Cities (filed Dec. 19, 2007), R. 271, JA

554. On rehearing, the Commission affirmed its determination that a just and reasonable cost allocation requires spreading the cost of relieving the Path's constraints across the SP15 zone rather than locally. Third Order at P 13, JA 69.

E. The Operator's Compliance Filings

On September 16, 2011, concurrent with issuance of the Third Order, the Commission accepted the Operator's February 26, 2007 and December 20, 2007 compliance filings in which the Operator revised its Tariff to (1) incorporate the allocation Criteria into the Tariff and (2) comply with the Commission's directive that the Operator modify the Criteria to accommodate the Path's classification as "zonal." *See* Compliance Order at PP 19, 26, JA 581, 583.

This appeal followed.

SUMMARY OF ARGUMENT

The Commission did not ignore or abandon any policy or rule here. Rather, it recognized and applied the most important rule in this proceeding – that costs follow benefits. Under established cost allocation principles, those entities who are responsible for certain costs, or benefit from their incurrence, should pay for those costs.

In applying the cost causation rule to the facts of this case, the Commission was guided, but not absolutely controlled, by the Criteria offered by the Operator. That the Commission belatedly reached its final decision here, after changing its

mind as to the best way to apply the Criteria, is hardly a reason to upset the Commission's decision. That is the very purpose of rehearing – to offer the agency another chance to consider the arguments of the parties.

Here, the Commission had ample reason to conclude that the Cities should share in the responsibility to pay for the costs of alleviating the constraint on the South of Lugo transmission path. As the Commission found, and as the Cities do not dispute, the Cities were partially responsible for the transmission constraint. Moreover, the Cities benefit from mitigation of the constraint.

The Cities, in an attempt to avoid responsibility for a portion of these costs, advocate for a strict application of the Criteria. But the reasonableness of the Criteria was an open issue throughout the proceeding. The Cities' entire argument is premised on the erroneous assumption that the Criteria are an established Commission-approved tariff provision. Moreover, the Cities' position would jettison any consideration of who actually causes and benefits from the costs at issue, in violation of the Commission's long-standing cost causation principle. Exercising its statutory discretion in assuring that rates are just and reasonable, the Commission understandably applied the cost causation rule and reasonably directed the Operator to amend the cost allocation methodology to categorize South of Lugo as a zonal constraint.

ARGUMENT

I. STANDARD OF REVIEW

The Court's review of Commission orders is governed by the arbitrary and capricious standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A); *see, e.g.*, *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (arbitrary and capricious standard governs review of FERC's orders regarding a proposed rate). The Court must affirm the Commission's orders so long as the Commission examined the relevant data and articulated a rational connection between the facts found and the choice made. *Midwest ISO*, 373 F.3d at 1368 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Commission's factual findings are conclusive if supported by substantial evidence. *Id.* (citing 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." *Fla. Mun. Power Agency. v. FERC*, 315 F.3d 362, 365-66 (D.C. Cir. 2003) (citations omitted). Where the evidence might support more than one rational interpretation, "the question [the Court] must answer . . . is not whether record evidence supports [the petitioner's] version of events, but whether it supports FERC's." *Cogeneration Ass'n v. FERC*, 525 F.3d 1279, 1283 (D.C. Cir. 2008) (citations omitted).

This standard of review is particularly deferential in the rate design context, which involves issues that are "fairly technical" and "involve policy judgments that lie at the core of the regulatory mission." *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009); *see also Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) ("The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions.").

As explained below, the Commission's decision to allocate the costs related to the relief of constraints on the Path to all customers that contribute to or benefit from such relief was reasonable, well-explained, supported by substantial evidence, and consistent with established policy. Accordingly, that decision must be upheld.

II. THE COMMISSION ADHERED TO ITS COST CAUSATION POLICY TO ALLOCATE THE PATH'S COSTS

A. The Cost Causation Principle Aligns Costs With Benefits

The Commission evaluates proposed rate designs under its well-established cost causation principle. ALJ Decision at P 62 (citing *Midwest Indep. Transmission Sys. Operator Inc.*, 108 FERC ¶ 61,163, at P 587 (2004) (proposed allocation of costs reasonable because the parties expected to benefit from the expenditure will be paying the costs); *Cal. Indep. Sys. Operator Corp.*, 103 FERC

¶ 61,114, at PP 20-26 (2003) (both cost causation and benefits received are appropriate considerations in determining whether a charge is just and reasonable); *Pac. Gas & Electric Co.*, 100 FERC ¶ 61,160, at P 15 (2002) (the cost of services that provide system-wide reliability benefits should be allocated to all system customers); *Midwest Indep. Transmission Sys. Operator Inc.*, 98 FERC ¶ 61,141, at 61,412 (2002) (holding that benefits received by loads served justified the allocation of costs to those loads)), JA 353-354. This Court described the cost causation principle as follows:

> [A]ll approved rates reflect to some degree the costs actually caused by the customer who must pay them. Not surprisingly, [the Court] evaluate[s] compliance with this unremarkable principle by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party.

Western Area Power Admin. v. FERC, 525 F.3d 40, 57-58 (D.C. Cir. 2008) (quoting *Midwest ISO*, 373 F.3d at 1368-69).

As acknowledged by the Court, the Commission's established ratemaking precedent requires rates to generally adhere to the principle of cost causation. *Alcoa*, 564 F.3d at 1346 (traditionally all Commission-approved rates reflect to some degree the costs actually caused by the customer who must pay them); *see also Midwest ISO*, 373 F.3d at 1368 (affirming recovery of a system operator's administrative costs from all system users because they all benefit from operation of the system) (citing *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir.

1992); *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 708 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *Pac. Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1320 (D.C. Cir. 2004)). The arbitrary and capricious standard governs the Court's review of the Commission's adherence to the cost causation principle. *Western Area Power Admin.*, 525 F.3d at 57 (upholding charge despite fact costs not shared precisely according to the users, where FERC articulated reasoned explanation).

The Cities fail to demonstrate that the Commission acted unreasonably in applying the cost causation policy or that it failed to apply the policy consistently. Here, the Operator's proposed cost allocation methodology, both in general and with respect to the Path, was based on the cost causation principle. *See* Tariff Filing at 1, JA 76. Consistent with precedent, on rehearing, the Commission applied the cost causation principle to determine the justness and reasonableness of the allocation of the Path's costs. *See* Second Order at PP 25-26, JA 13-14; Third Order at PP 16-17, JA 70-72.

Specifically, the Commission found that multiple grid users in the SP15 (Southern California) zone contributed to constraints on the Path and all such users benefitted from the Operator's must-offer calls that relieved the constraints. Second Order at PP 25-26, JA 13; Third Order at PP 16-17, JA 70-71. Record evidence showed that the Path is used by multiple load-serving entities, including

the Cities, to import power into southern California to serve load. Second Order at P 25, JA 13; Third Order at P 16, JA 70-71. Thus, relieving constraints on the Path benefits the Cities and other load-serving entities, such as Edison. Third Order at P 16, JA 70-71. Indeed, the Cities concede that they contribute to constraints on the Path. *See* Br. 26 ("The Southern Cities loads do affect flows on the South of Lugo constraint."). Further, the Commission found that all metered subsystems within the SP15 zone (not just Edison) are affected by the Path. Second Order at P 26 (citing the Operator's Operating Procedure T-144), JA 14; *see also* Third Order at P 17 (holding that record evidence supports conclusion that the Cities' loads benefit from SP15 zonal minimum load cost incurrence in the same manner as Edison's loads), JA 71-72.

Accordingly, the Commission appropriately held that classifying the Path as zonal for purposes of allocating the minimum load costs is:

> consistent with cost causation principles, because cost responsibility associated with the dispatch of must-offer generating units is allocated to the entities that cause those costs to be incurred. We find that those costs should not fall solely on SoCal Edison, but rather on all entities that cause those costs and that receive the zonal benefits associated with the dispatch of must-offer generating units to relieve the South of Lugo constraint.

Third Order at P 15, JA 70.

B. Consideration Of Benefits Is A Fundamental Part Of The Cost Causation Principle

The Cities misconstrue the Commission's application of the cost causation principle as an alleged new standard. *See* Br. 13, 20-23 (arguing that the Commission sidestepped the Criteria by relying on a "regional benefits" standard). The Cities' argument ignores that consideration of who benefits from a cost is an integral part of the cost causation standard.

Cost causation and received benefits are alternate means of expressing the same concept. *See KN Energy, Inc.*, 968 F.2d at 1302 (recognizing that the benefit principle is another prism through which to view the question of cost causation); *see also Midwest ISO*, 373 F.3d at 1368 (cost causation standard requires comparison of costs assessed against a party to the burdens imposed or benefits drawn by that party). The cost causation standard requires "costs [to] be matched, to the greatest practicable extent, to the customers responsible for imposing the cost burden at issue or benefiting from it." ALJ Decision at P 62 (citing cases), JA 353-354. As the ALJ recognized, "Commission precedent seems conclusive," an entity may be "deemed to have caused costs *either* if it is directly responsible for imposing the cost burden at issue *or* if the entity benefits from the cost incurrence." ALJ Decision at P 39, JA 343.

Consistent with precedent, the Commission identified who benefitted from relief of the Path's constraints to appropriately allocate the South of Lugo costs.

Indeed, the Cities acknowledge that the Commission's decision to allocate the Path's costs zonally was based on the finding that it provides "regional benefits." *See* Br. 23 n.15 (noting that in the Third Order, the Commission cites to the "regional benefits" that the Path provides in seven of the eleven paragraphs that comprise the Commission's determination).

C. The Criteria Are Not A Commission-Adopted Standard Or Rule

The Cities' claims regarding the Criteria are mistaken. *See* Br. 16-21 (arguing that FERC disregarded established rules or policies by departing from the "Commission-approved" Criteria). The Cities erroneously assert that the Criteria are a Commission-approved tariff rule that the Commission was required to follow in allocating the Path's costs. *See* Br. 16. Rather, the Criteria are simply part of the Operator's proposed three-bucket cost allocation methodology, presented here for the Commission's review. *See* First Order at P 25, JA 415. As explained below, the justness and reasonableness of the proposed Criteria remained an open issue until the Commission issued the final order denying the Cities' request for rehearing (the Third Order).

The Commission initially set the proposed minimum load cost allocation methodology for hearing pursuant to its authority under section 205 of the Federal Power Act, 16 U.S.C. § 824d(e). Order on Tariff Filing at PP 1, 63 (finding that the Operator's cost allocation proposal has not been shown to be just and

reasonable), JA 140, 160. In its order on the ALJ Decision, the Commission directed the Operator to submit a compliance filing incorporating the Criteria into its Tariff, subject to certain modifications. First Order at P 25, JA 415-416. But the First Order did not become final until the Commission issued an order on the subsequent rehearing requests. *See Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (finality of order suspended until the Commission fully resolves any rehearing request by way of a later final order). On rehearing, the Commission directed the Operator to "modify the . . . [C]riteria to accommodate South of Lugo" as zonal. Second Order at P 26, JA 14. The Criteria were unconditionally accepted as part of the Operator's Tariff in 2011 upon concurrent issuance of the Third Order and the Compliance Order.

Thus, the Cities' allegation that the Commission departed from an established rule lacks merit. Br. 20-21 (citing multiple D.C. Circuit cases, each of which involves an agency's departure from an established rule or precedent). As detailed *supra* at 14-16, the relevant Commission policy for examining any cost allocation proposal, including the proposed allocation of the Path's minimum load costs, is the cost causation standard. The Commission correctly applied that standard to evaluate the justness and reasonableness of the Operator's proposal to allocate the South of Lugo costs zonally. Third Order at P 15, JA 70.

That the ALJ and the Commission, initially, uncritically applied the Criteria to decide the cost responsibility for South of Lugo costs (ALJ Decision at P 96, n.58, JA 370; First Order at P 39, JA 421) was a misjudgment that the Commission corrected on rehearing. *See* Third Order at P 15 (finding that the ALJ Decision and First Order "incorrectly concluded" that the South of Lugo constraint should be classified as local under the Criteria), JA 70. The Commission's ultimate decision – to allocate South of Lugo costs zonally to more closely assign cost responsibility to all entities that benefit from the cost incurrence – reflects a reasoned application of the Commission's cost causation precedent.

III. THE COMMISSION FULLY EXPLAINED AND SUPPORTED THE BASIS FOR ALLOCATING SOUTH OF LUGO COSTS REGIONALLY

The Commission fully explained, in two orders, its decision to allocate the Path's minimum load costs across the SP15 (Southern California) zone rather than locally. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43-44 (agency must "articulate a satisfactory explanation" for its action). The Commission's task when reviewing, as here, a proposed rate design is to ensure, "based on record evidence, that the rates and practices set forth in the [Operator's] [t]ariff were just, reasonable, and not unduly discriminatory." *Wis. Pub. Power*, 493 F.3d at 260. Conversely, the Cities bear the burden "to show that the Commission's choices are unreasonable and its chosen line of demarcation is not within a zone of reasonableness as distinct

from the question of whether the line drawn by the Commission is precisely right." *Id.*

A. The Commission Reasonably Classified The South Of Lugo Path As Zonal Based On Substantial Record Evidence

The Commission's determination that the South of Lugo transmission path should be classified as zonal in the Second and Third Orders is fully supported. The Commission looked to South of Lugo's actual operational characteristics and found that the Path provides regional reliability benefits that are more consistent with a zonal constraint than a local constraint. Second Order at P 25, JA 13. The Commission's findings were based on the following record evidence:

1. Testimony by an Operator witness that the South of Lugo Path is associated with multiple high-voltage transmission paths, over which power flows into the SP15 zone. Exhibit ISO-22 at 23, 25, R. 304, JA 224, 226.

2. Testimony from an Edison witness that South of Lugo is a major transmission path that imports power to the Los Angeles basin, a large load center. Exhibit SCE-6, R. 329, JA 189-221.

3. Testimony from an Edison witness that there is no meaningful distinction between the Cities' loads, which are located in the Los Angeles basin, and Edison's loads with respect to transmission reliability and who benefits from the South of Lugo path. *Id.*

4. The Operator's sworn statements that if the Path is overloaded the Cities', Edison's, and San Diego Gas & Electric Co.'s loads would be subject to curtailment; i.e., being dropped, and a significant benefit of must-offer minimum load requirements is avoidance of load dropping. Exhibit S-37, R. 467, JA 247-248.

5. Operator testimony that the South of Lugo constraint should be

classified as a "zonal." Exhibit ISO-1, R. 283, JA 270-274.

6. Testimony from a Cities witness that because overloads or outages on transmission lines in the SP15 zone, including the Path, affect the Cities' ability to import power, the Cities benefit from mitigation of transmission constraints in the SP15 zone. Exhibit SOC-42 at 6-7, R. 391, JA 280-281.

7. The Cities' data response detailing the amount of power they import into the SP15 zone. Exhibit SCE-19 at 2, R. 342, JA 277.

See Second Order at PP 25-26 (citing the record evidence identified above as indicating that relief of South of Lugo constraints provides regional reliability benefits), JA 13-14.

The Commission found this evidence showing regional benefits "compelling." Third Order at P 16, JA 70. Even when weighed against evidence identified by the Cities (evidence that the problem is not imports but a lack of generation to support imports), the Commission held that "this qualifier does not diminish the essential fact that relieving the South of Lugo constraint benefits" the Cities and other entities serving load within their own territories. *Id.*; *see also Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("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").

If classified as local, the South of Lugo minimum load costs would have been allocated only to one of the load-serving entities benefitting from the

Operator's relief of the South of Lugo constraint – Edison. Such a mismatch between benefits and cost responsibilities, the Commission understandably found, was not acceptable. Third Order at P 15 ("costs should not fall solely on [] Edison, but rather on all entities that cause those costs and that receive the zonal benefits"), JA 70; *see also id.* at P 19 ("allocating . . . costs to one particular [entity] is not equitable where more than one [entity] benefits"), JA 73. Thus, based on the record compiled in this proceeding, the Commission justifiably concluded that allocating the South of Lugo costs across the SP15 (Southern California) zone more closely matched costs to the entities responsible for necessitating the costs or benefitting from them. *See Western Area Power Admin.*, 525 F.3d at 58 ("FERC is not bound to reject any rate mechanism that tracks the cost causation principle less than perfectly."). The Cities fail to show that the Commission's decision was unreasonable.

B. The Commission Fully Responded To Objections Raised On Rehearing

The Cities remaining challenge to the Commission orders is that the Commission failed to meaningfully respond to its objections raised on rehearing. Br. 22-33. The Cities raised three arguments on rehearing: (1) the Commission failed to provide a reasoned explanation for its change in position regarding South of Lugo; (2) the Commission's classification of South of Lugo as zonal was inconsistent with the Criteria; and (3) the Commission disregarded evidence

concerning operational characteristics of the South of Lugo Path that support a "local" classification. Rehearing Request at 2-4, JA 556-558. Contrary to the Cities' assertion, however, the Commission provided detailed support and explanation for its determination and responded to each of the Cities' contentions raised on rehearing. *See* Third Order at PP 13-23, JA 69-75.

1. The Commission Correctly Changed Its Decision On Rehearing

The Cities' fail to appreciate the Commission's explanation for its ultimate cost allocation decision. On rehearing, the Commission identified the applicable cost allocation principle and detailed the record evidence supporting the classification of South of Lugo as zonal. Third Order at P 14, JA 70. Next, the Commission explained why it found the cited record evidence compelling. *Id.* at PP 15-17, JA 70-72. Unlike the cases the Cities cite in support of their argument (Br. 24), here there was no absence of explanation.

Rehearing "enables the Commission to correct its own errors" or "to explain why in its expert judgment the party's objection is not well taken, which facilitates judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005). Specifically, Federal Power Act section 313(a) provides that "the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing." 16 U.S.C. § 825*l*(a); *see also Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125-26 (D.C. Cir. 2002) (on rehearing the

Commission may reverse the outcome of an earlier order or may retain the outcome but supply a "new improved rationale"). Consistent with the purpose of rehearing, the Commission identified an error in the First Order (allocating South of Lugo costs in a manner that did not match cost incurrence with cost responsibility) and corrected the error. The Commission cannot be faulted for changing positions where, as here, it identified the supporting evidence and explained the change.

2. The Commission Answered The Charge That It Improperly Ignored The Criteria

The Commission did not disregard the Cities' claim (Br. 24) that the Commission's "regional benefits test" is inconsistent with the Criteria. *See* Third Order at P 18 (disagreeing with the premise of the Cities' contention that the Commission introduced a new "regional benefits concept"), JA 72. From the inception of the administrative proceeding, the reasonableness of the Criteria was in question, subject to the Commission's examination under the Federal Power Act. The Criteria were never Commission-approved or -adopted guidelines, standards or policy, to be applied uncritically in this case. *Compare* First Order at P 25 (Criteria should be added to Tariff), JA 415-416, *with* Second Order at P 26 (Criteria must be modified to accommodate South of Lugo zonal designation), JA 14.

It is sufficient that the Commission explained on rehearing that examination of the justness and reasonableness of the South of Lugo cost allocation required consideration of which entities received the benefits associated with relief of the South of Lugo constraint, consistent with cost causation principles. *See* Third Order at PP 13, 15, 18, JA 69, 70, 72. Significantly, no party in this case ever disputed that the governing standard for evaluating cost allocation issues is the cost causation standard. *See* ALJ Decision at PP 35-36, JA 342-343 (detailing parties' positions regarding the cost causation standard).

3. Commission Did Not Ignore The Cities' Evidence

The Commission also fully confronted the Cities' third objection on rehearing, that the Commission disregarded evidence concerning operational characteristics of the South of Lugo Path that support a "local" classification. *See* Rehearing Request at 14-18, JA 568-572. The Cities argue that the First Order enumerated multiple operating characteristics that "compelled" classification of South of Lugo as a local constraint and, on rehearing, the Commission did not "reverse" the prior factual determinations regarding those operating characteristics. Br. 27-28; *see also* Third Order at P 10 (summarizing the Cities' rehearing objection on this issue), JA 68.

The Commission confronted all of these facts and arguments on rehearing. *See* Third Order at PP 19-22, JA 72-74. The Commission readily acknowledged

that "South of Lugo does not satisfy the interzonal interface definition in [the Criteria]." Second Order at P 25, JA 13. Instead, the Commission found that South of Lugo's "actual operational characteristics," i.e., how the transmission path functions, show that the Path has a broader, regional impact. Third Order at P 13 (recognizing the "difficulties inherent in evaluating" the operational characteristics), JA 69.

Contrary to the Cities' assertion that the Commission in the Second and Third Orders "vacillated on the significance of" Operating Procedure T-144, the Commission consistently referenced T-144 as additional support for the allocation of South of Lugo costs zonally. *See* Third Order at PP 21-22 (finding that both versions of Operating Procedure T-144 support the decision to classify South of Lugo as a zonal constraint), JA 73-74; *see also* Second Order at P 26 (noting that T-144 shows that multiple utility distribution companies are affected by South of Lugo), JA 14. Generally, the Operator develops operating procedures to guide implementation of its Tariff requirements. Operating Procedure T-144 specifies the procedures for operating the South of Lugo transmission lines under normal and emergency conditions and identifies generating units available to mitigate constraints on the Path.

The Cities arbitrarily assign significance to the fact that the Operator adopted a new version of T-144 after initiating this tariff proceeding. Br. 31-32.

The Commission explained that "while there are differences between the two versions of the T-144 operating procedure, a careful reading of both documents reveals that there are material similarities . . . that support the decision to" classify South of Lugo as a zonal constraint. Third Order at P 21 (parsing through both versions to "fully assess [the Cities'] argument that [the Second] Order inappropriately relied on version 4.4 rather than version 4.3"), JA 73-74. Further, the Commission answered the Cities' charge that version 4.4 was unreliable because it was not support by an engineering analysis (Br. 31-32). *See* Third Order at P 22 (finding that version 4.4 went through the Operator's same technical review and approval process as version 4.3), JA 74.

The Commission also considered the Cities' evidence that South of Lugo is merely a local reliability issue. *See id.* at P 20 (finding that the extent to which must-offer generating units help address local reliability is incidental to the regional relief of reducing constraints on South of Lugo), JA 73. Finally, the Commission addressed evidence raised by the Cities that the South of Lugo constraints arise from voltage stability concerns, not from power flows. *See id.* at P 19 (holding that "whether the constraint on South of Lugo is related primarily to voltage issues does not provide a compelling reason to categorize South of Lugo as [a] local constraint"), JA 73. Ultimately, the Commission considered the evidence proffered by the Cities, but found that it was not "compelling in face of the

evidence indicating that the [South of Lugo] constraint is appropriately classified as zonal." *Id.* at P 20, JA 73.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the Commission's orders should be upheld in all respects.

Respectfully submitted,

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July 23, 2012
FINAL BRIEF: September 20, 2012

City of Anaheim et al. v. FERC **Docket No. ER04-835 *et al.***
D.C. Cir. No. 11-1442

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 6,698 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addenda.

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FINAL BRIEF: September 20, 2012

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 703. Form and venue of proceeding

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

Subsec. (g)(5). Pub. L. 109–58, § 1277(b)(1), substituted ''2005'' for ''1935''.

1992—Subsec. (g). Pub. L. 102–486 added subsec. (g).

1978—Subsec. (b). Pub. L. 95–617, § 204(b)(1), designated existing provisions as par. (1), inserted ''except as provided in paragraph (2)'' after ''in interstate commerce, but'', and added par. (2).

Subsec. (e). Pub. L. 95–617, § 204(b)(2), inserted ''(other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title)'' after ''under this subchapter''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1277(b)(1) of Pub. L. 109–58 effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such date, see section 1274 of Pub. L. 109–58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102–486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102–486, set out as a note under section 796 of this title.

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Section 214 of Pub. L. 95–617 provided that:

''(a) PRIOR ACTIONS.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall apply to, or affect, any action taken by the Commission [Federal Energy Regulatory Commission] before the date of the enactment of this Act [Nov. 9, 1978].

''(b) OTHER AUTHORITIES.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title.''

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

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

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

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 20th day of September 2012, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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