ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 12-1008 and 12-1081

TC RAVENSWOOD, LLC, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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December 5, 2012

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

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

B. Rulings Under Review:

1. Order Accepting Tariff Revisions Subject to Modification, Suspending for Five Months, and Directing Compliance Filings, *New York Independent System Operator, Inc.*, 134 FERC ¶ 61,058 (Jan. 28, 2011) ("January Order"), R.36, JA 573;

2. Order on Request for Expedited Clarification and Rehearing, *New York Independent System Operator, Inc.*, 134 FERC ¶ 61,178 (Mar. 9, 2011) ("March Order"), R.65, JA 800;

3. *New York Independent System Operator, Inc.*, 135 FERC ¶ 61,002 (Apr. 4, 2011) ("April Order"), R.81, JA 912;

4. Order on Rehearing, *New York Independent System Operator, Inc.*, 135 FERC ¶ 61,170 (May 19, 2011) ("May Order"), R.117, JA 998; and

5. Order on Rehearing, *New York Independent System Operator, Inc.*, 137 FERC ¶ 61,218 (Dec. 15, 2011) ("December Order"), R.135, JA 1181.

C. Related Cases:

This case has not previously been before this Court or any other court. Other appeals pending in this Circuit have substantially the same parties but different issues: (1) *New York Public Service Commission v. FERC*, Nos. 08-1366,

et al. (D.C. Cir. filed Nov. 21, 2008 and later) (mitigation in New York City capacity market); (2) *TC Ravenswood, LLC v. FERC*, No. 11-1258 (D.C. Cir. filed July 12, 2011) (mitigation in energy markets outside of New York City and Long Island); and (3) *TC Ravenswood, LLC v. FERC*, No. 11-1305 (D.C. Cir. filed Aug. 25, 2011) (mitigation in New York City capacity market).

/s/ Jennifer S. Amerkhail
Jennifer S. Amerkhail
Attorney

December 5, 2012

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GLOSSARY

April Order	*New York Independent System Operator, Inc.*, 135 FERC ¶ 61,002 (Apr. 4, 2011), R.81, JA 912
Commission or FERC	Federal Energy Regulatory Commission
December Order	*New York Independent System Operator, Inc.*, 137 FERC ¶ 61,218 (Dec. 15, 2011), R.135, JA 1181
FPA	Federal Power Act
First Tariff Revision	New York ISO's Tariff Revisions to Implement Revised Demand Curves (filed Nov. 30, 2010), R.1, JA 25
JA	Joint Appendix
January Order	*New York Independent System Operator, Inc.*, 134 FERC ¶ 61,058 (Jan. 28, 2011), R.36, JA 573
March Order	*New York Independent System Operator, Inc.*, 134 FERC ¶ 61,178 (Mar. 9, 2011), R.65, JA 800
May Order	*New York Independent System Operator, Inc.*, 135 FERC ¶ 61,170 (May 19, 2011), R.117, JA 998
New York ISO or NYISO	Intervenor New York Independent System Operator, Inc., operator of the transmission grid in New York and administrator of electricity markets for capacity products
NYC	New York City
New York Commission	Public Service Commission of the State of New York
R.	Record citation
Ravenswood	Petitioner TC Ravenswood, LLC

Second Tariff Revision	New York ISO Tariff Filing: Compliance to State Currently Effective Demand Curves (filed Mar. 28, 2011), R.70, JA 856
September Order	*New York Independent System Operator, Inc.*, 136 FERC ¶ 61,192 (Sept. 15, 2011), R.131, JA 1099
Suppliers	Petitioners TC Ravenswood, LLC, NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC
Tariff	New York ISO Market Administration and Control Area Services Tariff

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FEDERAL ENERGY REGULATORY COMMISSION,
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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

This case concerns the level of wholesale electricity rates in New York for the period 2011 through 2014. Certain wholesale suppliers of electricity in New York City claim that the Federal Energy Regulatory Commission ("Commission" or "FERC") erred, on statutory and policy grounds, in not allowing new, higher rates to go into effect earlier. While these suppliers present many specific issues for review, the ratemaking issues presented fall into two general categories:

1. Whether the Commission violated the rate filing provisions of section 205(e) of the Federal Power Act ("FPA"), 16 U.S.C. § 824d(e), by suspending the

effectiveness of the proposed tariff for a period longer than suppliers would prefer.

2. Whether the Commission adequately explained its decision in considering various factors (inflation, revenue projections, property taxes) in setting the level of the demand curves used to set the rates.

STATUTORY AND REGULATORY PROVISIONS

The Addendum to this brief contains the pertinent statutory and regulatory provisions.

INTRODUCTION

New York Independent System Operator, Inc. ("New York ISO") operates a market for electric capacity in New York State. Capacity is the capability to generate or transmit electrical power, and is distinct from energy, which is the actual quantity of electricity that is bid, produced, purchased, consumed, sold, or transmitted over a period of time. To set the rate paid for capacity, New York ISO holds monthly auctions using administratively-determined curves that serve as a proxy for customers' demand. There is a curve for each different area, or zone, of the state: (1) New York City; (2) Long Island; and (3) the Rest of New York (also called New York Control Area). And there is a different curve for each capability year.

The New York ISO files to reset these demand curves every three years. In the proceeding below, New York ISO proposed new demand curves for the

capability period May 2011 through April 2014. Petitioners TC Ravenswood, LLC ("Ravenswood"), NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC (collectively, "Suppliers"), as well as other suppliers and consumer representatives, contested parts of its proposal.

In a series of orders on New York ISO's proposal, the Commission resolved the many issues raised regarding the factors that define, and the implementation of, those demand curves. *New York Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,058 (2011) ("January Order"), R.36, JA 573, 134 FERC ¶ 61,178 (2011) ("March Order"), R.65, JA 800, 135 FERC ¶ 61,002 (2011) ("April Order"), R.81, JA 912, 135 FERC ¶ 61,170 (2011) ("May Order"), R.117, JA 998, 136 FERC ¶ 61,192 (2011) ("September Order"), R.131, JA 1099, 137 FERC ¶ 61,218 (2011) ("December Order"), R.135, JA 1181.[1] (A one-page list of relevant dates and events is attached in the Addendum to this brief.)

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

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. The Federal Power Act

Section 201(b) of the Federal Power Act confers upon the Commission jurisdiction over all rates, terms and conditions of electric transmission service and sales at wholesale by public utilities in interstate commerce. 16 U.S.C. § 824(b).

Section 205(c) of the FPA, 16 U.S.C. § 824d(c), requires public utilities to file tariff schedules with the Commission providing their jurisdictional rates, terms and conditions of service, and related contracts for service. When those tariff schedules are filed, sections 205(a)-(b) of the FPA, 16 U.S.C. §§ 824d(a)-(b), direct the Commission to assure that the rates and services described in the tariff are just and reasonable and not unduly discriminatory. *See also* 18 C.F.R. § 35.1 (obligation to file rates and tariffs).

Section 205(e), 16 U.S.C. § 824d(e), provides that the Commission may suspend tariff schedules, and defer the use of any rates proposed therein, for up to five months while the Commission investigates the justness and reasonableness of the proposal. At the end of the suspension period, the proposed change becomes effective, subject to refund if the Commission later determines the change to be unjust and unreasonable.

B. New York ISO Capacity Markets

For the last decade, the New York ISO has operated monthly auctions for capacity using an administratively-determined demand curve. *Electricity Consumers Res. Council v. FERC*, 407 F.3d 1232, 1235 (D.C. Cir. 2005). Capacity suppliers bid into these auctions each month and thereby create the supply curve. *Id*. "[T]he point of intersection between the supply curve and the [installed capacity] Demand Curve . . . determines the quantity and price of required [capacity]." *Id*.; *see also Consolidated Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 966 (D.C. Cir. 2003) ("[u]nlike tariffs for traditional cost-of-service rates, the filed tariffs at issue here contain no precise prices; instead, they set standards for NYISO's administration of . . . markets"); *Independent Power Producers of N.Y. v. New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,311 at P 34 n.18, JA 1246 (2008) ("the monthly auctions establish the supply/demand intersect point at which, in times like these of excess capacity, the price will be expected to fall below the reference point cost of new entry").

This Court has addressed New York ISO's capacity market and others like it, as well as administratively-determined demand curves, often since the inception of these markets. *See Keyspan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1054 (D.C. Cir. 2003) (addressing recalculation of price cap for New York ISO's capacity market with a new pricing methodology); *Electricity Consumers*, 407

F.3d at 1234 (upholding New York ISO's new capacity market rate design); *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 810 (D.C. Cir. 2007) (addressing the amount of capacity that entities are required to purchase in the New York ISO auctions); *Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 468 & n.3 (D.C. Cir. 2008) (discussing capacity market mechanisms, including an "administratively-determined demand curve," considered for the New England ISO); *Connecticut Dept. of Pub. Util. Control v. FERC*, 569 F.3d 477, 480 (D.C. Cir. 2009) (same); *Maryland Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285-86 (D.C. Cir. 2011) (upholding prices resulting from capacity auctions in the mid-Atlantic region that employ an administratively-determined demand curve).

In the New York ISO capacity markets, a demand curve is defined by three points. *See Electricity Consumers*, 407 F.3d at 1235 ("Figure 2: Sloped [Capacity] Demand Curve" (showing the three points used to define the demand curve in the first auctions and a hypothetical supply curve)). At the full (100 %) peak load capacity requirement, "the price equals the annualized cost of a new peaker plant" less predicted revenues from energy sales. *Id.*; *see* January Order at P 6, JA 575 (explaining same). The price falls to zero once the requisite reserve margin is met, usually between 12 and 18 percent in addition to peak load. January Order at P 6, JA 575. The third and final point is the maximum price paid for capacity equal to 1.5 times the annualized cost of a new peaking unit. *Id.*; *see also* Figure 1, *infra*

p. 8 (showing three points of the demand curves for each capacity zone in New York ISO for 2010 to 2012).

Every three years, New York ISO reassesses factors used to determine the demand curves. *See* New York ISO Market Administration and Control Area Services Tariff ("Tariff"), § 5.14.1.2, R.1, JA 52 (filed Nov. 30, 2010). It follows a lengthy process set forth in its Tariff for expert, independent review and many iterations of stakeholder input. *Id.*, §§ 5.14.1.2.1 to 5.14.1.2.11, JA 53-54; *see also* January Order at PP 4-5, JA 574-75 (describing requisite assessments and review process). At the conclusion of that review process, New York ISO proposes new demand curves for the next three years and submits them to the Commission for its review. Tariff § 5.14.1.2.11, JA 54.

II. The Commission Proceedings And Orders

A. First Proposed Tariff Revision

On November 30, 2010, New York ISO proposed revisions to its Tariff to implement new demand curves for May 2011 through April 2014. Tariff Revisions to Implement Revised Installed Capacity Demand Curves, at 1, JA 25 ("First Tariff Revision"). (Chronology of Proceeding, a one-page list of relevant dates and actions, is attached in Addendum.) The proposed revisions incorporated new characteristics and assumptions about the costs and revenues of peaking units for each of the three different zones in the state. *Id*. at 5-20, JA 29-44. New York

ISO also reviewed the shape and slope of the existing demand curves and proposed not to change either. *Id*. at 21, JA 45. Figure 1, below, shows the three demand curves at issue in this appeal for the 2011/2012 period, as compared to the 2010/2011 curves that were in use at the time of New York ISO's filing. New York ISO's First Proposed Revision is shown in column II of Figure 1.

Figure 1: Comparison of 2010/2011 and 2011/2012 Demand Curves
(dollar figures are in $/kW-month and percentages are of the peak load)

	I	II	III	IV
	Existing Curves 5/2010 - 4/2011	First Proposed Revision (suspended and superseded)	Second Proposed Revision 5/2011 - 9/2011	Compliance Curves 10/2011 - 4/2012
New York City	$27.32 at max **$15.99 at 100%** $0.00 at 118%	$32.36 at max **$16.91 at 100%** $0.00 at 118%	$27.32 at max $15.99 at 100% $0.00 at 118%	$34.84 at max $19.19 at 100% $0.00 at 118%
Long Island	$24.25 at max **$8.69 at 100%** $0.00 at 118%	$29.43 at max **$6.31 at 100%** $0.00 at 118%	$24.25 at max $8.69 at 100% $0.00 at 118%	$31.35 at max $9.98 at 100% $0.00 at 118%
Rest of New York	$13.42 at max **$9.90 at 100%** $0.00 at 112%	$14.65 at max **$8.86 at 100%** $0.00 at 112%	$13.42 at max $9.90 at 100% $0.00 at 112%	$14.96 at max $8.84 at 100% $0.00 at 112%

Source: First Tariff Revision, § 5.14.1.2, JA 51-52; Compliance Filing, § 5.14.1.2, R.132, JA 1141-42 (filed Sept. 22, 2011).

Because New York had excess capacity in all zones in 2011, *see* First Tariff Revision, Attachment 1 at P 25, JA 78, the most relevant number in Figure 1 is the

price at 100 percent of peak load. While the table shows (in bold) that New York ISO proposed to increase this price between 2010/2011 and 2011/2012 for New York City, it also shows that New York ISO proposed to decrease the price for other New York zones. (In its January Order at Appendix A, JA 632, the Commission graphically depicted these demand curves superimposed on all other demand curves used since 2003.)

Not shown in Figure 1 are the last two years of the capability period, May 2012 through April 2014. New York ISO proposed to inflate the 2011/2012 curve by 1.7 percent to establish curves for these years. First Tariff Revision at 22, JA 46. Finally, New York ISO requested an effective date of January 28, 2011 for the proposed demand curves. *Id*. at 23, JA 47.

B. January Order

On January 28, 2011, on review of the First Tariff Revision, the Commission directed modifications to several "inconsistencies in the determination of the proposed [capacity] demand curves. . . ." January Order at P 1, JA 573. Finding that the First Tariff Revision may be unreasonable in that it contained improperly calculated components, *id*. at P 167, JA 630, the Commission suspended it "for five months, to become effective the earlier of June 28, 2011, or a date set by a subsequent Commission order." *Id*. at P 168, JA 630. The Commission directed

that "the currently effective demand curves will remain in effect until superseded." *Id*.

Noting the difficulties of implementing demand curves in the middle of the summer, the Commission suggested that New York ISO indicate when it would be able to implement the revised curves. *Id*. The Commission allowed for some flexibility in implementation, but required that the new demand curves be in use no later than November 1, 2011. *Id*.

The Commission directed many changes to, or further analysis of, the factors that determine the revised demand curves. *See*, *e.g.*, *id*. at PP 53, JA 592 (including the costs of System Deliverability Upgrades that allow a resource to deliver its power throughout the capacity zone), 90, JA 606 (excluding property tax abatement), 114, JA 614 (revising the level of excess capacity), 140, JA 622 (requiring more support for estimates of New York City interconnection costs), 161, JA 628 (revising winter/summer ratio to reflect single excess capacity assumption). Some of these changes were simple, such as the requirement to exclude property tax abatement from the calculation of the costs of a New York City peaking unit. *Id*. at P 90, JA 606. Others, such as the requirement to consistently apply one assumption about levels of excess capacity in the system, were harder, requiring New York ISO to provide additional support for its

proposed levels or provide analysis supporting an alternate level and make any requisite changes to several factors. *Id*. at P 114, JA 614.

C. March Order

Responding to a request for expedited clarification from New York ISO, the Commission, on March 9, 2011, provided that "the current 2010/2011 demand curve rates are to remain in effect without [any escalation or] adjustment during the suspension period. . . ." March Order at P 16, JA 805. Further, if New York ISO proposed an escalated demand curve to go into effect in May 2011, the Commission explained that it would not accept such a rate during the five-month suspension period. *Id*. at 16 & n.11, JA 805 (providing that an interim rate is appropriate pending final approval of a settlement, but not "with respect to alternate rate proposals for the five-month suspension period"). Additionally, the Commission provided that New York ISO "may choose to defer the effective date even further [past June 28, 2011] if it does not wish to implement the revised rates during the summer . . . Period." *Id*. at P 18, JA 807.

In the same order, the Commission denied Ravenswood's emergency request to shorten the five-month suspension period. *See id*. at PP 10-14, 17-18, JA 803-804, 806-807; Ravenswood's Emergency Request for Rehearing and Expedited Action (filed Feb. 7, 2011) ("Ravenswood February Rehearing Request"), R.37, JA 634. Elaborating on its reason for imposing the maximum suspension, the

Commission provided that the suspension length was consistent with the policy in *West Texas Utilities Co.*, 18 FERC ¶ 61,189 (1982). March Order at P 17 n.13, JA 806. The demand curves here are not "typical rates" and have a "unique nature and purpose," *id*., in that the demand curves are used in capacity auctions along with market participants' bids to determine the ultimate capacity prices for each month. *Id*. at P 18, JA 807.

In response to Ravenswood's argument that the existing demand curves were too low, the Commission found that they continue to be just and reasonable and had not been shown to be unreasonable. *Id*. at P 17, JA 806. For that reason, "the existing rates [should] remain in effect until replaced by rates ordered by the Commission. . . ." *Id*.

D. Second Proposed Tariff Revision

On March 28, 2011, New York ISO proposed revisions to its Tariff to implement new demand curves for May 2011 through April 2014. New York ISO Tariff Filing: Compliance to State Currently Effective Demand Curves, R.70, JA 856 (Mar. 28, 2011) ("Second Tariff Revision"). The revised demand curves were a combination of: (1) un-escalated 2010/2011 curves; and (2) the proposed curves from the First Tariff Revision. *Id*., Attachment II at 2-3, JA 863-64. New York ISO requested an effective date in April so that it could implement the un-escalated 2010/2011 demand curves for the May 1, 2011 auction. *Id*. at 1, JA 856. It also

requested that the "current [capacity] Demand Curves . . . remain in effect until a date to be determined by the Commission upon its issuance of an order on the compliance filing that the New York ISO intends to submit on March 29, 2011." *Id*. at 3, JA 858. Finally, New York ISO requested that the Commission grant any waivers necessary for its filing. *Id*. at 1, JA 856.

E. April Order

By letter order on April 4, 2011, the Commission accepted the Second Tariff Revision and granted New York ISO's request that it remain "in effect on and after May 1, 2011, until a date set by Commission order." April Order at P 1, JA 912. The Commission also found "good cause" to grant waiver of the notice requirement to allow the revisions to become effective on April 21, 2011, that is, less than 60 days after the revisions were filed. *Id*. at P 10, JA 915 (granting waiver "to provide certainty for participants in the May 1, 2011 [auction]").

F. Change In New York's Property Tax Law

On May 11, 2011, the Public Service Commission of the State of New York ("New York Commission") filed a letter in the proceeding below, announcing a state effort to change the New York City property tax abatement law. New York Commission Letter, R.111, JA 963. The New York Commission described the legislative measure as "guarantee[ing] property tax abatements to the relevant generation facilities that would be located in the City." *Id*. At that time, the bill

had passed the State Assembly and was scheduled for action by the New York State Senate the following week. *Id.*

The following week, the Senate passed the bill. The Governor signed it into law on May 18, 2011. 2011 N.Y. Laws 28, JA 1261. The measure amended the real property tax law "for the purpose of making peaking units eligible for benefits, as of right, under the . . . abatement program." *Id.* § 1, JA 1261. The law provides qualifying peaking units with a full abatement of property tax for fifteen years. *Id.* §§ 2-3, JA 1262 (codified at N.Y. REAL PROP. TAX LAW § 489-aaaaaa & bbbbbb (Consol. 2012)).

G. May Order

Suppliers and others timely filed requests for rehearing of the January Order and the March Order. *See, e.g.*, R.55, JA 688 (Suppliers' Rehearing Request); R.57, JA 717 (New York ISO's Rehearing Request); R.58, JA 767 (City of New York's Rehearing Request); Ravenswood's Request for Rehearing and Clarification ("Ravenswood's April Rehearing Request") (filed Apr. 8, 2011), R.99, JA 917.

On May 19, 2011, the Commission addressed Suppliers' and other parties' arguments and denied all requests for rehearing of the January Order except one. May Order at P 1, JA 998; *see, e.g., id.* at PP 20-25, JA 1005-1007 (denying request of New York ISO and consumers to exclude deliverability costs from

curves), 58-66, JA 1019-20 (denying request of New York ISO and consumers to accept unsupported excess capacity assumption), 68, JA 1022 (rejecting request by independent power producers to prescribe inputs that set the excess capacity assumption), 93-94, JA 1033 (denying request of New York ISO and consumers to exclude interconnection costs from the New York City demand curve), 98-100, JA 1035 (denying New York ISO's request to accept its proposed winter/summer revenue adjustment without further revision).

Reviewing the record and finding changed circumstances in the new tax law, *id*. at P 41, JA 1013, the Commission granted rehearing to the extent it directed New York ISO to modify the demand curve to include a full tax abatement for the New York City proxy peaking unit. *Id*. at P 43, JA 1014.

As relevant in this appeal, the May Order also reaffirmed the use of the model employed by New York ISO's expert that predicts energy and ancillary services revenues for the proxy peaking units, rejecting the model proposed by Suppliers' expert as unreasonable. *Id*. at PP 73-75, JA 1024-25. It also reaffirmed the New York ISO's proposal to inflate by 1.7 percent the 2011/2012 costs to create demand curves for the next two years. *Id*. at PP 82-88, JA 1028-30. Finding that New York ISO had adequately supported this inflation factor, the Commission explained that it allows regional variations in indices used to support inflation factors. *See id*. at PP 88-89, JA 1030-31.

Finally, the Commission addressed Ravenswood's request for rehearing of the March Order. *Id*. at PP 101-106, JA 1036-37. Recounting the procedural details of the case, *id*. at P 104, JA 1037, the Commission explained that it did not "extend the suspension period of the original filed rates" beyond the maximum length specified in section 205(e) of the Federal Power Act, 16 U.S.C. § 824d(e). May Order at P 105, JA 1037. The "proposed rates [in the First Tariff Revision] were superseded and the suspension of those originally-filed rates . . . was rendered moot" when the Commission accepted the Second Tariff Revision. *Id*. at P 104, JA 1037. The Commission also reaffirmed New York ISO's discretion to seek deferred implementation of the Second Tariff Revision. *Id*. at P 105, JA 1037.

H. Compliance Tariff And September Order

On September 15, 2011, the Commission accepted the compliance revisions filed on June 20, 2011 with a September effective date. September Order at P 2, JA 1099. The Compliance Curves were first used in the October 2011 auction. *See* Letter Order, R.134, JA 1179.

I. December Order

Suppliers filed a request for rehearing of the April Order that the Commission denied on December 15, 2011. December Order at P 1, JA 1181. The Commission reaffirmed its finding that the Second Tariff Revision had superseded the existing rates and made the suspension of the First Tariff Revision

irrelevant. *Id*. at P 10, JA 1185. Because it had not suspended the Second Tariff Revision, *id*., the Commission concluded that it had not exceeded the maximum statutory period for suspension in section 205(e) of the FPA, 16 U.S.C. § 824d(e).

In the same order, the Commission addressed Suppliers' request for rehearing of the May Order. *See id*. at P 1, JA 1181. It reaffirmed its finding that the New York tax amendment had alleviated the Commission's concerns about discretion and exclusionary criteria in the earlier tax abatement program. *Id*. at P 33, JA 1192.

This appeal followed.

SUMMARY OF ARGUMENT

This case concerns the Commission's authority to suspend a rate that it finds may be unreasonable, and put in place a temporary rate, until it can investigate and make a final determination on the proposed new rate. Suppliers in New York City, including Petitioners, wanted the new rate to be implemented immediately because, for them alone, it would mean increased revenues. For all suppliers located outside New York City, however, the prices would fall with implementation of the proposed demand curves.

Finding significant inconsistencies in factors use to set the demand curves in New York ISO's proposal, the Commission suspended the rate for the maximum period allowed under section 205(e) of the Federal Power Act, 16 U.S.C. §

824d(e). In doing so, the Commission kept the existing just and reasonable rate in place, that is, until New York ISO filed, and the Commission approved, a superseding tariff.

The superseding tariff contained ministerial changes to the tariff sheets allowing the existing rate to remain in effect until the Commission completed its investigation of new demand curves. This superseding rate, the Second Tariff Revision, was used in five monthly auctions to set New York capacity prices until the Compliance Curves were implemented. Arguing for a nominal suspension of New York ISO's first proposed demand curves and alleging that the Commission violated the maximum suspension period set in the Federal Power Act, Suppliers here seek to redo those five auctions using demand curves that the Commission found to be unreasonable.

The Commission did not overstep the bounds of its statutory authority in suspending New York ISO's first proposal or in accepting New York ISO's superseding rate for implementation during those five monthly auctions. It is within the discretion of a filing utility, such as New York ISO, to file a superseding tariff. Nothing in the Federal Power Act establishes an outer bound on the amount of time requested by that utility to implement its filing. Moreover, this Court grants the Commission considerable discretion in matters of rate suspension and management of its own dockets. The Commission reasonably exercised that

discretion here in allowing New York ISO to make a second rate filing, superseding its first filing, that ensures that rates remain just and reasonable at all times.

Future auctions will use the Compliance Curves set in the challenged orders. Seeking higher capacity prices in those auctions, Suppliers contest many of the Commission's decisions on the factors that determine the shape and height of the Compliance Curves. The Commission conducted a thorough and extensive review of these technical and sometimes obscure factors, making a reasonable and well-supported decision about each one. These decisions are consistent with the Commission's and this Court's precedents and, accordingly, are worthy of judicial respect.

ARGUMENT

I. The Commission Properly Followed The Rate Filing Provisions Of The Federal Power Act.

A. Standard Of Review For Suspension Decisions

"It is well-established that a court may not review a Commission decision as to whether or not to suspend a rate, at least as long as the agency complies with its statutory obligation to give a reason, and in no other way oversteps the bounds of its authority." *Exxon Pipeline Co. v. United States*, 725 F.2d 1467, 1470 (D.C. Cir. 1984); *see also Resolute Natural Res. Co. v. FERC*, 596 F.3d 840, 842 (D.C. Cir. 2010) (declining to review agency decision not to suspend or investigate rate).

It is also well-established, at least since the *Exxon* decision, that this Court reviews the reason given for the length of a rate suspension under a "very narrow standard of review. . . ." *Exxon*, 725 F.2d at 1468. The Court looks at whether the reason offered is "in some way . . . related to FERC's interim or ultimate inquiries." *Id*. at 1473 & n.12 (these inquiries concern the reasonableness of the rates or "the lasting effect of new rates later found to be unreasonable"). In any event, the Court may remand the case only if it finds that the Commission's choice of suspension length is "plainly and absolutely foreclosed by existing rule or past precedent" or the Commission has failed to provide a reason for setting different suspension lengths in cases that are factually identical. *Id*. at 1474.

This is a "minimum threshold test" in which the Court does not "review the merits of a given case." *Id*. at 1473. For to do otherwise would "intrude at the suspension stage" and "disrupt the Commission's regulatory function, by forcing a consideration of the reasonableness of a proposed rate prior to a final FERC ruling on that very question." *Id*.; *see also Delmarva Power & Light Co. v. FERC*, 671 F.2d 587, 594-95 (D.C. Cir. 1982) (same deferential standard of review when there is a question of whether the Commission's orders "result in a suspension longer than what is statutorily permissible").

B. The Commission Did Not Exceed Its Statutory Authority In Accepting The Superseding Second Tariff Revision.

Suppliers argue that the Commission exceeded the five-month suspension period allowed in section 205(e) of the FPA, 16 U.S.C. § 824d(e), by allowing the existing rates to remain in effect for a little over seven months after New York ISO filed its First Tariff Revision. Br. 33-41. The Commission did not violate the statutory suspension period. Because the suspended First Tariff Revision was superseded by the Commission's acceptance of New York ISO's Second Tariff Revision, the suspension was no longer operative. *See* May Order at PP 101-105, JA 1036-37; December Order at PP 10-13, 39-40, 49, JA 1185-86, 1195-96, 1198.

In the early orders challenged here, the Commission simultaneously exercised its authority to suspend the First Tariff Revision for the maximum period and invited New York ISO to voluntarily propose that the new demand curves become effective on a later date. January Order at PP 167-68, JA 630; March Order at PP 16, 18, JA 805, 807; *see also* Chronology of Proceeding in Addendum (one-page list of relevant dates and actions). Accepting the Commission's invitation on March 28, 2011, New York ISO proposed changes to its Tariff in order to continue the same level of the existing rates until the Commission concluded its investigation of the First Tariff Revision. *See* Second Tariff Revision at 3, JA 858 (requesting proposed rates "remain in effect until a date to be determined by the Commission upon its issuance of an order on [New York ISO's]

compliance filing"). "The interim rates that [New York ISO] filed on March 28, 2011, were not suspended, but were accepted . . . as proposed by NYISO." December Order at P 10, JA 1185; *see also* April Order at P 10, JA 915 ("We grant waiver and accept NYISO's March 28, 2011 proposed revisions to its Services Tariff, to be effective April 21, 2011, as requested, subject to further action by the Commission.").

The five-month limitation in the statute applies to the Commission's action, not to entities filing tariffs under section 205 of the FPA, 16 U.S.C. § 824d. New York ISO acted within its rights in requesting an implementation date (ultimately, September 15, 2011) for its Second Tariff Revision that allowed adequate time to develop and implement the revised demand curves. *See* December Order at PP 11, 39, 42, 49, JA 1185, 1195, 1196, 1198. A filing entity may request any effective date for its filing so long as the effective date is at least 60 days from the date of filing (or waiver of that requirement is granted). 16 U.S.C. § 824d. In fact, the Commission's filing regulations provide that "[a]ll rate schedules or tariffs . . . shall be tendered for filing with the Commission and posted not less than sixty days nor more than one hundred-twenty days prior to the date on which the electric service is to commence and become effective . . . unless a different period of time is permitted. . . ." 18 C.F.R. § 35.3(a)(1).

Because implementation in these types of markets can be difficult, regional system operators, including the New York ISO, frequently request long periods between the date of their filings and implementation dates. *See, e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,067 at P 16 (2012) ("request[ing] an effective date of more than 120 days from the date of its filing . . . [d]ue to the complexity and significant cost of developing software necessary to implement [proposed pricing] systems"); *New York Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,186 at P 12 (2011) (requesting delayed effective date because of implementation difficulties).

That New York ISO requested a delayed implementation date within a filing that it styled as a compliance filing is of no consequence here. *Cf.* Br. 38-39 (arguing that New York ISO made a compliance filing under Commission directive). The Commission did not order the New York ISO to make the Second Tariff Revision. December Order at P 39, JA 1195. Nor did the Commission regard the Second Tariff Revision as a compliance filing. *Id.*; *compare* April Order at P 10, JA 915 ("We grant waiver and accept NYISO's March 28, 2011 proposed revisions to its Services Tariff") *with* September Order at P 71, JA 1127 ("We find that NYISO's filing complies with the Commission's directive"). Indeed, there is no need to grant waiver of the 60-day notice requirement for a compliance filing, as the Commission did in the April Order. *See* April Order at P 10, JA 915.

Contrary to Suppliers' claim, Br. 26, 38-40, the Commission did not find that New York ISO withdrew its First Tariff Revision. Suppliers misunderstand the Commission's use of a comparison to explain the effect of the superseded tariff sheets. *See* December Order at P 39, JA 1195 (finding that "superseded rates . . . can have no more effect than if they were withdrawn by the filing entity").

In sum, the Commission reasonably acted by accepting the Second Tariff Revision for implementation in the May 2011 auction, and thereby nullified the suspension of New York ISO's First Tariff Revision. *See Domtar Me. Corp. v. FERC*, 347 F.3d 304, 314 (D.C. Cir. 2003) ("[W]e have long given agencies broad discretion as to the manner in which they carry out their duties. . . . An agency is allowed to be master of its own house, lest effective agency decisionmaking not occur in any proceeding. . . .") (citation omitted)). In this way, the Commission met all statutory limitations on its suspension powers in the Federal Power Act.

C. The Suspension Length Is Irrelevant Because The First Tariff Revision Was Superseded And, In Any Event, The Commission Appropriately Suspended The Filing For The Maximum Period.

Because the Second Tariff Revision superseded the First Tariff Revision, May Order at P 104, JA 1037; December Order at PP 10, 12, JA 1185, 1186, the length of the suspension of the First Tariff Revision is irrelevant. May Order at P 8, JA 1001 ("[a]s a result of [April] order, the suspension period ending June 28, 2011 . . . is eliminated"). If the Commission had granted Supplier's requested one-

day suspension, the tariff filing would have gone into effect on January 29, 2011. Even if that were the case, none of the auctions would have used the demand curves in the First Tariff Revision given that the Commission accepted New York ISO's Second Tariff Revision before the first relevant auction. *See* April Order at PP 8, 10, JA 914, 915 (making the Second Tariff Revision effective starting with the May 2011 auction); December Order at P 39, JA 1211 ("[First Tariff Revision] rates cannot become effective once they are superseded").

Assuming that the Second Tariff Revision was never in effect, Suppliers argue that the Court must vacate the Commission's decision to impose a maximum suspension period. *See* Br. 27, 47. They argue that the Commission: (1) failed to explain its departure from its suspension policy in *West Texas*, 18 FERC at 61,375, Br. 42-47; and (2) acted arbitrarily in failing to address Suppliers' arguments regarding the impact of the suspension decision on Suppliers, Br. 48-49. Suppliers apply the wrong standard of review in arguing that the Commission erred in imposing the maximum suspension. Even if they had argued the correct standard, their argument is without merit.

The Commission's reason for the selecting the maximum suspension period passes this Court's minimum threshold test in that it is related to the agency's inquiry regarding the reasonableness of the rates, and the lasting effect of those rates, that result from the demand curves. *See Exxon*, 725 F.2d at 1473-74. The

Commission imposed the maximum suspension to provide time for New York ISO to recalculate and further support revised components of the demand curve so that just and reasonable curves are used in all monthly auctions. March Order at P 18, JA 807; *see* January Order at P 168, JA 630 (expressing concern about New rk ISO's ability to quickly implement Commission-directed changes to the demand curve); *see also Exxon*, 725 F.2d at 1473-74 (finding that "FERC's concern about the impact of a new rate" on those receiving royalty payments on oil production "is not wholly irrelevant to FERC's ultimate decision" about the reasonableness of the oil transportation rate); *Astoria Generating Co., L.P. v. New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189 at P 141 (2012) ("Re-running past auctions would create market uncertainty for market participants and require resolving complex questions.").

On appeal and in the proceedings below, Suppliers contend that this case is "readily distinguishable" from other cases in which the Commission set a maximum suspension length. Br. 42; *see* Ravenswood February Rehearing Request at 5-6, JA 638-39. This is not the correct standard. *See Northeast Energy Assocs. v. FERC*, 158 F.3d 150, 154 (D.C. Cir. 1998) (remanding where FERC failed to justify different suspension periods in factually indistinguishable cases). In any event, the proper inquiry is whether the Commission has a reasonable basis to make its suspension decision. *See Exxon*, 725 F.2d at 1474 (court remands if

FERC "fail[s] to offer even summary reasons to explain the difference" in suspension lengths "in cases that [are] absolutely indistinguishable"). And here, as explained next, the Commission had a reasonable basis for suspending the rates for the maximum period consistent with its obligation under the statute to assure just and reasonable rates at all times.

Suppliers' additional argument that proper application of the *West Texas* policy results in a one-day rather than a maximum suspension in this case, Br. 27, fails for two reasons. First, *West Texas* does not "plainly and absolutely foreclose[ ]" a maximum suspension in this case. *Exxon*, 725 F.2d at 1474. As stated in *West Texas*, the Commission generally imposes a five-month suspension when its preliminary analysis indicates that rates may be unjust and unreasonable and the proposed increased revenues may be substantially excessive. 18 FERC at 61,375. But *West Texas* also allows a maximum suspension "when increased revenues do not appear to be excessive, but other, extraordinary factors indicate that wholesale customers may suffer irreparable harm absent a five month suspension. . . ." *Id*.; *see also* March Order at P 17 n.13, JA 806 ("*West Texas* . . . allows for extraordinary circumstances and gives the Commission flexibility to take these into account").

Second, here, the Commission properly applied its policy on suspension length, explaining that the circumstances favor a maximum suspension in this case.

March Order at P 17 n.13, JA 806. The rate filing at issue here is unlike the rates filed in *West Texas*, where the utility proposed a revenue requirement and the Commission determined whether the resulting stated rate was cost-justified under traditional ratemaking analysis. Although the rates here may not be "extraordinary" relative to other rates in modern auction-based markets, they are not "typical rates" like those in *West Texas* in that they are neither stated rates nor a revenue requirement for a single utility. March Order at P 17 n.13, JA 806. Here, the New York ISO runs monthly auctions using two inputs – the demand curve and suppliers' capacity offers – to determine monthly capacity prices. *See* January Order at P 3, JA 574; *see also* March Order at P 17 n.13, JA 806 (noting "the unique nature and purpose of the[se] rates"). Thus, the Commission found that a maximum suspension was appropriate because "the exact revised [demand curve] prices . . . cannot be predicted with any certainty at this juncture," and market participants, including Suppliers, require certainty about the demand curves before bidding their capacity into the auction. March Order at P 18, JA 807.

"The purpose of a five month maximum suspension period is to prevent unjust and unreasonable rates from becoming effective due to statutory time constraints." Ravenswood February Rehearing Request at 7, JA 640. This is exactly the Commission's concern – that the New York ISO would use unreasonable demand curves as an input into its monthly auctions and thereby set

unreasonable rates for capacity. *See* January Order at P 168, JA 630. Because refunds of rates set by auction are difficult, if not impossible, to accurately calculate, the Commission's suspension decision protected, in the first instance, capacity buyers and sellers from unreasonable rates in the market. *Accord Towns of Concord, Norwood, & Wellesley v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) ("[a]gency discretion is often at its zenith" when the agency is fashioning remedies). Suppliers' implication otherwise, that this decision did not protect the interests of any capacity sellers in New York, *see* Br. 49, is not borne out by the facts. *See supra* p. 8 (under the First Revised Tariff, capacity prices would rise for some sellers and fall for others).

II. The Commission Adequately Explained Its Decisions In Considering Various Factors In Setting The Demand Curves.

A. Standard Of Review

Suppliers mount challenges to various technical aspects of the demand curve determinations. *See* Br. 25-26 (summarizing issues three through six). Where each issue before the court "requires a high level of technical expertise, [the Court] must defer to the informed discretion of the responsible federal agencies. . . . It is not enough for petitioners to convince [the Court] of the reasonableness of their views. . . ." *Transmission Access Policy Group v. FERC*, 225 F.3d 667, 714 (D.C. Cir. 2000) (internal quotations omitted), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *see also Wisconsin Pub. Power Inc. v. FERC*, 493 F.3d 239, 256

(D.C. Cir. 2007) ("the court's review of whether a particular rate design is just and reasonable is highly deferential").

Generally, the Court's review of FERC orders is governed by the arbitrary and capricious standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). Under that standard, the Commission's decision must be reasoned and based on substantial evidence in the record. FPA § 313(b), 16 U.S.C. § 825*l*(b); *see, e.g., East Tex. Elec. Coop., Inc. v. FERC*, 218 F.3d 750, 753 (D.C. Cir. 2000). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

B. The Commission Correctly Determined That A Lower Inflation Factor Is Reasonable When Equipment Prices Are Stable.

New York ISO proposed to adjust the demand curve costs in the second and third years of the reset period by a measure of inflation that is smaller than Suppliers wanted. January Order at P 142, JA 622. In this reset proceeding, the New York ISO proposed, and the Commission approved, using an average of three general inflation forecasts (as informed by industry-specific sources) instead of adjusting the Handy-Whitman Index which New York ISO had used in the past. *Id*. at PP 142, 150, JA 622, 625. While this index tracks actual utility costs by

region, it does not forecast future industry-specific costs. *Id*. at PP 144-45, JA 623; s*ee also* Protest of New York City Suppliers, Joint Aff. of Levitan Associates Inc. ("Levitan Affidavit") at P 131, R.24, JA 292 (filed Dec. 21, 2010).

Because the Commission approved the use of the Handy-Whitman Index in New York ISO's last reset proceeding and in other regional capacity markets, Suppliers argue that the Commission departed from policy and precedent without reasoned explanation in approving a general inflation adjustment here. Br. 28-29, 55-57. But the Commission explained that it is not its policy to bless one measure of inflation for use by all regional operators for all time. *See* May Order at P 89, JA 1031 (earlier determinations about adjustment factors in other system operators' markets "are not binding here"). Rather, the Commission examines each inflation adjustment factor on a case-by-case basis to determine whether the filing entity has shown that the factor is within the zone of reasonableness. *Id*. at PP 82, 85, JA 1028, 1029 (noting that "escalation factor . . . is essentially a judgment informed by an analysis of cost and inflation"). Thus, contrary to Suppliers' assertion, Br. 56-57, the Commission has not standardized the method by which regional operators, including the New York ISO, must escalate demand curves. *Cf. Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1212 (D.C. Cir. 2009) (describing how case-by-case examination of interconnection costs was changed to "standardize[ ] the method by which utilities must set their rates for interconnection").

In the challenged orders, the Commission explained that material changes in economic circumstances militate toward use of a general inflation factor instead of a factor set by extrapolating from the historical costs in the Handy-Whitman Index. May Order at P 88, JA 1030. In particular, the Commission relied on the explanation by New York ISO's expert that it was appropriate to use an industry-specific index at a time, like 2007, when "both commodity and equipment prices were rapidly rising" and there were other fundamental changes in relevant costs in the region. *Id*. at P 83, JA 1028 (citing New York ISO Answer, Attach. 1, Aff. of Eugene T. Meehan at P 17, JA 481 ("Meehan Affidavit")). It is, however, inappropriate to trend those years of rapid increases into the next three years when stability is predicted for equipment prices, as it was by New York ISO's experts in 2010. *Id*. at PP 83-84, JA 1028-29 (citing New York ISO Answer, Attach. 3, Aff. of Christopher D. Ungate at PP 24-30, JA 504-507 ("Ungate Affidavit")).

Thus, the Commission did not deviate from a prior practice of mandating use of the Handy-Whitman Index for inflation adjustments in capacity markets, as it had no such practice. However, assuming *arguendo* that it did, this Court should find that the Commission properly explained how changed economic circumstances justified the different result in this case. *See id*. at PP 82-85, JA 1028-29; *see also Alcoa Inc. v. FERC*, 564 F.3d 1342, 1348 (D.C. Cir. 2009) ("assuming for the sake of argument that FERC did depart from past precedent, we

hold it did so with an explanation that, although admittedly spare, is nonetheless adequate"); *ANR Pipeline Co. v. FERC*, 205 F.3d 403, 407 (D.C. Cir. 2000) (upholding agency decision where "FERC explained how changed circumstances justified a new policy").

Suppliers' contention that the Commission had "[n]o record evidence" to support its decision, Br. 58, is also without merit. The record contains evidence from New York ISO's experts that it is proper to use a forecast of general inflation when there is "a lack of a strong economic recovery" and past prices for power plant equipment are "not sustainable over the next few years." May Order at P 85, JA 1029; *see id*. at P 88 n.85, JA 1030 (citing Meehan Affidavit at P 16, JA 480 (noting virtues and vices of both measures and concluding that it is "reasonable to use the general inflation forecast when the equipment market is currently stable") and Ungate Affidavit at P 27, JA 505 (quoting from Gas Turbine World to show that forecasted prices for simple cycle combustion turbines, like the NYC proxy unit, decrease by about ten percent between 2009 and 2010 and are predicted to be essentially flat for 2011 and 2012)).

The Commission acknowledged the differing opinion of Suppliers' witnesses about the usefulness of the Handy-Whitman Index in these changed economic circumstances. January Order at P 150, JA 625 (citing Levitan Affidavit and finding that historical increases in the index do "not necessarily justify a

forecast growth rate equal to historical growth rates"); May Order at P 83, JA 1028 (basing decision on review of all testimony). After weighing the evidence, the Commission concluded that New York ISO's reliance on "industry-specific . . . factors" other than the Handy-Whitman Index to inform its cost projections for the proxy units was reasonable. January Order at P 150, JA 625; *see* May Order at P 84, JA 1029 (noting reliance on industry-specific source); *see also Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003) ("[t]he question we must answer . . . is not whether record evidence supports [petitioner]'s version of events, but whether it supports FERC's").

As it did in the case originally establishing these demand curves, the Court must "defer[ ] to the Commission's resolution of factual disputes between expert witnesses." *Electricity Consumers*, 407 F.3d at 1236; *see id*. at 1239 (finding substantial evidence to support FERC's conclusion about "the annualized costs of installing a new peaker plant"); *Arizona Corp. Comm'n v. FERC*, 379 F.3d 952, 954-55 (D.C. Cir. 2005) (FERC's orders do not lack substantial evidence "simply because petitioners offered some contradictory evidence"). As the Commission did there, here it evaluated the predictions of expert witnesses regarding market trends and found substantial evidence in support of New York ISO's predictions. *See Electricity Consumers*, 407 F.3d at 1240 (affirming FERC's evaluation of predictions about savings from the new market structure). Nothing more is

required. *See Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 530 (D.C. Cir. 2012) (This Court's "case law [does not] prevent[ ] the Commission from making findings based on generic factual predictions derived from economic research and theory").

C. The Commission Reasonably Determined That The *Status Quo* Rates Should Not Increase During The Interim.

Even if the Handy-Whitman Index is not used to inflate the Compliance Curves by 7.8 percent, Suppliers assert that the same escalation is required of the curves that were in effect for five months from May to September 2011. *See* Br 27-28, 53-54. Suppliers assert that the Commission should apply this inflation factor to the Existing Curves (set forth in column I of Figure 1, *supra* p. 8). Br. 49. The Existing Curves, however, were not in effect after April 30, 2011, and any escalation of them is irrelevant given use of the Second Tariff Revision starting on May 1, 2011. *See* May Order at PP 104-106, JA 1037-38; December Order at P 11, JA 1185.

In any event, the Commission's early decision to keep the Existing Curves in place without adjustment during suspension was proper and consistent with its precedents. Rejecting New York ISO's request to apply a 1.7 percent inflation adjustment to the Existing Curves, the Commission explained that any modification to the existing published demand curves would require a new proceeding under FPA section 206, 16 U.S.C. § 824e. March Order at P 16, JA

805. "[I]f the Commission suspends a proposed rate for more than a nominal period, the Commission cannot put one element used to calculate the proposed rate into effect during the suspension period" without revisiting the reasonableness of the existing rate. *Id*; *see also* May Order at P 106, JA 1038 (rejecting Ravenswood's request for same reason). To do so would entail a piecemeal review of the existing rate. March Order at P 16 & n.11, JA 805 (citing *Houlton Water Co. v. Maine Pub. Serv. Co.*, 55 FERC ¶ 61,037 at 61,110 (1991) (in setting a reasonable rate, FERC "does not look to a single component of the overall rate, but rather looks to all of the components")).

To be sure, the Second Tariff Revision reinstated the Existing Curves for an interim five-month period. To the extent Suppliers argue on appeal that these reinstated curves should be escalated because, otherwise, the Commission is "altering the rate formula" for the demand curves, Br. 28, *see also* Br. 27, 51-53, their argument is jurisdictionally barred and without merit.

In the proceeding below, Suppliers did not argue that the demand curves are set by a rate formula that includes the inflation adjustment as an input. *See* Ravenswood's April Rehearing Request at 6, 9-11, JA 922, 925-27; Ravenswood's Request for Rehearing, 2, 14 (filed June 20, 2011), R.120, JA 1056, 1068. Nor did Suppliers cite any precedent on piecemeal ratemaking or formula rates that they thought the Commission was violating in not inflating the curves. *Id*. Suppliers

are jurisdictionally barred from introducing these previously undeveloped arguments on appeal. *See* FPA Section 313(b), 16 U.S.C. § 825*l*(b) (argument must be presented in petition for agency rehearing absent "reasonable ground for failure so to do"); *see also TC Ravenswood, LLC v. FERC*, No. 07-1278, 2009 U.S. App. LEXIS 10014, at *10 (D.C. Cir. May 7, 2009) (unpublished) ("court cannot consider objections [Ravenswood] never urged before the Commission without 'reasonable ground' for failure"); *Public Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164, 1171 (D.C. Cir. 2007) (declining to reach merits because "when a party advances a wholly undeveloped claim. . . the agency has little occasion to present a reasoned explanation"); *Domtar*, 347 F.3d at 312 ("[t]o be sure, the company did argue to FERC that its rulings are inconsistent . . . [y]et it did not point to [FERC precedent] in making this argument;" petitioner "may not use that case to support its argument now").

Contrary to Suppliers' assertion, the Commission did not remove any inputs from the formula for calculating the demand curves. Indeed, the Tariff shows that the demand curves are not set by formula. The relevant section of the Tariff contains the process that the New York ISO must follow and the assessments it must conduct before proposing new demand curves. Tariff § 15.14.1.2, JA 63 (describing four assessments required prior to New York ISO proposing demand curves); JA 64-65 (describing the schedule and procedures for conducting the

review). None of these assessments describes, or even alludes to, escalation or adjustment in the second and third year of the reset period. *Id.*; *see* January Order at P 5, JA 575 (reproducing relevant Tariff text).

Moreover, the assessments are not inputs in the traditional sense, as the demand curves result from an elaborate review and stakeholder process. *See, e.g.*, January Order at P 4, JA 574 ("review process typically takes over one year" and includes proposed and final curves with stakeholder process in between); *see also Ocean State Power II*, 69 FERC ¶ 61,146 at 61,552 (1994) (formula rates are of a "fixed, predictable nature" which require "components of the formula to be predictable and that periodic adjustments to the specific numerical values assigned to the components be made in essentially a mechanical fashion").

As Suppliers note, Br. 52-53, the Commission recently has directed "consistent application" of the inflation adjustment to all parts of a mitigation program. *Astoria Generating Co., L.P. v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244 at P 3 (2012) (granting suppliers' complaint and directing Tariff changes to list inflation adjustment as part of calculations). In that case, however, the Tariff explicitly required use of the inflation adjustment and the Commission simply was ordering consistency among similar provisions. *See* New York ISO Services Tariff, Section 23, Attachment H, § 23.4.5.7.4, JA 1287 (tariff already defined "Mitigation Net CONE" as including an escalation factor).

Here, however, where the relevant Tariff section does not mention an inflation adjustment, the Commission properly followed its long-standing precedent in leaving the Existing Curves unchanged during the suspension period. *See West Texas*, 18 FERC ¶ 61,189 at 61,376 (explaining that FERC generally does not allow rate changes during the suspension period because it causes "the utility's customers [to] confront and evaluate a 'moving target' of rate levels"). Furthermore, the Commission's subsequent acceptance of the Second Tariff Revision, reinstating the Existing Curves without escalation for an interim period, was consistent with its directives in an earlier order. *See* March Order at P 16, JA 805 (rejecting New York ISO's request to institute increased interim rates); *see also Sacramento Mun. Util. Dist.*, 616 F.3d at 530 (denying claim of unexplained departure because "FERC's [prior] statements were entirely consistent with its subsequent findings").

D. The Commission Correctly Changed Its Decision About Tax Abatement Before The Demand Curves Were Reset.

For many years, New York City has provided property tax relief to suppliers that build new facilities in the city. *See* January Order at P 65, JA 598. In the First Tariff Revision, New York ISO proposed to reflect this relief in lower demand curves for the city. *Id*. at P 67, JA 599. The Commission rejected that proposal, finding the then-current tax abatement program was discretionary and used criteria that could prevent the proxy peaking unit from qualifying for tax abatement. *Id*. at

P 88, JA 606. When, in May 2011, the property tax law changed to provide tax relief "as-of-right" to the proxy peaking unit, the Commission changed its decision. May Order at PP 41-42, JA 1013. On rehearing, it directed inclusion of full tax relief, thereby lowering the New York City demand curves. *Id*. at P 43, JA 1014.

In an earlier proceeding, the Commission denied suppliers' request to incorporate a June 2008 tax law change into the recently reset demand curves ("2008 reset proceeding"). *Independent Power Producers of N.Y. v. New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,311 (2008). There, the Commission found that a change in law that eliminated the tax exemption came too late after completion of the process for setting the demand curves. *See id*. at PP 34-35, JA 1246 ("[to] reopen and start anew the lengthy review process now would re-ignite the debate over all of the factors"). The Commission also found that suppliers had not met their burden of proof to show that the demand curves approved in the 2008 reset proceeding were unjust and unreasonable. *Id*. at P 33, JA 1245.

Here, Suppliers contend that "FERC should have followed its precedent" in *Independent Power Producers* and should not have "revise[d] just one component of the demand curve reset after approving [it]." Br. 65. Addressing this contention of piecemeal ratemaking, *see* Br. 64-75, the Commission distinguished the challenged orders from the *Independent Power Producers* decision by their procedural history and differing burdens of proof. December Order at PP 27-29,

JA 1190-91. The Commission explained that it was not engaging in piecemeal ratemaking in the challenged orders, because "[it] had not yet taken final action on the new demand curves." *Id*. at P 27, JA 1190.

Contrary to Suppliers' claim, Br. 65, the circumstances in the 2008 reset proceeding differ in important ways from the circumstances in this reset proceeding. There, the Commission approved three years of new demand curves with a tariff effective date of January 29, 2008 and an implementation date of May 1, 2008. *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,064 (2008). By the time suppliers filed their complaint to adjust the demand curves, New York ISO had held six monthly auctions using the new curves. *See Independent Power Producers*, 125 FERC ¶ 61,311 at PP 1, 21, JA 1235, 1241 (New York ISO asserted that suppliers' request was unwarranted "in the middle of the three-year reset period"). Additionally, the issue of property tax cost was not raised on rehearing of the Commission's 2008 order resetting the demand curves. *See New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,299 at PP 19-28, 33-41, JA 1227-30, 1231-34 (2008).

By contrast, in the 2011 proceeding at issue here, the Commission suspended the effectiveness of the new demand curves for five months and allowed for a later implementation date. January Order at P 168, JA 630. It did this because it required New York ISO to further analyze factors, provide support for

its proposal, and make substantial changes to the curves. *See* March Order at P 18, JA 807 (FERC's "directives permit or require New York ISO to propose estimates of certain costs or to further support a cost component"). Parties sought rehearing of the tax abatement issue. *See* May Order at P 30, JA 1008. Thus, when New York changed the tax law for the purpose of granting tax relief "as of right" to peaking units, 2011 N.Y. Laws 28 § 1, JA 1261, the new demand curves were still in flux and not yet in use. *See, e.g.*, May Order at P 98, JA 1035 ("clarify[ing] what [New York ISO] is expected to do to comply with the January 28, 2011 order with respect to [winter/summer adjustment]").

The circumstances in the two proceedings overlap in that they both relate to a change in New York law on tax relief for peaking units. However, the 2011 change came before the new demand curves were final, December Order at P 27, JA 1190, whereas the 2008 change came after the Commission had weighed all the factors and approved the new demand curves, *id*. at P 29, JA 1191. Furthermore, inclusion of the 2011 change was advocated by parties seeking rehearing on the tax abatement issue. *See id*. at P 28, JA 1190; May Order at P 30, JA 1008; *see also* New York Commission Letter at 1, JA 963 (notifying FERC on May 11, 2011 of pending tax law amendment).

Suppliers, on the other hand, seeking to reopen the 2008 proceeding under section 206 of the FPA, 16 U.S.C. § 824e, had the burden to prove that the overall

rate was unjust and unreasonable. December Order at PP 28-29, JA 1190-91. By contrast, when the tax law changed in 2011, the Commission was still balancing interests to determine the reasonableness of the overall rate in order to set the 2011 demand curves. It, therefore, did not engage in piecemeal ratemaking. *See Sacramento Mun. Util. Dist.*, 616 F.3d at 532 ("[petitioner] is wrong: FERC did not depart from [one of its own prior decisions]"); *see also East Ky. Power Coop. v. FERC*, 489 F.3d 1299, 1301 (D.C. Cir. 2007) ("FERC's conclusion was not inconsistent with its prior determinations because, as the Commission has explained, new evidence was before it").

Nor did the Commission direct the change without fully reviewing and weighing the evidence. *See* Br. 75-79. The pertinent question before the Commission was "whether it is reasonable to assume that [the selected NYC proxy] unit . . . will receive an abatement of property tax." December Order at P 33, JA 1192. In the January Order, the Commission answered that question in the negative, finding discretion on the part of the granting authority and uncertainty regarding whether the proxy unit would meet the program's criteria. January Order at P 88, JA 606. The law was amended, however, for the express purpose of providing tax relief to the New York City proxy unit. 2011 N.Y. Laws 28 § 2, JA 1262 (defining peaking unit as one which "constitute[s] a peaking unit as set forth in [Tariff] section 5.14.1.2"). And the Commission found that its concerns about

discretion and limiting criteria were satisfied with the adoption of the new statutory scheme. *See* December Order at P 33, JA 1192. As such, it was reasonable for the Commission to assume that the proxy unit would receive an abatement and, accordingly, direct adjustment of the demand curves. *See Sacramento Mun. Util. Dist.*, 616 F.3d at 530 ("even if [petitioner's] testimony arguably could have supported a different conclusion on the costs and benefits of the . . . proposal, that would not mean FERC's conclusion lacked substantial evidence").

Suppliers dismiss the evidence that the Commission relies on, preferring to focus on the timing of the Commission's grant of rehearing – one day after the New York law changed. Br. 72. But Suppliers fail to recognize that the Commission was informed by the New York Commission of the bill, and its progress through the New York legislature, at least a week prior to its passage. *See supra* p. 13. Suppliers also fail to recognize that the Commission found their assertion, repeated here on appeal, Br. 77-78 – that the New York City proxy unit would not qualify for tax relief because of the law's minimum investment requirement – lacking in any evidentiary support. December Order at P 35, JA 1193. Suppliers' further contention, that "a peaking unit other than the proxy peaking unit designated pursuant to [the Tariff]" is subject to limiting criteria, Br. 76-77, is also without merit. The Commission reiterated that the relevant question

is whether the designated proxy unit will receive an abatement, not whether all peaking units will receive it. December Order at P 33, JA 1192.

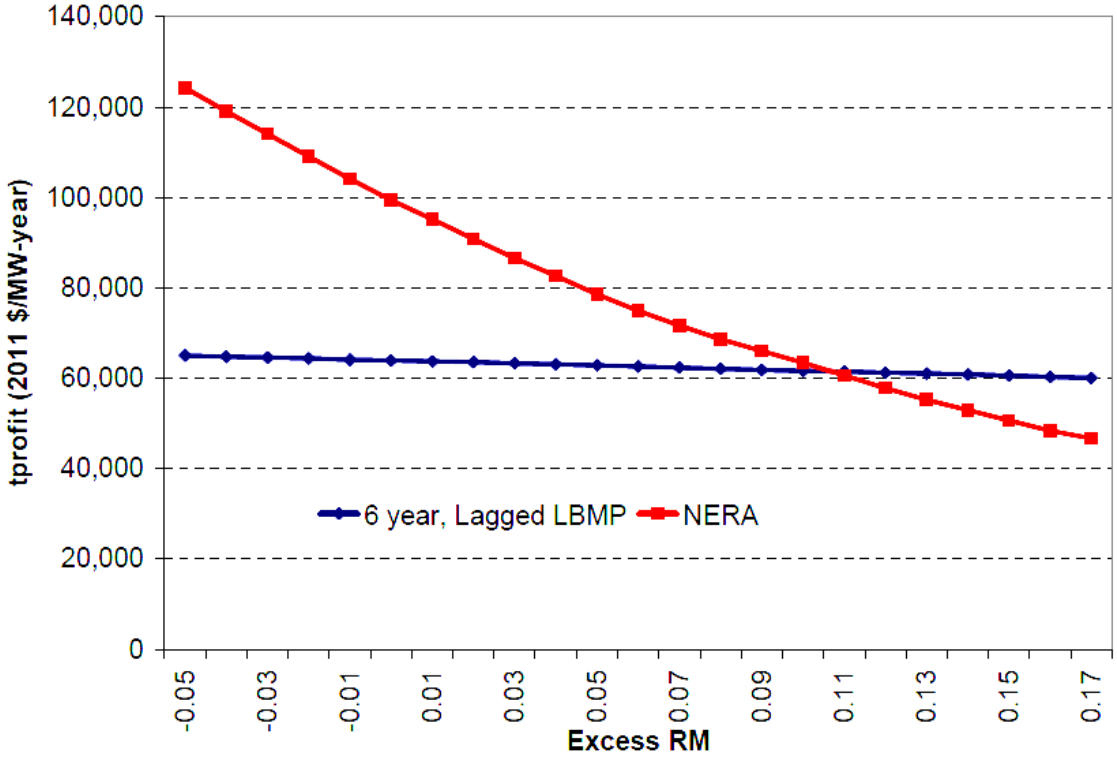
E. The Commission Properly Approved New York ISO's Analysis That Predicts Energy And Ancillary Services Revenues.

Finally, Suppliers argue that the Commission must replace New York ISO's model used to predict revenues from energy and ancillary services. *See* Br. 29. Suppliers prefer their expert's model that includes more data and statistical testing and results in higher demand curves. Br. 60-64. Closely examining the two competing models, the Commission concluded that Suppliers' model was unreasonable because its output runs counter to a fundamental assumption about the function of energy markets. *See* May Order at PP 73-75, JA 1024-25.

In particular, the Commission looked at whether the competing models rationally predict how energy prices respond to increases or decreases in reserve margins. *See id*. at P 74, JA 1024; *see also Maine Pub. Utils. Comm'n*, 520 F.3d at 480 ("reserve margin" is the amount of capacity above that "required by the system to meet peak load"). Although energy prices (and thus profits) should fall when there is extra capacity available to bid into the energy markets, only one of the models (that of the consultant National Economic Research Associates, Inc. for New York ISO), as shown below in Figure 2, creates outcomes that are consistent with this assumption. Suppliers' proposed model with six years of data and a

different statistical approach "implies little or no price response." May Order at P 75 & n.72, JA 1025 (citing the chart of Suppliers' expert, reproduced below).

Figure 2. Competing Models Showing Change in Revenue for New York City Proxy Unit as Reserve Margin ("RM") Increases



Source: Suppliers' Protest, Attachment B, Affidavit of Richard L. Carlson at 67, JA 375.

Faced with not only "dueling experts," *Hoopa Valley Tribe v. FERC*, 629 F.3d 209, 213 (D.C. Cir. 2010), but also "dueling price models," May Order at P 74, JA 1024, the Commission considered both experts' models and explained why New York ISO's model, although not perfect, was objective and reasonable. *Id.* at P 75, JA 1025 (noting choices about data and methods vetted in stakeholder process). That is enough. *See Southwest Airlines Co. v. Transp. Sec. Admin.*, 650

F.3d 752, 756 (D.C. Cir. 2011) (court "will not second-guess [agency's] determination of this obscure calculation" where agency "considered the [competing] report and its underlying data, and [agency] explained why the [competing] report was inferior to the . . . report on which the agency relied"); *American Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1261 (D.C. Cir. 2003) (if agency "adequately considers contradictory evidence, . . . our standard of review does not permit a reviewing court to displace the [agency's] choice between conflicting views").

CONCLUSION

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

Respectfully submitted,

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September 24, 2012
Final Brief: December 5, 2012

TC Ravenswood, LLC v. FERC **Docket No. ER11-2224**
D.C. Cir. Nos. 12-1008*, et al*.

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 11,294 words, not including the tables of contents and authorities, the glossary, the certificates of counsel and Addendum B.

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December 5, 2012

ADDENDUM A
Chronology of Proceeding

2011 Demand Curve Reset Proceeding
Chronology of Proceeding

November 30, 2010	New York ISO files First Tariff Revision to set demand curves for May 2011 to April 2014, JA 25
January 28, 2011	Commission suspends First Tariff Revision for five months and directs substantial changes to the curves, January Order, JA 573
March 9, 2011	Commission denies requests for escalation of the 2010 demand curves, March Order, JA 800
March 28, 2011	New York ISO files Second Tariff Revision to continue 2010 demand curves in May auction and thereafter until Commission approves final reset demand curves, JA 856
April 4, 2011	Commission Letter Order ("April Order") accepting superseding rates in Second Tariff Revision, JA 912
May 1, 2011	First auction to use Second Tariff Revision demand curves
May 18, 2011	New York amends Property Tax Law
May 19, 2011	Commission issues rehearing order, May Order, JA 998
September 15, 2011	Commission approves New York ISO's Compliance Demand Curves effective on the date of the order, September Order, JA 1099
October 1, 2011	First auction to use Compliance Curves
December 15, 2011	Commission denies requests for rehearing, December Order, JA 1181

ADDENDUM B
Statutes & Regulations

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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).

§ 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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

[1] See References in Text note below.

LIMITATION ON AUTHORITY PROVIDED

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

STUDY

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

§ 824f. Ordering furnishing of adequate service

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

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

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

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

(b) Request for inventory and cost statements

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

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

§ 824h. References to State boards by Commission

(a) Composition of boards; force and effect of proceedings

The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Cooperation with State commissions

The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Availability of information and reports to State commissions; Commission experts

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may upon request from a State make available to such State as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement to the Commission by such State of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 10, 1920, ch. 285, pt. II, § 209, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

ation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, § 311, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Public Printer under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Printing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 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 chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

(June 10, 1920, ch. 285, pt. III, § 314, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 109–58, title XII, § 1288, Aug. 8, 2005, 119 Stat. 982.)

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in

AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

SOURCE: Order 271, 28 FR 10573, Oct. 2, 1963, unless otherwise noted.

Subpart A—Application

§ 35.1 Application; obligation to file rate schedules, tariffs and certain service agreements.

(a) Every public utility shall file with the Commission and post, in conformity with the requirements of this part, full and complete rate schedules and tariffs and those service agreements not meeting the requirements of § 35.1(g), clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy subject to the jurisdiction of this Commission, the classifications, practices, rules and regulations affecting such rates, charges, classifications, services, rules, regulations or practices, as required by section 205(c) of the Federal Power Act (49 Stat. 851; 16 U.S.C. 824d(c)). Where two or more public utilities are parties to the same rate schedule or tariff, each public utility transmitting or selling electric energy subject to the jurisdiction of this Commission shall post and file such rate schedule, or the rate schedule may be filed by one such public utility and all other parties having an obligation to file may post and file a certificate of concurrence on the form indicated in § 131.52 of this chapter: *Provided, however,* In cases where two or more public utilities are required to file rate schedules or certificates of concurrence such public utilities may authorize a designated representative to file upon behalf of all parties if upon written request such parties have been granted Commission authorization therefor.

(b) A rate schedule, tariff, or service agreement applicable to a transmission or sale of electric energy, other than that which proposes to supersede, cancel or otherwise change the provisions of a rate schedule, tariff, or service agreement required to be on file with this Commission, shall be filed as an initial rate in accordance with § 35.12.

(c) A rate schedule, tariff, or service agreement applicable to a transmission or sale of electric energy which proposes to supersede, cancel or otherwise

change any of the provisions of a rate schedule, tariff, or service agreement required to be on file with this Commission (such as providing for other or additional rates, charges, classifications or services, or rules, regulations, practices or contracts for a particular customer or customers) shall be filed as a change in rate in accordance with § 35.13, except cancellation or termination which shall be filed as a change in accordance with § 35.15.

(d)(1) The provisions of this paragraph (d) shall apply to rate schedules, tariffs or service agreements tendered for filing on or after August 1, 1976, which are applicable to the transmission or sale of firm power for resale to an all-requirements customer, whether tendered pursuant to § 35.12 as an initial rate schedule or tendered pursuant to § 35.13 as a change in an existing rate schedule whose term has expired or whose term is to be extended.

(2) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to give the party furnishing service the unrestricted right to file unilateral rate changes under section 205 of the Federal Power Act:

Nothing contained herein shall be construed as affecting in any way the right of the party furnishing service under this rate schedule to unilaterally make application to the Federal Energy Regulatory Commission for a change in rates under section 205 of the Federal Power Act and pursuant to the Commission's Rules and Regulations promulgated thereunder.

(3) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to withhold from the party furnishing service the right to file any unilateral rate changes under section 205 of the Federal Power Act:

The rates for service specified herein shall remain in effect for the term of _____ or until _____, and shall not be subject to change through application to the Federal Energy Regulatory Commission pursuant to the provisions of Section 205 of the Federal Power Act absent the agreement of all parties thereto.

(4) Rate schedules covered by the terms of paragraph (d)(1) of this section, but which are not covered by paragraphs (d)(2) or (d)(3) of this section, are not required to contain either of the boilerplate provisions set forth in paragraph (d)(2) or (d)(3) of this section.

(e) No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge or compensation for or in connection with electric service subject to the jurisdiction of the Commission, or impose any classification, practice, rule, regulation or contract with respect thereto, which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown.

(f) A rate schedule applicable to the sale of electric power by a public utility to the Bonneville Power Administration under section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act (Pub. L. No. 96–501 (1980)) shall be filed in accordance with subpart D of this part.

(g) For the purposes of paragraph (a) of this section, any service agreement that conforms to the form of service agreement that is part of the public utility's approved tariff pursuant to § 35.10a of this chapter and any market-based rate agreement pursuant to a tariff shall not be filed with the Commission. All agreements must, however, be retained and be made available for public inspection and copying at the public utility's business office during regular business hours and provided to the Commission or members of the public upon request. Any individually executed service agreement for transmission, cost-based power sales, or other generally applicable services that deviates in any material respect from the applicable form of service agreement contained in the public utility's tariff and all unexecuted agreements under which service will commence at the request of the customer,

are subject to the filing requirements of this part.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 541, 40 FR 56425, Dec. 3, 1975; Order 541–A, 41 FR 27831, July 7, 1976; 46 FR 50520, Oct. 14, 1981; Order 337, 48 FR 46976, Oct. 17, 1983; Order 541, 57 FR 21734, May 22, 1992; Order 2001, 67 FR 31069, May 8, 2002; Order 714, 73 FR 57530, 57533, Oct. 3, 2008; 74 FR 55770, Oct. 29, 2009]

§ 35.2 Definitions.

(a) *Electric service*. The term *electric service* as used herein shall mean the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale for resale in interstate commerce, and may be comprised of various classes of capacity and energy sales and/or transmission services. *Electric service* shall include the utilization of facilities owned or operated by any public utility to effect any of the foregoing sales or services whether by leasing or other arrangements. As defined herein, *electric service* is without regard to the form of payment or compensation for the sales or services rendered whether by purchase and sale, interchange, exchange, wheeling charge, facilities charge, rental or otherwise.

(b) *Rate schedule*. The term *rate schedule* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing and may take the physical form of a contract, purchase or sale or other agreement, lease of facilities, or other writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A rate schedule is designated with a Rate Schedule number.

(c)(1) *Tariff*. The term *tariff* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section offered on a generally applicable basis, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A tariff is designated with a Tariff Volume number.

(2) *Service agreement*. The term *service agreement* as used herein shall mean an agreement that authorizes a customer to take electric service under the terms of a tariff. A service agreement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A service agreement is designated with a Service Agreement number.

(d) *Filing date*. The term *filing date* as used herein shall mean the date on which a rate schedule, tariff or service greement filing is completed by the receipt in the office of the Secretary of all supporting cost and other data required to be filed in compliance with the requirements of this part, unless such rate schedule is rejected as provided in § 35.5. If the material submitted is found to be incomplete, the Director of the Office of Energy Market Regulation will so notify the filing utility within 60 days of the receipt of the submittal.

(e) *Posting* (1) The term posting as used in this part shall mean:

(i) Keeping a copy of every rate schedule, service agreement, or tariff of a public utility as currently on file, or as tendered for filing, with the Commission open and available during regular business hours for public inspection in a convenient form and place at the public utility's principal and district or division offices in the territory served, and/or accessible in electronic format, and

(ii) Serving each purchaser under a rate schedule, service agreement, or tariff either electronically or by mail in accordance with the service regulations in Part 385 of this chapter with a copy of the rate schedule, service agreement, or tariff. Posting shall include, in the event of the filing of increased rates or charges, serving either electronically or by mail in accordance with the service regulations in Part 385 of this chapter each purchaser under a

rate schedule, service agreement or tariff proposed to be changed and to each State Commission within whose jurisdiction such purchaser or purchasers distribute and sell electric energy at retail, a copy of the rate schedule, service agreement or tariff showing such increased rates or charges, comparative billing data as required under this part, and, if requested by a purchaser or State Commission, a copy of the supporting data required to be submitted to this Commission under this part. Upon direction of the Secretary, the public utility shall serve copies of rate schedules, service agreements, or tariffs, and supplementary data, upon designated parties other than those specified herein.

(2) Unless it seeks a waiver of electronic service, each customer, State Commission, or other party entitled to service under this paragraph (e) must notify the public utility of the e-mail address to which service should be directed. A customer, State Commission, or other party may seek a waiver of electronic service by filing a waiver request under Part 390 of this chapter providing good cause for its inability to accept electronic service.

(f) *Effective date.* As used herein the *effective date* of a rate schedule, tariff or service agreement shall mean the date on which a rate schedule filed and posted pursuant to the requirements of this part is permitted by the Commission to become effective as a filed rate schedule. The effective date shall be 60 days after the filing date, or such other date as may be specified by the Commission.

(16 U.S.C. 284(d), 792 et seq.; Pub. L. 95–617; Pub. L. 95–91; E.O. 12009, 42 FR 46267)

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended at 28 FR 11404, Oct. 24, 1963; 43 FR 36437, Aug. 17, 1978; 44 FR 16372, Mar. 19, 1979; 44 FR 20077, Apr. 4, 1979; Order 39, 44 FR 46454, Aug. 8, 1979; Order 699, 72 FR 45325, Aug. 14, 2007; Order 701, 72 FR 61054, Oct. 29, 2007; Order 714, 73 FR 57530, Oct. 3, 2008]

§ 35.3 Notice requirements.

(a)(1) *Rate schedules or tariffs.* All rate schedules or tariffs or any part thereof shall be tendered for filing with the Commission and posted not less than sixty days nor more than one hundred-twenty days prior to the date on which the electric service is to commence and become effective under an initial rate schedule or tariff or the date on which the filing party proposes to make any change in electric service and/or rate, charge, classification, practice, rule, regulation, or contract effective as a change in rate schedule or tariff, except as provided in paragraph (b) of this section, or unless a different period of time is permitted by the Commission. Nothing herein shall be construed as in any way precluding a public utility from entering into agreements which, under this section, may not be filed at the time of execution thereof by reason of the aforementioned sixty to one hundred-twenty day prior filing requirements. The proposed effective date of any rate schedule or tariff filing having a filing date in accordance with § 35.2(d) may be deferred by the public utility making a filing requesting deferral prior to the rate schedule or tariff's acceptance by the Commission.

(2) *Service agreements.* Service agreements that are required to be filed and posted authorizing a customer to take electric service under the terms of a tariff, or any part thereof, shall be tendered for filing with the Commission and posted not more than 30 days after electric service has commenced or such other date as may be specified by the Commission.

(b) *Construction of facilities.* Rate schedules, tariffs or serviceagreements predicated on the construction of facilities may be tendered for filing and posted no more than one hundred-twenty days prior to the date set by the parties for the contract to go into effect. The Commission, upon request, may permit a rate schedule or service agreement or part thereof to be tendered for filing and posted more than one hundred-twenty days before it is to become effective.

(16 U.S.C. 284(d); Pub. L. 95–617; Pub. L. 95–91; E.O. 12009, 42 FR 46267)

[44 FR 16372, Mar. 19, 1979; 44 FR 20077, Apr. 4, 1979; as amended by Order 714, 73 FR 57531, Oct. 3, 2008]

§ 35.4 Permission to become effective is not approval.

The fact that the Commission permits a rate schedule, tariff or service

TC Ravenswood, LLC v. FERC Docket No. ER11-2224
D.C. Cir. No. 12-1008, *et al*.

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 5th day of December 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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