In the United States Court of Appeals for the Ninth Circuit

No. 12-71958

CALIFORNIA, *EX REL.* KAMALA D. HARRIS,
ATTORNEY GENERAL, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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STATEMENT OF THE ISSUES

This proceeding involves the Federal Energy Regulatory Commission's ("Commission" or "FERC") orders on remand from *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004). *Lockyer* rejected challenges to the Commission's market-based rate program, but held that the Commission erred in finding that it lacked authority to order refunds for violations of market-based rate quarterly

reporting requirements. The Court remanded the case for the Commission to consider whether, in its discretion, to order refunds. *Lockyer*, 383 F.3d at 1016-18.

On remand, the Commission established a trial-type hearing to address whether any seller violated the quarterly reporting requirements and, if so, whether that seller's market share during the period in question increased sufficiently to enable it to exercise market power and thus charge "unjust and unreasonable" rates. The Administrative Law Judge granted the respondent-sellers' motions for summary judgment, finding that complainant-purchasers had not satisfied their burden to show that any seller's market share had increased and, therefore, that its rates were unjust and unreasonable. The Commission affirmed.

The issues on appeal are:

1. Whether the challenged orders comply with *Lockyer*'s mandate to consider whether to order refunds for any reporting violations; and

2. Whether the Commission appropriately affirmed summary judgment because the complainant did not satisfy its burden to show that any seller had market power and, therefore, that its rates were unjust and unreasonable.

STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF JURISDICTION

This Court has jurisdiction under Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b).

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Federal Power Act ("FPA") section 201, 16 U.S.C. § 824(b)(1), grants the Commission exclusive jurisdiction over the transmission and sale of electric energy in interstate commerce. *City of Redding, Cal. v. FERC*, 693 F.3d 828, 838 (9th Cir. 2012). Under FPA section 205, 16 U.S.C. § 824d, any rate or charge that is not "just and reasonable" is unlawful. *Id.* Under FPA section 206(b), 16 U.S.C. § 824e(b), if the Commission finds, after a hearing held upon its own motion or upon complaint, that a rate is unjust and unreasonable, it "may order refunds of any amounts paid . . . in excess of those which would have been paid under the just and reasonable rate . . . ." *Id.* at 838-39. The complainant in an FPA section 206 proceeding has the burden to show an existing rate is unjust and unreasonable. *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009); *Boston Edison Co. v. FERC*, 233 F.3d 60, 64 (1st Cir. 2000).

"[T]he Supreme Court 'has repeatedly held that the just and reasonable standard does not compel the Commission to use any single pricing formula . . . .'" *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (quoting *Mobil*

Oil Explor. & Prod. Southeast, Inc. v. United Distrib. Co., 498 U.S. 211, 224 (1991)). Both market-based and cost-based rates can satisfy the statutory just and reasonable standard. *E.g.*, *Lockyer*, 383 F.3d at 1013; *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *Elizabethtown Gas*, 10 F.3d at 870-71.

Market-based rates are presumed to be just and reasonable where there is a competitive market, i.e., where neither the buyer nor the seller has significant market power. *Lockyer*, 383 F.3d at 1012-13; *La. Energy*, 141 F.3d at 365; *Elizabethtown Gas*, 10 F.3d at 870; *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990). "'[W]hat matters is whether an individual seller is able to exercise anticompetitive market power, not whether the market as a whole is structurally competitive.'" *Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 916 (9th Cir. 2011) (quoting *Blumenthal*, 552 F.3d at 882). Thus, the relevant issue in determining whether market-based rates are just and reasonable is whether the seller has the ability to exercise market power.

From the 1980s, when the market-based rate program began, through the period at issue here (2000-2001), the Commission used the "hub-and-spoke analysis" to determine whether an entity had generation market power. *AEP Power Mktg, Inc.*, 97 FERC ¶ 61,219 at 61,969 (2001). Under the hub-and-spoke analysis, an entity's installed and uncommitted generation capacity market share,

in both the region where it sells electricity and regions to which it is directly interconnected, is calculated; a seller whose market share is 20 percent or less in each of the markets is presumed to lack market power. *Id.*; *Cal. ex rel. Bill Lockyer v. Brit. Colom. Power Exch. Corp.*, 122 FERC ¶ 61,260 at n.70 (2008) (Cal. ER[1] 210) (citing, *e.g.*, *Western Res.*, 83 FERC ¶ 61,110 at 61,532 (1998); *Louisville Gas and Elec.*, 62 FERC ¶ 61,016 at 61,143-46 (1993)).

II. Events Leading To The Challenged Orders

A. California Restructures Its Electricity Market

In response to high energy prices in the mid-1990s, California comprehensively restructured its electric energy industry from a cost-based to a market-based rate system. *Lockyer*, 383 F.3d at 1008-09. As part of the restructuring, companies applied to FERC for authority to sell electric energy at market-based rates. FERC approved market-based rate authority for those companies that it determined did not have, or had adequately mitigated, market power. *See, e.g., Pac. Gas and Elec. Co.*, 81 FERC ¶ 61,122 at 61,437, 61,537, 61,572 ordering para. (J) (1997).

[1] Petitioners' (California, *ex rel.* Kamala D. Harris, Attorney General; Public Utilities Commission of California; Pacific Gas and Electric Co.; Southern California Edison Co. (collectively, "California")) excerpts of record are cited as "Cal. ER." The Commission's excerpts of record are cited as "FERC ER."

B. The California Complaint Initiating The Underlying FERC Proceeding

On March 20, 2002, California's Attorney General filed an FPA section 206 complaint against all sellers of power and ancillary services subject to FERC jurisdiction in markets operated by the California Independent System Operator ("System Operator," the entity responsible for managing California's electric transmission grid) and the California Power Exchange Corporation ("Power Exchange," the entity California created to provide a centralized auction market for trading electricity), as well as sellers of power to the California Energy Resources Scheduler ("California Scheduler," a state entity that purchased wholesale power on the spot market). The complaint alleged that FERC's market-based rate tariff system violated the Federal Power Act because it does not require the filing of the precise rate to be charged. *See Lockyer*, 383 F.3d at 1009, 1010, 1012; R.1 in *Cal ex rel. Lockyer v. FERC*, 9th Cir. No. 02-73093 (FERC ER 9). The complaint further alleged that, even if FERC's market-based rate tariff system were valid, electricity sellers' quarterly market-based rate reports did not contain the transaction-specific data the statute and the Commission required. *Lockyer*, 383 F.3d at 1010. In addition to non-monetary relief, the complaint requested that the Commission "require the Defendants to refund the difference between the rate charged and a just and reasonable rate . . . ." R.1 at 24 (FERC ER 32); *see also id.*

at 25 (FERC ER 33) (requesting that "Defendants be forced to disgorge any revenues they collected . . . at rates found to exceed just and reasonable levels.").

C. FERC's Original Orders On The Complaint

The Commission found no merit to the challenge to its market-based rate program. *Cal. ex rel. Bill Lockyer v. Brit. Colom. Power Exch. Corp.*, 99 FERC ¶ 61,247 ("Original Order on Complaint") (Cal. ER 230), *on reh'g*, 100 FERC ¶ 61,295 (2002) ("Original Rehearing Order on Complaint") (Cal. ER 214). As the Commission explained, if a utility establishes that it does not have, or has adequately mitigated, market power, and therefore, that it will be able to charge only just and reasonable market-based rates, the filing of a market-based rate tariff before sales are executed in conjunction with later-filed quarterly reports detailing the numerical rates actually charged satisfies Federal Power Act requirements. Original Rehearing Order on Complaint, 100 FERC P 13 (Cal. ER 220).

The Commission granted the complaint in part, however, finding that quarterly filings reporting aggregated, rather than transaction-specific, data did not comply with FPA section 205(c) and Commission reporting requirements. Original Order on Complaint at 62,065-66 (Cal. ER 251-54). Thus, the Commission directed all public utility sellers that made sales to the California Scheduler or into the System Operator or Power Exchange markets since October 2, 2000 to file, in compliance with Commission reporting requirements, new

quarterly transaction reports showing non-aggregated data for those sales. *Id.* at 62,067 (Cal. ER 254).[2] The Commission denied the Attorney General's request for refunds, finding that the reporting requirement violations were essentially a compliance issue and, therefore, the Commission did not have authority to retroactively order refunds. *Id.* (Cal. ER 255-56).

D. The *Lockyer* Opinion

On appeal, the Court agreed with the Commission that there was no merit to the challenge to its market-based rate program, but found that the Commission erred in concluding that it lacked authority to order refunds for the reporting violations. *Lockyer*, 383 F.3d at 1008, 1011-13, 1015-18. The Court explained that the reporting requirements are "integral to the tariff, with implied enforcement mechanisms sufficient to provide substitute remedies for the obtaining of refunds for the imposition of unjust, unreasonable and discriminatory rates . . . ." *Id.* at 1016. Thus, the Court concluded, "FERC may elect not to exercise its remedial discretion by requiring refunds, but it unquestionably has the power to do so." *Id.*

[2] Specifically, the Commission required sellers to provide the following information, for each transaction, in the re-filed quarterly reports: the identity of the buyer and seller; description of the service; delivery point(s); price(s); quantities; and dates/duration of service. Original Order on Complaint at 62,067 (Cal. ER 254).

III. The Orders on Remand

A. The Orders Establishing Hearing Proceedings

On remand, the Commission established trial-type hearing proceedings before an Administrative Law Judge ("Administrative Judge") to determine whether "any individual public utility seller's violation of the Commission's market-based rate quarterly reporting requirement led to an unjust and unreasonable rate for that particular seller in California during the 2000-2001 period" and, therefore, whether a refund or other remedy should be ordered. *Cal. ex rel. Bill Lockyer v. Brit. Colom. Power Exch. Corp.*, 122 FERC ¶ 61,260 P 2 ("122 FERC") (Cal. ER 191), *on clarification*, 123 FERC ¶ 61,042 ("123 FERC") (Cal. ER 181), *on reh'g*, 125 FERC ¶ 61,016 (2008) ("125 FERC") (Cal. ER 158), *on reh'g*, 129 FERC ¶ 61,276 (2009) ("129 FERC") (FERC ER 1); *see also* 122 FERC P 31 (Cal. ER 207) (noting that the "California complainants alleged that all sellers that violated the Commission's filing requirement were charging an unjust and unreasonable rate and implied that there is a link between the failure of these particular sellers to properly file quarterly reports and the reasonableness of their individual rates.").

Thus, the Commission directed purchasers to supplement the record by presenting evidence regarding whether, "based on the facts and circumstances associated with each individual seller, that seller's improper or untimely filing of

its quarterly transaction reports masked an accumulation of market power (as defined by the Commission's test for approving market-based rates in effect at the time of the transaction) such that the market rates were unjust and unreasonable." 122 FERC P 35 (Cal. ER 209); *see also id.* PP 2, 33, ordering para. (B) (Cal. ER 191, 208, 211) (same); *id.* P 35 (Cal. ER 209) ("In other words, since the time of the Commission's approval of the seller's market-based rate, did the seller gain the ability to exercise market power?"). The market power test in effect at the time of the transactions at issue, the hub-and-spoke analysis, focused on whether the seller at any point reached a 20 percent market share threshold. *Id.* P 35 & nn.45, 70 (Cal. ER 202, 209, 210). Once the Commission received the Administrative Judge's factual determinations, it would exercise its remedial discretion to determine what remedy, if any, was appropriate for a particular seller. *Id.* PP 2, 33, 35 (Cal. ER 191, 208, 209).

The Commission held the hearing in abeyance for settlement proceedings. 122 FERC P 36, Ordering Para. (B) (Cal. ER 210-11). Numerous sellers settled with California, and were dismissed as parties to the proceeding. 123 FERC P 5 & n.11, P 13 (Cal. ER 183, 187-88); 125 FERC P 16 (Cal. ER 166); *see also* Br. 13 n.1 (discussing numerous settlements).

On rehearing, the Commission reaffirmed its hearing directives. Rejecting claims that different analyses be used, the Commission reiterated that the 20

percent market share hub-and-spoke analysis applied here because that was the analysis used to determine whether rates were just and reasonable when the transactions at issue occurred. 125 FERC PP 24-26, 30 (Cal. ER 170-73). "The Commission is required to use the standards for assessing market power of market-based rate sellers and the reporting requirements in effect at the time the transactions took place;" otherwise, the Commission "would violate the requirement that all jurisdictional sellers be on notice as to what test will be applied to them." *Id.* P 30 (Cal. ER 172-73) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law.")).

The Commission also rejected requests to expand the scope of this proceeding to include not only reporting violations but also evidence of sellers' market manipulation. 125 FERC P 32 (Cal. ER 174). "[T]his proceeding [FERC Docket No. EL02-71] focuses solely on violations of our quarterly transaction report[ing requirement]s as a basis for potential refund liability and . . . is not a proceeding to address other potential tariff violations (such as gaming and anomalous bidding behavior), which is the subject of the [*Pub. Utils. Comm'n*] proceeding [FERC Docket No. EL00-95]."[3] *Id.*; *see also id.* P 41 (Cal. ER 178-79)

[3] *See Public Util. Comm'n of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006) ("*Pub. Utils. Comm'n*") (reviewing Orders issued in FERC Docket No. EL00-95), *on remand sub nom. San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs. into Mkts Operated by the Cal. Indep. Sys. Oper. Corp. and the Cal. Power Exch.*, 129 FERC ¶ 61,147 (2009), *on reh'g*, 135 FERC ¶ 61,183 (2011), *order on*

(same); 122 FERC n.65 (Cal. ER 208) (same); 129 FERC P 12 (FERC ER 7) (noting that the complaint initiating this proceeding raised only reporting violation allegations). Likewise, the Commission rejected requests to expand the scope of this proceeding to address alleged tariff violations regarding sales in the Pacific Northwest, which were being addressed in the *Port of Seattle* proceeding, FERC Docket No. EL01-10.[4] 125 FERC P 41 (Cal. ER 178).

B. The Hearing

1. California's Evidence

On July 1, 2009, California filed the direct testimony of two witnesses, Dr. Carolyn Berry, R. 550-53 (Cal. ER 519-745), and Mr. Gerald Taylor, R. 548 (FERC ER 39); *see Cal. ex rel. Bill Lockyer v. Brit. Colom. Power Exch. Corp.*, 130 FERC ¶ 63,017 P 23 (Cal. ER 57) (2010) ("130 FERC"). California's testimony did not include a hub-and spoke analysis. R. 548, Direct Testimony of Mr. Taylor at 13 (FERC ER 51). Instead, California chose to use different analyses to argue that certain sellers exercised market power and that all sellers

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initial decision, 142 FERC ¶ 63,011 (2013) ("*Pub. Utils. Comm'n* Remand Initial Decision")).

[4] *See Port of Seattle, Wash. v. FERC*, 499 F.3d 1016 (9th Cir. 2007) (reviewing Orders issued in FERC Docket No. EL01-10), *on remand sub nom. Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy and/or Capacity Mkts. in the Pacific Northwest*, 137 FERC ¶ 61,001 (2011), *on reh'g*, 143 FERC ¶ 61,020 (2011), *pending reh'g*, No. EL01-10-122 (June 3, 2013).

were, therefore, able to raise sale prices above competitive levels. *See Cal. ex rel. Bill Lockyer v. Brit. Colom. Power Exch. Corp.*, 135 FERC ¶ 61,113 P 23 (2011) (Cal. ER 29); 130 FERC PP 188-89 (Cal. ER 130-31).

Commission Staff and the respondent-sellers filed answering testimony on September 17, 2009. R. 651-88. California filed rebuttal testimony on December 17, 2009 (R. 754-60), which again failed to provide a hub-and-spoke market-power analysis. R. 756, Rebuttal Testimony of Mr. Taylor at 111-14 (FERC ER 58-61); 130 FERC P 23 (Cal. ER 57).

2. Respondent-Sellers' Motions For Summary Judgment

In October 2008 and January and March 2009, respondent-sellers filed 18 motions and two supplemental motions for summary disposition (R. 726, 817-18, 820-36, 890, 892). *See* 130 FERC PP 24-34 (Cal. ER 58-62). Among other things, movants pointed out that, contrary to the Commission's directives, California failed to present evidence under the hub-and-spoke analysis. *E.g.*, Allegheny's Motion, R. 726; *see* 130 FERC P 69 (Cal. ER 77).

Acknowledging that it had not presented evidence using a hub-and-spoke analysis, R. 748 (Cal. ER 382-402), 846 (Cal. ER 347-81), California contended that the Commission had not directed it to do so, *e.g.*, Cal. ER 391.

Commission Staff agreed with the movants that California's failure to apply the hub-and-spoke analysis contravened the Commission's clear directives and that

the motions for summary disposition should be granted. R. 749; *see* 130 FERC PP 83-88 (Cal. ER 83-85).

C. The Administrative Judge Grants Summary Judgment

The Administrative Judge found that, while the Commission "unequivocally directed the parties and the [Administrative Judge] to apply the hub-and-spoke analysis in this proceeding," California did not do so. 130 FERC PP 208, 210, 212 (Cal. ER 141-43). Thus, although California raised issues of fact regarding whether some or all of the sellers satisfied the reporting requirements, the Administrative Judge granted the motions for summary disposition because California failed to establish a prima facie case that sellers accumulated market power under the hub-and-spoke analysis. *Id.* PP 37, 200-18 (Cal. ER 63-64, 136-47).

D. The Commission's Orders On Summary Judgment

The Commission affirmed the Administrative Judge's determinations. *Cal. ex rel. Bill Lockyer v. Brit. Colom. Power Exch. Corp.*, 135 FERC ¶ 61,113 (2011) ("135 FERC") (Cal. ER 19), *on reh'g*, 139 FERC ¶ 61,211 (2012) ("139 FERC") (Cal. ER 1). As the Commission explained, while it "*specifically required* the [Administrative Judge] and the parties to use the Commission's hub-and-spoke analysis to determine whether, in the first instance, each supplier with alleged reporting deficiencies in 2000-2001 had accumulated market power," California

"did not follow these instructions and thus failed to provide this essential evidence." 135 FERC P 36 (Cal. ER 35); *see also* 139 FERC PP 21-28 (Cal. ER 13-15).

The Commission agreed with the Administrative Judge "that this failure alone [was] sufficient grounds to justify summary disposition as to all sellers." 135 FERC P 36 (Cal. ER 35); *see also id.* PP 37-42 (Cal. ER 36-38) (same); 139 FERC P 29 (Cal. ER 15) ("Given that the issue of whether suppliers accumulated market power was the threshold issue in this proceeding,[5] and given [California's] failure to offer any evidence to demonstrate the accumulation of market power under the hub-and-spoke standard, our affirming the grant of summary disposition was appropriate.") (footnote omitted).

SUMMARY OF ARGUMENT

California raises a number of challenges to the Commission's orders on remand. As the Commission was attentive to and complied with the Court's mandate in *Lockyer*, and reasonably affirmed the Administrative Judge's grant of summary judgment, however, none of the challenges has merit.

The complaint initiating this proceeding alleged that sellers had not complied with market-based rate quarterly reporting requirements, and requested

[5] Citing 122 FERC P 35 (Cal. ER 209) (directing that the parties and presiding judge should first address the 20 percent threshold under the hub-and-spoke test).

refunds of the difference between the amount charged and the just and reasonable rate. At first, the Commission believed it did not have authority to order refunds for the alleged reporting violations. *Lockyer* determined that the Commission has that authority, and remanded the case so the Commission could determine whether, in its discretion, to order refunds.

As California notes, the Court's mandate was to gauge the justness and reasonableness of the rates charged. Thus, in compliance with the Court's mandate, on remand the Commission ordered a hearing to determine whether any sellers who violated quarterly reporting requirements had gained market power (as determined under the hub-and-spoke market share analysis used when the sales in question were made). The Commission did this to determine whether any seller had the ability to charge unjust and unreasonable rates during the period at issue here.

The hearing properly ended at the summary judgment stage. The Administrative Judge granted respondent-sellers' motions for summary judgment because the complainant, California's Attorney General, had not satisfied its burden to show that sellers had market power during the period in question and, therefore, that the rates they charged during that period were unjust and unreasonable. Agreeing with the Administrative Judge that the Attorney General had disregarded its directive to address whether the sellers had gained market

power under the hub-and-spoke analysis and, therefore, had failed to establish a prima facie case that the rates charged were unjust and unreasonable, the Commission appropriately affirmed summary judgment.

There is no need for the Court to direct the Commission to make findings regarding which sellers violated quarterly reporting requirements. The Administrative Judge and the Commission accepted those reporting violations as true in determining whether to grant or affirm summary judgment. Moreover, there is no need to direct the Commission to order refunds for amounts collected in excess of just and reasonable rates. As the complainant, the Attorney General had, but failed to meet, the burden to show that sellers' rates were unjust and reasonable.

In addition to complying with the Court's mandate and appropriately affirming summary judgment, the Commission also acted consistently with precedent. While California contends precedent requires the justness and reasonableness of market-based rates to be determined based on the data in quarterly reports, the Commission reasonably found otherwise. As the Commission explained, quarterly reports help the Commission monitor for any indicia of market power. And, because, as this and other Courts have found, market-based rates charged by sellers without market power are just and reasonable, the Commission determines whether market-based rates are just and

reasonable, both before and after granting market-based rate authority, based on an analysis of the seller's market share. Here, where the Commission already had established a hearing to determine whether the market-based rates charged during the period in question were just and reasonable, there was no need for the Commission to take a step back to look at quarterly reporting data to determine whether that data indicated the Commission should order such a hearing.

The Commission also reasonably determined that a seller's market power needed to be assessed under the analysis in effect when the sales in question occurred. Applying a different analysis would violate the requirement that sellers be on notice of the standards that apply to their sales.

Finally, the Commission appropriately rejected attempts to broaden the scope of this proceeding to include market manipulation allegations. The complaint initiating this proceeding alleged only reporting violations, and market manipulation allegations were already being addressed in another complaint proceeding. The Commission's determination to address in different proceedings allegations raised in different complaints was well within its broad discretion to determine how best to handle related issues, and should be affirmed.

ARGUMENT

I. Standard Of Review

The Commission's determinations in proceedings on remand are reviewed to ensure they are responsive to the Court's mandate. *U.S. v. Kellington*, 217 F.3d 1084, 1092-93 (9th Cir. 2000). Although the Commission is "obligated to execute the terms of a mandate, [it is] free as to anything not foreclosed by the mandate . . . ." *Id.* at 1092 (internal quotation omitted). "[I]n addition to the mandate itself, '[t]he opinion by [the] court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate . . . .'" *Id.* at 1093 (quoting *In re Sandford Fork & Tool Co.*, 160 U.S. 247, 256 (1895)). Moreover, a mandate should be construed in light of applicable substantive law. *Id.*

The Commission's determination to affirm summary judgment is also subject to the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Review under this standard is "highly deferential." *Cal. Trout v. FERC*, 572 F.3d 1003, 1012 (9th Cir. 2009); *see also Lockyer*, 383 F.3d at 1012 ("appellate review is deferential."). "[A]gency decisions may be set aside only if 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008) (quoting 5 U.S.C. § 706(2)(A)). The Court "may reverse under the arbitrary and capricious standard if the agency relied on factors that Congress did not intend

it to consider, or offered an explanation for its decision that runs counter to the evidence or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

Under the Federal Power Act, "'[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.'" *Id.* (quoting FPA § 313(b), 16 U.S.C. § 825*l*(b)). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation omitted).

The Commission's "discretion is at its zenith when it is 'fashioning [] policies, remedies and sanctions . . . .'" *Pub. Utils. Comm'n*, 462 F.3d at 1053 (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (omission by Court)). The Court also "'afford[s] great deference to the Commission in its rate decisions.'" *Mont. Consumer Counsel*, 659 F.3d at 918 (quoting *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 532 (2008)).

II. The Remand Orders Comply With The Court's Mandate

A. *Lockyer*

Lockyer found that the reporting requirements are "integral to the tariff, with implied enforcement mechanisms sufficient to provide substitute remedies for the obtaining of refunds for the imposition of unjust, unreasonable and discriminatory

rates . . . ." *Lockyer*, 383 F.3d at 1016; *see also id.* at 1014 ("The structure of the tariff complied with the FPA, so long as it was coupled with enforceable post-approval reporting that would enable FERC to determine whether the rates were 'just and reasonable'"); *id.* at 1017 ("The FPA cannot be construed to immunize those who overcharge"). Thus, as California points out, "this Court's mandate [was] 'to gauge the "just and reasonable" nature of the rates.'" Br. 15 (quoting *Lockyer*, 383 F.3d at 1015), 44 (same); *see also* Br. 5 ("This proceeding involves sellers' unlawful overcharges for power"); Br. 15 (arguing that purchasers should be provided refunds because they were "charged unjust and unreasonable rates").

The Court explained that "FERC may elect not to exercise its remedial discretion by ordering refunds, but it unquestionably has the power to do so." *Id.* at 1016; *see also id.* at 1018 (leaving to "FERC to reconsider its remedial options in the first instance").

B. The Remand Orders Comply With *Lockyer*

In compliance with *Lockyer*, the Commission established a hearing to address whether any sellers who violated quarterly reporting requirements had gained market power and, therefore, had the ability to charge unjust and unreasonable rates during the period in question. 122 FERC P 35 (Cal. ER 209). The Commission reopened the record to permit purchasers (who, as complainants, had the burden of proof under FPA section 206) to present evidence that any seller

that violated the quarterly reporting requirement had an increased market share (as determined under the hub-and-spoke analysis used when the sales in question were made) sufficient to give it the ability to exercise market power. *Id.* PP 2, 33, 35 (Cal. ER 191, 208, 209); 130 FERC PP 35, 88, 146 (Cal. ER 63, 84, 146).

Despite the Commission's directives, California failed to submit evidence regarding whether any seller had gained the ability to exercise market power under the hub-and-spoke analysis. R. 748, California's Answer to Allegheny's Motion for Summary Disposition (Cal. ER 382-402); R. 846, California's Answer to Other Parties' Motions for Summary Disposition (Cal. ER 347-81); 139 FERC P 28 (Cal. ER 15). Accordingly, the Administrative Judge granted the sellers' motions for summary judgment, and the Commission affirmed. 130 FERC PP 37, 200-18 (Cal. ER 63-64, 136-47); 135 FERC ¶ 61,113 (Cal. ER 19-45); 139 FERC ¶ 61,211 (Cal. ER 1-17).

C. The Commission Appropriately Affirmed Summary Judgment

California asks the Court to direct the Commission: (1) to make findings regarding which sellers violated quarterly reporting requirements; and (2) to determine the just and reasonable rate for sales made by those sellers and order refunds for amounts collected in excess of those rates. Br. 49-51. Neither of the requested directives is necessary or appropriate.

First, in determining whether to grant summary judgment, the reporting violations were accepted as true. *E.g.*, 130 FERC P 66 (Cal. ER 76), n.205 (Cal. ER 75). Moreover, as the complainant California had the burden to show that sellers' rates were unjust and unreasonable. FPA section 206(b), 16 U.S.C. § 824e(b); *Blumenthal*, 552 F.3d at 881; *Boston Edison*, 233 F.3d at 64. California failed to meet that burden. 130 FERC PP 212, 217, 238 (Cal. ER 143, 146, 155); 135 FERC PP 30, 44 (Cal. ER 32, 39).

As the Court recognized in *Lockyer*, 383 F.3d at 1016, the Commission has broad remedial discretion, and "may elect not to exercise its remedial discretion by requiring refunds . . . ." *See also* FPA section 206(b), 16 U.S.C. § 824e(b) ("the Commission may [not must] order refunds of any amounts paid . . . in excess of those which would have been paid under the just and reasonable rate"); *Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000) ("the breadth of agency discretion is, if anything, at [its] zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions."); *Pub. Utils. Comm'n*, 462 F.3d at 1053 (same); *Towns of Concord, Norwood, and Wellesley, Mass. v. FERC*, 955 F.2d 67, 72-73, 76 (D.C. Cir. 1992) (same); 122 FERC P 26 & n.50 (Cal. ER 203) (same; citing cases). In the circumstances here, where the complaint initiating this proceeding requested refunds of "the difference

between the rate charged and a just and reasonable rate," R.1 at 24 (FERC ER 32), and the complainant failed to meet its burden to show that the rates charged were not just and reasonable, the Commission reasonably affirmed summary judgment in favor of the respondents.

D. The Commission Acted Consistently With Precedent

California asserts that the Commission departed from precedent requiring quarterly reports of actual transaction data so that rates are on file with the Commission (Br. 30, 34) and "so that pricing and other characteristics of actual sales [can] be evaluated," Br. 30;[6] *see also* Br. 29-37, 44-48 (same). In fact, however, the Commission acted consistently with precedent.

The Commission ensured that actual transaction data was on file, as it required sellers to file new quarterly transaction reports showing non-aggregated data for sales during the period in question. Original Order on Complaint, 99 FERC at 62,065-67 (Cal. ER 251-54).

[6] Citing *LG&E Power Mktg. Inc.*, 68 FERC ¶ 61,247 at 62,124 (1994) ("After-the-fact quarterly reports provide a means for spotting price trends, discriminatory patterns, or other indicia of the exercise of market power."); *Enron Power Mktg.*, 65 FERC ¶ 61,305 at 62,406 (1993), *on reh'g*, 66 FERC ¶ 61,244 (1994) (quarterly reports are necessary "so that the marketer's rates will be on file as required by section 205(c) of the FPA, to evaluate the reasonableness of the charges, and to provide for ongoing monitoring of the marketer's ability to exercise market power"); *Citizens Power & Light Corp.*, 48 FERC ¶ 61,210 at 61,778 (1989) (quarterly reports are necessary "to monitor the rates being paid").

Furthermore, consistent with Commission precedent, the challenged orders explain that quarterly reports help the Commission monitor for any indicia of market power. 125 FERC PP 28, 29 (Cal. ER 172); 130 FERC P 211 (Cal. ER 142-143); 139 FERC P 26 (Cal. ER 14); *see also Mont. Consumer Counsel*, 659 F.3d at 919 (noting that FERC monitors quarterly reporting data "to ensure that the reported transactions are consistent with the data expected of a competitive, unmanipulated market."). If such indicia are present, another analysis of the seller's market share is conducted to determine whether the seller actually has gained market power and could, therefore, charge unjust and unreasonable rates. 125 FERC P 28 (Cal. ER 172); 130 FERC P 211 (Cal. ER 143); 139 FERC P 26 (Cal. ER 14). Thus, recognizing that a seller's market share may change over time (Br. 9, 28, 30-31), the Commission continues to monitor for indicia of market power and requires a new market share analysis where there are market power concerns. That California may dislike the agency's approach is, in itself, hardly grounds for judicial reexamination. *See Mont. Consumer Counsel*, 659 F.3d at 916 ("Petitioners must do more than demonstrate that FERC's policy is a bad idea."); *id.* at 922 (the court's "review is that of a federal appellate court, not a policy analyst.").

California argues that Commission precedent requires the justness and reasonableness of market-based rates to be determined based on the data in

quarterly reports. Br. 25-29, 37-40. But, as this and other courts (and the Commission) have found, the Commission appropriately can presume that market-based rates charged by sellers without market power are just and reasonable. *E.g.*, *Blumenthal*, 552 F.3d at 882; *Lockyer*, 383 F.3d at 1012-13; *see also* 125 FERC P 25 (Cal. ER 170-71) (same). Thus, the Commission reasonably explained that it determines whether market-based rates are just and reasonable, both before and after granting market-based rate authority, based on an analysis of the seller's market share. 125 FERC P 28 (Cal. ER 172); 139 FERC P 26 (Cal. ER 14); 130 FERC P 211 (Cal. ER 143). The Commission's reasonable interpretation of its own precedent, not California's contrary interpretation, is due deference, and should be affirmed. *Cal. Trout*, 572 F.3d at 1013.

California also claims (Br. 38-40) that a statement by FERC counsel at oral argument in *Montana Consumer Counsel v. FERC*, 9th Cir. Docket No. 08-71827, which explains that the Commission uses a two-phase approach to ensure market-based rates are on file (Cal. ER 286-87), is at odds with the Commission's determinations here. As the Commission explained, however, that "statement merely reiterate[d] the Commission's policy and is entirely consistent with the Commission's orders -- the tariff filing 'initiates' the rate change and the quarterly report completes it." 139 FERC PP 18, 26 & n.61 (Cal. ER 10, 14). The cited

statement thus addressed only the requirement that rates be on file, not the review that is conducted to ensure market-based rates remain just and reasonable.

California further contends that the Commission departed from precedent requiring, "a seller that makes unauthorized market-based rate sales, in violation of FPA Section 205 filing requirements" to refund, without any need for a market share analysis, the difference between the market-based rate charged and the just and reasonable cost-based rate. Br. 44-48. The precedent California refers to is inapposite, as it involved sellers who, unlike here, made sales at market-based rates without first receiving necessary market-based rate authority. *See* 122 FERC PP 27-29 (Cal. ER 204-06) (explaining that precedent requiring refunds of the difference between the market-based rate and the just and reasonable cost-based rate applied to situations, unlike here, in which the seller had not obtained market-based rate authority); R. 552, Exh. CLP-1 (Dr. Berry Testimony) at 38 (Cal. ER 556) (same).

E. The Commission Appropriately Directed Use Of The Market Power Analysis In Effect When The Sales At Issue Occurred

The Commission directed purchasers to analyze whether a seller had market power when the sales at issue were made (2000-2001) under the market power test (hub-and-spoke) in effect during that period. 122 FERC n.45, P 35 & n.70 (Cal. ER 202, 210); 125 FERC PP 24, 30 (Cal. ER 170, 172-73); 135 FERC P 40 (Cal. ER 37); 139 FERC PP 24, 26 (Cal. ER 13-15). As the Commission explained,

sellers must be on notice of the standards that apply to their sales. 125 FERC PP 24, 30 (Cal. ER 172-73); 130 FERC P 213 (Cal. ER 144); 135 FERC P 40 (Cal. ER 37). Accordingly, whether a seller had market power needed to be assessed under the standard in effect during the period in question. 125 FERC PP 24, 30 (Cal. ER 172-73); 130 FERC P 213 (Cal. ER 144); 135 FERC P 40 (Cal. ER 37).

California does not dispute that the hub-and-spoke market share analysis was in effect during the period in question. *See* Br. 28-29. Instead, California argues that the hub-and-spoke analysis is relevant only in determining whether the Commission should grant a seller market-based rate authority in the first place. Br. 29. This argument was already addressed, *supra* 26-28.

California also argues that the hub-and-spoke analysis is an inadequate market power screen. Br. 27-28, 31. This argument, however, ignores notice requirements. While the Commission has refined its market power analysis since the transactions at issue occurred, it would have been improper for the Commission to retroactively apply the refined analysis to prior transactions. 125 FERC P 30 (Cal. ER 173). *See, e.g., Garfias-Rodriguez v. Holder*, 702 F.3d 504, 518 (9th Cir. 2012) (en banc) (whether a new policy should be applied retroactively depends, among other things, on whether the new policy is an abrupt departure from well-established practice and the extent to which the party against whom the new policy is applied relied on the former policy) (citing *Retail, Wholesale & Dep't Store*

Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972)); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800-01 (D.C. Cir. 2007) ("filed rate doctrine" requires that electricity sales under the Federal Power Act provide adequate notice to the seller and purchaser of the rate to be charged).

Finally on this issue, California contends that most of the sellers here are power marketers who do not own any generation and, therefore, can never be found to have market power under the hub-and-spoke analysis. Br. 27. In fact, however, a power marketer's market share is determined under the hub-and-spoke analysis based on the generation market share of its generation-owning affiliates. *E.g.*, *Heartland Energy Services, Inc.* 68 FERC ¶ 61,223 at 62,052, 62,061 (1994).

F. The Commission Properly Rejected Attempts To Broaden The Scope Of This Proceeding

The complaint initiating this proceeding alleged quarterly report filing violations. *See Lockyer*, 383 F.3d at 1010; 129 FERC P 12 (FERC ER 7-8). Initially, the Commission ruled that it did not have authority to order refunds for the alleged reporting violations. Original Order on Complaint, 99 FERC at 62,067 (Cal. ER 255-56). The Court found otherwise, and remanded this case for the Commission to consider whether to order refunds. *Lockyer*, 383 F.3d at 1008, 1016.

On remand, California requested that the Commission expand this proceeding to also address market manipulation allegations. *See* 125 FERC P 31 (Cal. ER 173). The Commission rejected this request, explaining that the complaint initiating this proceeding alleged only reporting, not market manipulation, violations and that this proceeding had focused since its inception on reporting violations. 129 FERC P 12 (FERC ER 7). Moreover, market manipulation allegations were already being addressed in another complaint proceeding, FERC Docket No. EL00-95. 125 FERC PP 32, 41, n.53 (Cal. ER 173, 174, 178-79); 129 FERC PP 11-13 (FERC ER 6-8); 122 FERC P 23, n.65 (Cal. ER 201, 208). While the "proceedings involve[d] many of the same parties and overlapping time periods," the Commission determined that "the nature and scope of the proceedings remain distinct," and that market manipulation was "more appropriately addressed" in the *Pub. Utils. Comm'n* proceeding. 125 FERC P 41 (Cal. ER 178-79); *see also id.* n. 53 (Cal. ER 173) (recognizing that a seller without market power could nonetheless be selling at an unjust and unreasonable rate as a result of market manipulation, and explaining that such manipulation was the subject of the other complaint proceeding). The Commission added that, if useful, quarterly data could be considered in the market manipulation proceeding. *Id.*

California acknowledges that the market manipulation claims went to hearing in the *Pub. Utils. Comm'n* proceeding and that the Administrative Judge there found numerous manipulation violations. Br. 43 (citing *Pub. Utils. Comm'n* Remand Initial Decision, 142 FERC ¶ 63,011). The Administrative Judge proposed refunds in excess of $90 million. *See* 142 FERC ¶ 63,011 at PP 1, 2.[7]

The Commission "enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures." *Mobil Oil*, 498 U.S. at 230 (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978)); *see also, e.g., La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007) (same). The Commission's determination to address in different proceedings allegations raised in different complaints was reasonable and well within its discretion.

G. The Commission Appropriately Affirmed Summary Judgment

California asks the Court to direct the Commission: (1) to make findings regarding which sellers violated quarterly reporting requirements; and (2) to

[7] Further evidence of the Commission's commitment to investigating market abuses and providing substantial ratepayer relief where appropriate is found, most recently, in *In re Make-Whole Payments and Related Bidding Strategies*, 144 FERC ¶ 61,068 (2013). In that case, the Commission approved a settlement under which JP Morgan Ventures Energy Corp. will pay $410 million in penalties and disgorgement to ratepayers -- including the return of $124 million to California ratepayers -- for allegations of market manipulation stemming from the company's bidding activities in electricity markets in California and the Midwest from September 2010 through November 2012. *Id.* PP 2-3.

determine the just and reasonable rate for sales made by those sellers and order refunds for amounts collected in excess of those rates. Br. 49-51.

California's request ignores that, in determining whether to grant summary judgment, the reporting violations were accepted as true. *E.g.*, 130 FERC P 66 (Cal. ER 76), n.205 (Cal. ER 75). This request also ignores that California, as the complainant, had the burden to show that sellers' rates were unjust and unreasonable (FPA section 206(b), 16 U.S.C. § 824e(b); *Blumenthal*, 552 F.3d at 881; *Boston Edison*, 233 F.3d at 64), and it failed to meet that burden (130 FERC PP 212, 217, 238 (Cal. ER 143, 146, 155); 135 FERC PP 30, 44 (Cal. ER 32, 39)).

As the Court recognized in *Lockyer*, 383 F.3d at 1016, the Commission has broad remedial discretion, and "may elect not to exercise its remedial discretion by requiring refunds . . . ." *See also*, *e.g.*, *Conn. Valley*, 208 F.3d at 1043-47 (upholding as within FERC's broad remedial discretion decision not to remedy even when presented with a statutory violation); *Pub. Utils. Comm'n*, 462 F.3d at 1053 (same); 122 FERC P 26 & n.50 (Cal. ER 203) (same; citing cases). In the circumstances here, where the complaint initiating this proceeding requested refunds of "the difference between the rate charged and a just and reasonable rate," R.1 at 24 (FERC ER 32), and the complainant failed to meet its burden to show that the rates charged were not just and reasonable, the Commission reasonably affirmed summary judgment in favor of the respondents.

The Commission met its responsibility to fully adjudicate the complaint before it. *See Port of Seattle*, 499 F.3d at 1035-36 (agency may not decline to adjudicate by referring complaint issues to non-public, non-reviewable proceedings). No more is necessary, and the challenged orders should be affirmed.

CONCLUSION

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

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Commission states that this case is on remand from *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004). Other than those stated in California's Statement of Related Cases, Br. 51, there are no additional cases related to this one.

Respectfully submitted,

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August 16, 2013

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C) and 9th Cir. R. 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points, and contains 7,389 words, not including the tables of contents and authorities, the glossary, the certificate of counsel, and the addendum.

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August 16, 2013

ADDENDUM

STATUTES

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 703. Form and venue of proceeding

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

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

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

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

(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

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§ 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.)

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

State of California, ex rel. Bill Lockyer, Attorney General of the State of California v. FERC **Docket No. EL02-71**
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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 16th day of August 2013, 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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