No. 13-72220

In the United States Court of Appeals for the Ninth Circuit

IDAHO POWER COMPANY, *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 ISSUE

Whether the Federal Energy Regulatory Commission (FERC or the Commission) reasonably conditioned its approval of a settlement between petitioners Idaho Power Company and IDACORP Energy Services Company (collectively Idaho Power) and the City of Tacoma, Washington, upon the removal of language unilaterally extinguishing the rights of non-settling parties to assert claims against Idaho Power.

STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF JURISDICTION

The Commission orders challenged in this appeal concern a settlement of potential refund liability for electricity sold in the Western United States in 2000 and 2001. The Commission has jurisdiction to issue these orders under sections 201, 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824, 824d and 824e. Petitioner Idaho Power timely petitioned for review of the challenged orders under section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), and this Court has jurisdiction over this appeal under the same section.

STATEMENT OF THE CASE

This case concerns a proposed settlement between Idaho Power and the City of Tacoma in the Pacific Northwest refund proceeding, arising out of the Western energy crisis of 2000-2001. The proposed settlement released Tacoma's refund claims against Idaho Power, but also purported to release the claims of any other party to the Pacific Northwest refund proceeding against Idaho Power as well. No party objected to the settlement terms as between Tacoma and Idaho Power, but non-settling parties PPL Montana, LLC and PPL EnergyPlus, LLC (collectively

PPL) and Powerex Corporation requested that the Commission not permit the settlement to compromise the rights of non-settling parties.

In the challenged orders, *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 139 FERC ¶ 61,209 (Settlement Order), Petitioners' Excerpts of Record (ER) 6, *on reh'g*, 141 FERC ¶ 61,148 (2012) (Rehearing Order), ER 1, the Commission approved the settlement as an uncontested settlement, subject to the condition that the settling parties remove the language extinguishing non-settling parties' rights. The Commission found such language to be inconsistent both with the history of the Pacific Northwest refund proceeding, in which such claims had been preserved, and with the Commission's policy of favoring settlements that do not impair the rights of third parties. On appeal, Idaho Power challenges the Commission's decision to conditionally approve the settlement.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

Under the Federal Power Act, all rates charged by a public utility must be "'just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.'" *Port of Seattle, Wash. v. FERC*, 499 F.3d 1016, 1023 (9th Cir. 2007) (quoting section 205(a) of the Federal Power Act, 16 U.S.C.

§ 824d(a)). Public utility rates and charges for wholesale sales and transmission of power are subject to FERC review, and the Federal Power Act charges FERC with ensuring the rates charged fall within a "'zone of reasonableness.'" *Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 914, 918 (9th Cir. 2011) (quoting *FPC v. Natural Gas Pipeline Co. of Am.*, 315 U.S. 575, 585 (1942)).

The Commission has authority to settle ratemaking proceedings informally. *United Mun. Distribs. Grp. v. FERC*, 732 F.2d 202, 207 n.7 (D.C. Cir. 1984) (citing section 554(c)(1) of the Administrative Procedure Act, 5 U.S.C. § 554(c)(1)). "The whole purpose of the informal settlement provision [Administrative Procedure Act section 554(c)] is to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest." *Penn. Gas & Water Co. v. FPC*, 463 F.2d 1242, 1247 (D.C. Cir. 1972). Under Rule 602(g) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(g), the Commission may approve an uncontested settlement as to the consenting parties "upon a finding that the settlement appears to be fair and reasonable and in the public interest." *See generally Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 701 (D.C. Cir. 2007); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998); *Tejas Power Corp. v. FERC*, 908

F.2d 998, 1003 (D.C. Cir. 1990). This standard permits the Commission to approve the uncontested offer of settlement without a determination on the merits that the settlement is "just and reasonable." *United Mun. Distribs. Grp.*, 732 F.2d at 207 n.8.

Conversely, to approve a contested settlement, the Commission must determine that the settlement is just and reasonable. *Id*. at n.11. *See also, e.g.*, *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 314 (1974) (an uncontested settlement may be adopted if approved in the general interest of the public but a contested settlement must be adopted as a resolution on the merits, supported by substantial evidence that the proposal is just and reasonable). Under Rule 602(h) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(h), the Commission may take a number of approaches to addressing contested settlements. The Commission may make a determination on the merits regarding contested issues if it finds that the record contains substantial evidence or that there are no issues of material fact. 18 C.F.R. § 385.602(h)(1)(i). If the Commission concludes that the record lacks substantial evidence, or that the contesting parties or disputed issues cannot be severed from the settlement for further proceedings, it may either establish procedures to gather further evidence concerning the contested issues, *id.*

§ 385.602(h)(1)(ii)(A), or "[t]ake other action which the Commission determines to be appropriate," *id.* § 385.602(h)(1)(ii)(B).

In *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *on reh'g*, 87 FERC ¶ 61,110, *on reh'g*, 88 FERC ¶ 61,168 (1999), the Commission established a framework for addressing contested settlements. *See* 85 FERC at 62,339-45. Under *Trailblazer*, the Commission first determines "whether the settlement presents an acceptable outcome for the case that is consistent with the public interest." *Id*. at 62,341. If the Commission can affirmatively make that determination, it will choose an approach to address the contested issues. *Trailblazer*, 85 FERC at 62,342. *Trailblazer* outlines four approaches to addressing contested issues:

> (1) the Commission addresses each issue raised by the objecting parties on the merits; (2) the Commission approves the contested settlement as a package, finding that it provides an overall just and reasonable result; (3) the Commission approves the settlement based on a determination that the interests of the objecting parties are too attenuated, and that the benefits of the settlement to the settling parties outweigh the nature of the objections; and (4) the Commission approves the settlement as uncontested as to the settling parties, and severs the contesting parties so that they can continue to litigate the contested issues.

Id., 85 FERC at 62,342-45.

II. THE WESTERN ENERGY CRISIS OF 2000-2001 AND THE PACIFIC NORTHWEST REFUND PROCEEDING

This Court is very familiar with the Western energy crisis of 2000-2001, and its consequences. *See In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1115 (9th Cir. 2001) (describing events). *See also, e.g., Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1008 (9th Cir. 2004); *Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash. v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 758-59 (9th Cir. 2004); *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005); *Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006). In response to the energy crisis, the Commission initiated a series of adjudicatory and investigative proceedings, intended both to settle and reform markets going forward and, where appropriate, to provide ratepayer relief retroactively.

Among those proceedings is the Pacific Northwest refund proceeding, which addresses whether refunds are warranted for sales made in the Pacific Northwest spot market during the refund period (December 25, 2000 through June 20, 2001). *See Port of Seattle*, 499 F.3d 1016. The Pacific Northwest refund proceeding arose from an October 26, 2000 complaint regarding the Pacific Northwest wholesale power markets, that ultimately resulted in an investigation of past spot market sales in the Pacific Northwest. *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 96 FERC ¶ 61,120 (2001). Following a hearing and based on the

particular circumstances presented, the Commission denied refunds for energy purchases in the Pacific Northwest spot market. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 103 FERC ¶ 61,348, *on reh'g*, 105 FERC ¶ 61,183 (2003). On appeal, this Court granted in part petitions for review of those Commission orders and remanded the issue of refunds to the Commission for further consideration. *Port of Seattle*, 499 F.3d 1016.

Following this Court's remand, the Commission ordered an evidentiary hearing before an administrative law judge to address the issue of refunds. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 137 FERC ¶ 61,001 P 1 (2011) (Remand Order), ER 331, *on reh'g*, 143 FERC ¶ 61,020 (2013), ER 18, *appeal pending*, *Pub. Utils. Comm'n of Cal. v. FERC*, Nos. 13-71276 & 13-71487 (9th Cir.). The Remand Order described the evidence parties should submit to establish their refund claims. Remand Order P 4, ER 332.

In the Remand Order, the Commission rejected the argument that it should establish a market-wide remedy for the Pacific Northwest, like that utilized in California. Remand Order P 24, ER 342. Unlike the California spot market, which operated through a centralized power exchange with a uniform clearing price, the Pacific Northwest spot market operated through bilateral contracts negotiated independently between buyers and sellers. *Id*. P 18, ER 338.

Accordingly, while spot market sales in California could be mitigated to the level of a just and reasonable market clearing price, that approach would be inappropriate in the Pacific Northwest market where each seller received only what a specific buyer agreed to pay for a given transaction. *Id*.

Thus, the Commission found that buyers seeking refunds for purchases in the Pacific Northwest spot market must make individualized showings of circumstances particular to their contracts. Remand Order P 21, ER 340. Under the *Mobile-Sierra* doctrine,[1] a rebuttable presumption of reasonableness applies to the majority of the contracts at issue, including the contracts of petitioner Idaho Power. "Under the *Mobile-Sierra* doctrine, [FERC] must presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law. The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash*., 554 U.S. 527, 530 (2008). However, "if it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission should not presume that the contract is just

[1] The *Mobile-Sierra* doctrine derives its name from the Supreme Court cases *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp*., 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co*., 350 U.S. 348 (1956).

and reasonable." *Id*. at 554. Following *Morgan Stanley*, the Commission found that the presumption of reasonableness may be rebutted by showing: "(1) that the contract rate imposes an excessive burden on consumers or seriously harms the public interest, or (2) that there is a causal connection between unlawful activity and the contract rate, such that the Commission should not presume that the contract is just and reasonable." *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 141 FERC ¶ 61,248 P 12 (2012), ER 98.

During the Pacific Northwest refund period, electricity in the Pacific Northwest wholesale spot market was traded an average of six times between the point of generation to the last wholesale purchaser in the chain. *Puget Sound,* 103 FERC ¶ 61,348 P 47. As a result of this chain of transactions between generation to the final purchaser, an award of refunds to the last wholesale purchaser in the chain could potentially give rise to so-called "ripple" claims, which are the "'sequential claims against a succession of sellers in a chain of purchasers that are triggered if the last wholesale purchaser in the chain is entitled to a refund.'" Rehearing Order P 4 n.5, ER 2 (quoting *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 96 FERC ¶ 63,044 at 65,300 (2001)). Thus, ripple claims are "contingent on a finding that refunds are due,"

and would not even arise unless and until a party is found liable for refunds in the Pacific Northwest refund proceeding. *Puget Sound*, 96 FERC ¶ 63,044 at 65,300.

The evidentiary hearing in the Pacific Northwest refund proceeding, on remand from this Court's 2007 *Port of Seattle* decision, commenced on August 27, 2013. The presiding Administrative Law Judge is expected to issue an Initial Decision by March 18, 2014, which will then be subject to Commission review. *See Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, Order of Chief Judge Granting Motion To Extend Procedural Time Standards And Waiving Period For Answers, Docket No. EL01-10-085 (Oct. 24, 2013). If no refunds are awarded as a result of the evidentiary hearing, the issue of ripple claims will become moot.

To facilitate settlement efforts, the Commission directed the appointment of a settlement judge. Remand Order PP 30-31, ER 343-44. Under the settlement procedures established, parties with a direct refund claim against another party based upon a contract that became effective during the refund period were directed to file a Notice of Settlement Claim. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, Order of the Chief Judge Confirming Settlement Procedures, Docket No. EL01-10-026 (Nov. 23, 2011), ER 328. The Chief Judge specified, however, that the order requiring the filing of

direct claims "shall not be construed to either diminish or enlarge the right of any Party to assert its position with respect to Ripple Claims." *Id*. P 10, ER 330. In this process, the Cities of Tacoma and Seattle presented direct claims for refunds against Idaho Power. *See* Pet. Br. 14.

III. THE CHALLENGED ORDERS CONDITIONALLY APPROVING THE IDAHO POWER SETTLEMENT

On March 2, 2012, Idaho Power and Tacoma submitted a Stipulation and Agreement, settling Tacoma's claim for refunds against Idaho Power. *See* ER 306-15. Under section 201(f) of the Federal Power Act, 16 U.S.C. § 824(f), as it existed prior to enactment of the Energy Policy Act of 2005 (Pub L. No. 109-58, §1291(c), 119 Stat. 594, 1217 (2005)), Tacoma, as a governmental entity, could not be found liable for refunds for its sales to Idaho Power during the refund period. *See* Stipulation and Agreement, Article II, section 6, ER 310; *Bonneville Power*, 422 F.3d at 926.

The settlement also purported to release Idaho Power (with the exception of the other direct refund claimant, the City of Seattle) from "any claims against [Idaho Power] that have been or could be presented for damages, refunds, disgorgement of profits, or other monetary or non-monetary remedies in connection with [Idaho Power's] sales of energy or capacity or trading activities in markets in the Pacific Northwest during the Settlement Period." Stipulation and

Agreement, Article III, section 6(a), ER 311. The settlement further provided that the Commission's final order approving the settlement "shall constitute a Commission determination that except for claims by Seattle, [Idaho Power] shall not be subject to further proceedings, investigations or scrutiny for claims of damages, refunds, disgorgement of profits, or other monetary or non-monetary remedies for its sales of energy or capacity or trading activities in the Pacific Northwest during the Settlement Period." *Id*., Article III, section 6(b), ER 311.

No parties opposed the terms of the settlement with respect to the claims between Tacoma and Idaho Power, but non-settling parties Powerex and PPL did express concern that the settlement would extinguish non-parties' rights to bring "ripple claims" against Idaho Power in the future. Settlement Order PP 3, ER 7. The Commission found that the uncontested settlement was fair and reasonable and in the public interest as between Idaho Power and Tacoma, and approved the settlement, "subject to the removal of any language purporting to foreclose claims by others." *Id*. P 6, ER 8. While the potential for ripple claims is speculative, the Commission held that the settlement between Idaho Power and Tacoma cannot be used to extinguish potential claims of others. *Id*. P 7, ER 8. Removing such language is consistent with the history of this proceeding, in which ripple claims have been preserved. *Id*. (citing *Puget Sound*, 103 FERC ¶ 61,348 PP 47-50

(stating that the "ALJ determined that all parties reserved their rights to pursue claims if the Commission was to direct further proceedings to determine refunds."); *Puget Sound,* Order of the Chief Judge Confirming Settlement Procedures, P 10, ER 330 ("This Order shall not be construed to either diminish or enlarge the right of any Party to assert its position with respect to Ripple Claims.")). It is also consistent with the Commission's policy to favor settlement agreements that do not impair the rights of non-parties. *Id*. P 7, ER 8 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs*., 113 FERC ¶ 61,171 P 40 (2005), *reh'g denied*, 115 FERC ¶ 61,032 P 23 (2006)).

On rehearing Idaho Power argued that ripple claims are illusory, as refunds in the Pacific Northwest are confined to seller-specific and contract-specific claims and remedies, not market-wide claims or remedies. Rehearing Order P 7, ER 3. In Idaho Power's view, a finding that Powerex or PPL committed a violation that affected its sales prices under a particular contract could not "ripple" into any finding that the conduct of any upstream seller (such as Idaho Power) amounted to a violation that affected the price under contract to Powerex or PPL. Thus, ripple claims are not just speculative, but could not even exist or arise. *Id*. P 8, ER 3.

The Commission acknowledged that the potential for ripple claims was at best speculative. *Id*. P 9, ER 3 (citing Settlement Order P 7, ER 8). Accordingly,

the Commission determined that the settlement properly was certified as uncontested, "given the largely unrealizable nature of a non-party's ripple claim." *Id*. P 9, ER 4. Nevertheless, the Commission weighed the interest in finality with the possible foreclosure of a non-settling party's claim, and determined it could not as a policy matter approve the uncontested settlement with language that would foreclose even remotely possible third party claims. *Id*. P 9, ER 4.

As the Commission found in the Settlement Order, P 7 & n.3, ER 8, it had never intended to foreclose ripple claims, to the extent they could arise. Rehearing Order P 10, ER 4. Accordingly, the Commission reaffirmed that the settlement between Idaho Power and Tacoma could not be used to extinguish potential claims of non-settling parties. *Id*. However, Idaho Power retains its right to argue that there is no basis for a ripple claim should some party attempt to make such a claim; it simply cannot preclude non-settling parties from ever making such a claim in the first place. *Id*.

The Commission further rejected Idaho Power's argument that the Commission should have treated the settlement as contested, and used the analysis for evaluating contested settlements set out in *Trailblazer*, 85 FERC ¶ 61,345. As the Commission found the settlement properly was certified as uncontested, there was no need to evaluate the settlement under *Trailblazer*. Rehearing Order P 11,

ER 4. No person objected to the fundamental aspects of the settlement that concerned the settling parties, Idaho Power and Tacoma. *Id*. P 12, ER 4. The other parties merely requested that the Commission not permit the uncontested settlement to affect the rights of non-settling parties adversely. *Id*. Accordingly, a *Trailblazer* analysis was not required to approve the essentially uncontested settlement as to the settling parties. *Id*.

SUMMARY OF ARGUMENT

In its proposed settlement of Tacoma's refund claims against it, Idaho Power purported unilaterally to release all non-settling party claims against it as well, including any "ripple" claims. In the challenged orders, the Commission evaluated the proposed Idaho Power settlement under the "fair and reasonable and in the public interest" standard for uncontested settlements, and approved the settlement upon the condition that the settling parties remove language purporting to foreclose third-party claims. The Commission found the settlement language inconsistent with the Commission's intent throughout the Pacific Northwest refund proceeding to preserve ripple claims, and inconsistent with the Commission's policy favoring settlements that do not impair the rights of third parties.

On appeal, Idaho Power argues that the Commission can and has imposed settlements on non-settling parties. However, to do so, the Commission must make

necessary findings, including the Commission's well-settled obligation, recognized by the courts, to evaluate whether settlements are in the public interest, including their impact on third parties. The Commission's policy determination to reject language foreclosing third party claims here was well within the Commission's discretion and should be affirmed by the Court.

Idaho Power contends that the Commission was required to find the settlement contested, and to evaluate the settlement under the Commission's *Trailblazer* methodology. However, the Commission interpreted its regulations -- a determination for which it receives deference -- and concluded that, here, the settlement reasonably was viewed as uncontested where no party objected to the agreement as between Tacoma and Idaho Power, but rather merely requested that the settlement not compromise the "largely hypothetical" and "largely unrealizable" ripple claims of non-settling parties.

In any event, Idaho Power would fare no better if the settlement were analyzed as a contested settlement under *Trailblazer*. *Trailblazer*, as well as the caselaw, requires that the Commission determine that a contested settlement is in the public interest prior to approving it. Here, the Commission already determined that the settlement language foreclosing third party claims was contrary to the public interest, so it likewise would not be approved under *Trailblazer*.

ARGUMENT

I. STANDARD OF REVIEW

Court review "of a FERC decision is limited to whether the decision was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with the law." *Cal. Dep't of Water Res. v. FERC*, 341 F.3d 906, 910 (9th Cir. 2003). The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003).

This appeal challenges FERC's application of its own settlement regulations and precedents. FERC's interpretation of its own regulations is entitled to deference, unless the interpretation is plainly erroneous. *Pankratz Lumber Co. v. FERC*, 824 F.2d 774, 777 (9th Cir. 1987); *City of Centralia v. FERC*, 799 F.2d 475, 481 (9th Cir. 1986); *Pac. Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1386 (9th Cir. 1984). "Likewise, [the court] must give deference to the Commission's interpretation of its own orders." *Cal. Trout v. FERC*, 572 F.3d 1003, 1013 (9th Cir. 2009) (citing *Cal. Dep't of Water Res. v. FERC*, 489 F.3d 1029, 1036 (9th Cir. 2007)).

II. THE COMMISSION REASONABLY REQUIRED REMOVAL OF THE SETTLEMENT LANGUAGE FORECLOSING THIRD PARTY CLAIMS.

In its proposed settlement, Idaho Power attempted to foreclose claims against it for refunds during the Pacific Northwest refund period not only by the other settling party, Tacoma, but also potential "ripple" claims that might be asserted against it by other parties to the Pacific Northwest refund proceeding. *See* Petitioner Br. 14-15. Ripple claims are "'sequential claims against a succession of sellers in a chain of purchasers that are triggered if the last wholesale purchase in the chain is entitled to a refund.'" Settlement Order P 3 n.2, ER 7 (quoting *Puget Sound*, 96 FERC ¶ 63,044 at 65,300); Rehearing Order P 4 n.5, ER 2. Here, such claims could be asserted against Idaho Power in the event that parties that purchased from Idaho Power during the refund period are themselves found liable for refunds, which has not yet been determined. For example, PPL Montana purchased more than $1 million in energy from Idaho Power during the settlement period. Comments of PPL Montana, LLC and PPL EnergyPlus, LLC in Opposition to Certain Provisions of the Stipulation and Agreement at 3, ER 267. If PPL Montana is forced to pay refunds to a party to whom PPL Montana resold that energy, PPL Montana may assert a "ripple" refund claim against Idaho Power. *Id.*

In the challenged orders, the Commission approved the settlement as an uncontested settlement "as between [Idaho Power] and Tacoma," as long as "any language purporting to foreclose claims by others" was removed. Settlement Order P 6, ER 8. *See also* Rehearing Order P 6, ER 3. Under the Commission's regulations, uncontested settlements may be approved "upon a finding that the settlement appears to be fair and reasonable and in the public interest." 18 C.F.R. § 385.602(g)(3). *See* Settlement Order P 6, ER 8. The Commission determined that the settlement failed to meet this standard insofar as it purported to foreclose third party claims. *Id*. PP 6-7, ER 8.

A. Foreclosing Third Party Claims Was Inconsistent With The Commission's Preservation Of Ripple Claims In The Pacific Northwest Refund Proceeding.

The Commission found that foreclosing ripple claims would be contrary to the history of the Pacific Northwest refund proceeding, in which the rights of parties to assert ripple claims in the future should circumstances arise had been preserved. Settlement Order P 7, ER 8; Rehearing Order P 10, ER 4. Even prior to this Court's 2007 remand in *Port of Seattle*, the Commission held that all parties reserved their rights to pursue ripple claims in the event of further proceedings to determine refunds. *See* Settlement Order P 7 n.3, ER 8 (quoting *Puget Sound*, 103 FERC ¶ 61,348 PP 47-50) (stating that the "ALJ determined that all parties

reserved their rights to pursue claims if the Commission was to direct further proceedings to determine refunds").

Following the *Port of Seattle* remand, the Commission set the matter for hearing, but held the hearing in abeyance pending settlement procedures. Remand Order P 31, ER 344. In the November 23, 2011 Order of the Chief Judge Confirming Settlement Procedures, ER 328-30, parties "desir[ing] to have an initial and direct claim against another Party[,] with whom it had a contract that became effective" during the Pacific Northwest refund proceeding refund period, were required to "provide a copy of the Notice of Settlement Claim." ER 328. Idaho Power emphasizes that "the only parties that presented claims against Idaho Power under the procedures established by agreement of the parties, and as directed by the Chief ALJ, were Tacoma and Seattle." Pet. Br. 33, *see also id*. at 5-6, 14. However, as the Commission observed, the Chief Administrative Law Judge specifically provided that "[t]his Order shall not be construed to either diminish or enlarge the right of any Party to assert its position with respect to Ripple Claims." Settlement Order P 7 n.3, ER 8 (quoting *Puget Sound,* Order of the Chief Judge Confirming Settlement Procedures P 10, ER 330). *See also* Rehearing Order P 10 n.12, ER 4. The Court "must defer to the [agency's] interpretation of its administrative orders if that interpretation is 'not unreasonable

[and] the language of the orders bears [that] construction.'" *Akootchook v. U.S. Dep't of the Interior*, 747 F.2d 1316, 1320-21 (9th Cir. 1984) (quoting *Udall v. Tallman*, 380 U.S. 1, 18 (1965)).

B. Foreclosing Third Party Claims Was Inconsistent With The Commission's Policy Favoring Settlements That Do Not Impair Third Party Rights.

The Commission found that preserving the potential for future ripple claims was "consistent with the Commission's policy to favor settlement agreements that do not impair the rights of non-parties." Settlement Order P 7, ER 8. "[T]he Commission weighed the interest in finality with the possible foreclosure of a non-party's claim, and determined it could not as a policy matter approve the uncontested Settlement with language that would foreclose even remotely possible third-party claims." Rehearing Order P 9, ER 4. Accordingly, the Commission determined that "the Settlement between [Idaho Power] and Tacoma cannot be used to extinguish potential claims of non-settling parties." *Id*. P 10, ER 4.

Idaho Power contends that "there is no such Commission policy" against "applying settlements to non-consenting parties," Pet. Br. 24, pointing to cases in which the Commission has approved settlements as to non-settling parties that did not challenge the settlements. Pet. Br. 26-27 & n.50. However, the Commission possesses authority to impose settlements on non-settling parties only if the

Commission is able to make the necessary findings, including that the settlement is in the public interest. Settlement Order PP 6-7, ER 8. As this Court has recognized, the "primary purpose" of the Federal Power Act is the protection of consumers. *Pub. Utils. Comm'n*, 462 F.3d at 1046; *Lockyer*, 383 F.3d at 1017. Accordingly, it is well-settled that the Commission has an independent responsibility to assess the impact of a settlement on the public interest, including its impact on non-parties to the settlement. "[T]he Commission may adopt an uncontested settlement *only* after finding it 'fair and reasonable and in the public interest;' that is, the Commission has a duty to disapprove uncontested settlements that are unfair, unreasonable, or against the public interest.'" *Petal Gas*, 496 F.3d at 701. *See also, e.g., Mobil Oil*, 417 U.S. at 314 (holding that a settlement proposal enjoying unanimous support can be adopted "if approved in the general interest of the public"); *NorAm Gas*, 148 F.3d at 1165 (even if customers unanimously support the proposed settlement, "the Commission would still have the responsibility to make an independent judgment as to whether the settlement is 'fair and reasonable and in the public interest'").

"Indeed, the Commission exercises this authority when necessary, attaching conditions to uncontested settlements, and even rejecting some entirely." *Saltville Gas Storage Co., L.L.C.*, 128 FERC ¶ 61,257 P 9 (2009). "The Commission

exercises this authority particularly when the settlement, as this one, may have an impact on future parties or others not present during the negotiations." *Id*. *See also, e.g. Tuscarora Gas Transmission Co*., 127 FERC ¶ 61,217 (2009) (uncontested settlement approval conditioned upon revision of section that may adversely affect similarly-situated shippers across the grid).

Petal Gas, for example, affirmed the Commission's rejection of an uncontested settlement between a pipeline and certain shippers, "the active parties to the settlement," based upon "the interests of its inactive parties," finding this to represent the "independent consideration of fairness and reasonableness and the public interest the Commission is duty-bound to give." 496 F.3d at 701. Similarly, *Penn. Elec. Co. v. FERC*, 11 F.3d 207, 210 (D.C. Cir. 1993), affirmed Commission orders lowering the rate agreed to in an uncontested settlement, based upon its impact on third parties. *See id*. ("FERC's responsibility under [Federal Power Act] section 205 is to ensure just and reasonable rates for native load customers and for third parties. Whether a rate satisfies this requirement is to be determined by FERC, not the parties to an agreement, however voluntary their agreement may be.")

Here, the Commission determined that the settlement language foreclosing ripple claims was not fair and reasonable and in the public interest. Settlement

Order PP 6-7, ER 8; Rehearing Order PP 9-10, ER 3-4. On that basis, the Commission made a policy determination not to approve the uncontested settlement "with language that would foreclose even remotely possible third party claims." Rehearing Order P 9, ER 4. This policy determination was well within the Commission's discretion and should be affirmed by the Court. In reviewing the Commission's orders, the Court "consider[s] merely whether 'the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made;' we do not second-guess its policy judgments." *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 788 (9th Cir. 2012) (quoting *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1084 (9th Cir. 2011)). *See also Mont. Consumer Counsel*, 659 F.3d at 922 (noting that the "well-being of consumers . . . should be the touchstone" guiding FERC Federal Power Act decisions and that review of such decisions "is that of a federal appellate court, not a policy analyst").

III. IDAHO POWER'S ARGUMENTS BASED ON *TRAILBLAZER* DO NOT UNDERMINE THE COMMISSION'S DECISION.

Idaho Power argues that the Commission was required to find its settlement contested, Pet. Br. 19-24, and to apply the Commission's methodology for evaluating contested settlements in *Trailblazer*, 85 FERC ¶ 61,345. Pet. Br. at 31-45. *See supra* p. 6 (discussing *Trailblazer* evaluation of contested settlements).

This argument does not aid Idaho Power, as: (1) the Commission properly found that the settlement should be evaluated as an uncontested settlement; (2) applying *Trailblazer* would reach the same result because *Trailblazer*, like the standard for uncontested settlements, requires the Commission to consider the public interest; and (3) Idaho Power's arguments regarding application of *Trailblazer* here are in any event without merit.

A. The Commission Reasonably Determined That The Settlement Should Be Analyzed As An Uncontested Settlement.

Idaho Power contends that the Commission "was arbitrary and capricious in characterizing the proposed settlement as 'uncontested,'" and applying the standard for uncontested settlements in 18 U.S.C. § 385.602(g)(3), Pet. Br. 20, as opposed to a contested settlement subject to the *Trailblazer* standard of review. *Id.* at 21. "Since this issue involves an interpretation of an administrative regulation, we 'must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Daubert v. Sullivan,* 905 F.2d 266, 268 (9th Cir. 1990) (quoting *Udall,* 380 U.S. at 16-17). FERC's "interpretation of its own regulation is afforded even more deference than that

which courts normally give agency interpretations of statutes." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 1004 (9th Cir. 2010).

Here, the Commission reasonably interpreted what constitutes an "uncontested" settlement under its regulations, and rejected Idaho Power's arguments that the settlement should have been analyzed under *Trailblazer*. Rehearing Order PP 11-12, ER 4. No entity objected to the terms of the settlement as between the settling parties Idaho Power and Tacoma. *Id*. P 12, ER 4. Rather, PPL and Powerex "merely requested that the Commission not permit the uncontested settlement to affect the rights of non-settling parties adversely." *Id*. The potential that such claims will be asserted is "at best speculative" and "largely hypothetical." *Id*. P 9, ER 3. Ripple claims are "contingent on a finding that refunds are due," and therefore will not even arise unless and until a party is found liable for refunds. *Puget Sound*, 96 FERC ¶ 63,044 at 65,300. The circumstances giving rise to such claims had never occurred, and may never occur. Rehearing Order P 9, ER 3. If no refunds are awarded, all ripple claims will become moot. *Id*. Accordingly, given the preservation of the agreement between Tacoma and Idaho Power, and the "largely unrealizable nature" of the ripple claims in any event, the Commission found the settlement properly was certified as uncontested. *Id*.

Further, as the Commission found, "a *Trailblazer* analysis was not needed to approve the essentially uncontested Settlement as to the settling parties." Rehearing Order P 12, ER 4. As modified, the settlement did not impact the rights of non-settling parties, "consistent with the Commission's policy to favor settlement agreements that do not impair the rights of non-parties." Settlement Order P 7, ER 8 (citing *San Diego*, 113 FERC ¶ 61,171 P 40). The settlement in *San Diego* was approved as an uncontested settlement because the rights of non-settling parties were not affected. *San Diego*, 113 FERC ¶ 61,171 P 40. *See* Pet. Br. 28-29. Similarly, here, the settlement as modified is not imposed on non-settling parties, and the settlement properly may be approved as uncontested. *See United Mun. Distrib. Grp*, 732 F.2d at 208-09 (affirming Commission orders approving a settlement as to all consenting parties as uncontested, where the sole nonconsenting party was "in no wise being required to accept the settlement against its will"); *Arctic Slope Reg'l Corp. v. FERC*, 832 F.2d 158, 167 (D.C. Cir. 1987) (affirming orders approving a settlement as uncontested among the consenting parties, while leaving the objecting party free to pursue claims in future rate proceedings).

Idaho Power asserts that the Commission's failure to apply *Trailblazer* here is inconsistent with *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of*

Energy and/or Capacity, 143 FERC ¶ 61,013, *reh'g denied*, 144 FERC ¶ 61,029 (2013) (approving a contested settlement under *Trailblazer*). *See* Pet. Br. 20, 23, 35, 45. The Court should not consider this alleged inconsistency because those 2013 orders post-date the 2012 orders under review here. *See Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005) ("'We will not reach out to examine a decision made after the one actually under review. . . . An agency's decision is not arbitrary and capricious merely because it is not followed in a later adjudication.'") (quoting *MacLeod v. ICC*, 54 F.3d 888, 892 (D.C.Cir.1995)). S*ee also, e.g., Altamont Gas Transmission Co. v. FERC*, 965 F.2d 1098, 1102 (D.C. Cir. 1992) (a later change "cannot retroactively invalidate a decision that was sound when made"); *CHM Broad. Ltd. P'ship v. FCC*, 24 F.3d 1453, 1459 (D.C. Cir. 1994) ("We have held that the FCC is not bound retroactively by its subsequent decisions and need not explain alleged inconsistencies in the resolution of subsequent cases.").

In any event, there is no inconsistency. In the 2013 *Puget Sound* orders, the proposed settlement provided that the City of Seattle would withdraw all of its evidence submitted in the Pacific Northwest refund proceeding adverse to its settling partner, Transcanada Energy Ltd. *See Puget Sound*, 144 FERC ¶ 61,029 P 3. Certain California Parties sought "clarification" that the waiver applied only

to evidence relating to Seattle's contracts with Transcanada, and not evidence relating to more generally-applicable market conditions. *See id*. P 4. The Commission found the settlement contested because the California Parties' requested "clarification" would "undermine a key provision of the Settlement" between the settling parties. *Puget Sound*, 143 FERC ¶ 61,013 P 34, 144 FERC ¶ 61,029 P 15. In contrast, here, the settlement comments did not concern the fundamental agreement between Tacoma and Idaho Power at all; the comments concerned only the preservation of "largely hypothetical" and "speculative" future third party claims against Idaho Power. Rehearing Order P 9, ER 3. Further, it should be noted that the 2013 *Puget Sound* orders affirmatively upheld the finding here, "that settling parties may not adversely affect non-settling parties' ability to assert and litigate ripple claims." *Puget Sound*, 143 FERC ¶ 61,013 P 38.

B. Applying *Trailblazer* Would Not Change The Result Because The Commission Still Must Consider The Public Interest.

Idaho Power contends that the settlement should have been evaluated as a contested, rather than an uncontested, settlement, positing that its settlement would fare better under the more stringent standard for contested settlements, rather than the less stringent standard for uncontested settlements. *See, e.g., Amoco Production Co. v. FERC*, 271 F.3d 1119, 1121 (D.C. Cir. 2001) (the fair and reasonable standard for uncontested settlements is "less stringent" than the just and

reasonable standard applied to contested settlements). Under the Commission's regulations, "'[a]n uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.'" *United Mun. Distribs. Grp.*, 732 F.2d at 207 n.8 (quoting 18 C.F.R. § 385.602(g)). "The Commission's regulations thus permit it to approve uncontested offers of settlement without a determination on the merits that the rates approved are 'just and reasonable.'" *Id*. Conversely, to approve a contested settlement, the Commission must independently conclude that the settlement is just and reasonable, even in the presence of widespread support for the settlement. *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 963 (D.C. Cir. 2013).

Assuming *arguendo* that the Commission should have evaluated the settlement as a contested settlement under *Trailblazer*, the error was harmless because the settlement language foreclosing non-settling party claims still would not be approved. In reviewing agency action, the Court is required to apply the rule of prejudicial error. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007); *Cal. Wilderness Coal.*, 631 F.3d at 1090. Idaho Power bears the burden of showing that the Commission's alleged error was

prejudicial. *See, e.g., Shinseki v. Sanders*, 556 U.S. 396, 409 (2009); *Cal. Wilderness Coal.*, 631 F.3d at 1092.

Idaho Power cannot meet that burden here. *Trailblazer*, like the standard for uncontested settlements, requires that the Commission consider the public interest. Under *Trailblazer*, "[w]hen presented with a settlement, the first issue for the Commission is whether the settlement presents an acceptable outcome for the case that is consistent with the public interests protected by the Commission." *Trailblazer*, 85 FERC ¶ 61,345 at 62,341. *See, e.g., Devon Power LLC*, 115 FERC ¶ 61,340 P 59 (2006), *on reh'g*, 117 FERC ¶ 61,133 P 14 (2006), *rev'd in part on other grounds*, *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), *rev'd in part on other grounds, NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 130 S. Ct. 693 (2010) (Under *Trailblazer*, the Commission "must first determine whether the settlement presents an acceptable outcome for the case that is consistent with the public interest.").

Courts likewise have recognized the Commission's obligation to consider the public interest in approving contested settlements. *See Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1497-98 (D.C. Cir. 1989) ("To be sure, FERC is not required to approve a settlement simply because the parties support it. FERC must also consider the public interest, and insofar as it found the Settlement 'not

acceptable to the Commission,' we understand it to have referred to the public interest.") (citation omitted); *NRG Power Mktg.*, 718 F.3d at 963 (discussing cases reversing FERC orders approving contested settlements "because FERC had relied on the consent of the settling parties without independently concluding that the settlement was just and reasonable or in the public interest") (citing *NorAm Gas*, 148 F.3d at 1164-65; *Laclede Gas Co. v. FERC*, 997 F.2d 936, 946 (D.C. Cir. 1993); *Tejas*, 908 F.2d at 1003); *So. Natural Gas Co. v. FERC*, 780 F.2d 1552, 1559 (11th Cir. 1986) (affirming Commission rejection of a contested settlement on public interest grounds).

As the Commission found the settlement contrary to the public interest insofar as it "impair[ed] the rights of third parties," *see* Settlement Order PP 6-7, ER 8, the provisions foreclosing third party claims likewise would not be approved under *Trailblazer*. While Idaho Power focuses on *Trailblazer's* four approaches to reaching a merits decision on contested issues, addressed below, *see infra* pp. 34-38, Idaho Power omits the public interest inquiry that precedes any such analysis. It is only after the public interest threshold is passed that the Commission considers the proper approach for addressing the objections to the settlement. *See Trailblazer*, 85 FERC ¶ 61,345 at 62,341-42 (when presented with a settlement, the Commission first considers whether it is consistent with the public interest; only if

the settlement passes this threshold test does the Commission consider approaches for resolving objections to the settlement).

C. Idaho Power's Arguments Regarding The Application Of *Trailblazer* To The Settlement Are Without Merit.

In any event, Idaho Power's arguments regarding the *Trailblazer* analysis are without merit. *Trailblazer* sets out four approaches to evaluating contested settlements on the merits: (1) the Commission renders a binding merits decision on each contested issue; (2) the Commission approves the settlement based on a finding that the overall settlement as a package is just and reasonable; (3) the Commission determines that the benefits of the settlement outweigh the nature of the objections, and the interests of the contesting party are too attenuated; or (4) the Commission approves the settlement as uncontested for the consenting parties, and severs the contesting parties to allow them to litigate the issues raised. *See Trailblazer*, 87 FERC ¶ 61,110, at 61,439. Idaho Power contends that the Commission should have approved the settlement under each of these four approaches. Pet. Br. 39-40, 41, 43-44, 46-47.

As discussed, the Commission did not evaluate the settlement under *Trailblazer* because the Commission reasonably evaluated the settlement under the more lenient standard for uncontested settlements. Rehearing Order PP 11-12, ER

4. In any event, Idaho Power is wrong that the settlement would pass muster under any of the *Trailblazer* approaches.

Idaho Power's primary argument is that ripple claims against it are foreclosed as a matter of law, based upon two rulings in the Commission's Remand Order: (1) the finding that Idaho Power's contracts are subject to the *Mobile-Sierra* rebuttable presumption of reasonableness (*see supra* pp. 9-10), Remand Order P 20, ER 339; and (2) the rejection of a market-wide remedy for the Pacific Northwest, Remand Order P 24, ER 342. *See* Pet Br. 36-38. In Idaho Power's view, these findings compel the conclusion that ripple claims are precluded because -- given no market-wide resetting of contract prices -- the *Mobile-Sierra* presumption of reasonableness must be overcome based on "individual acts that affected pricing under a buyer's contracts" that are unrelated to the conduct of upstream sellers. Pet. Br. 42. *See also id*. at 39 (arguing that ripple claims cannot "survive in a contract-specific case"); 41 (arguing that a finding of refund liability on the part of PPL or Powerex would be based upon their violations, having nothing to do with Idaho Power's own conduct). On this basis, Idaho Power contends that the Commission should have: (1) rejected Powerex's and PPL's objections on the merits, Pet. Br. 35-40; (2) found that the settlement "produced an overall just and reasonable result" since Powerex and PPL are in no

worse position if they lose claims that "are not cognizable," *id*. at 40-41; and (3) found that Powerex and PPL's interests in ripple claims were too attenuated to outweigh the benefits of the settlement. *Id*. at 42-43.

However, Idaho Power's arguments do not provide a basis to conclude that there is no conceivable ground upon which ripple claims could be asserted against Idaho Power. For example, while "one seller's violation does not mean that the upstream seller also committed a violation," Pet. Br. 42, it also does not absolve the upstream seller; Idaho Power does not explain why an upstream seller could not be found liable for refunds based upon its own conduct. Also, as Idaho Power recognizes, the Commission has held that the *Mobile-Sierra* presumption of reasonableness may be rebutted by showing that the contract rates at issue impose an excessive burden on consumers or seriously harm the public interest. *See* Pet. Br. 36 (citing *Puget Sound*, 141 FERC ¶ 61,248 PP 14-15, ER 99). Idaho Power does not demonstrate that such a showing would be impossible with regard to all of its contracts.

Thus, in the challenged orders, the Commission did not accept Idaho Power's arguments that future ripple claims "are not only speculative, but could not even exist or arise." *See* Rehearing Order PP 8-10, ER 3-4. Ripple claims are speculative because they cannot arise unless and until one of Idaho Power's

contracting parties is itself found liable for refunds in the Pacific Northwest refund proceeding. *Id*. P 9, ER 3. If ripple claims are asserted in the future, Idaho Power retains full rights to argue that there is no basis for the claim. *Id*. P 10, ER 4. The Commission did not, however, find such claims precluded at this time; to the contrary, the Commission found that the right to assert such claims is preserved. *Id*.

Moreover, as Idaho Power itself observes, the Remand Order's rejection of market-wide relief and its findings regarding the applicability of the *Mobile-Sierra* doctrine to the relevant contracts may be challenged on appeal of final FERC orders. *See* Pet. Br. 38 & n.66 (recognizing that "[t]he correctness of FERC's determination of the role of system market dysfunctions and market-wide relief" "may well be argued in other review proceedings"). Petitions for review of the Remand Order have been filed by certain California Parties (No. 13-71276) and the City of Seattle (No. 13-71487), who argued on rehearing of the Remand Order that the Commission erred in finding the subject contracts subject to the *Mobile-Sierra* presumption of reasonableness, and in foreclosing a market-wide remedy. *See Puget Sound Energy*, 143 FERC ¶ 61,020 PP 7-12, 28, ER 22-24, 31 (describing arguments raised on rehearing).

As to the last *Trailblazer* prong, Idaho Power contends that the Commission should have severed Powerex and PPL from the settlement, and approved the settlement as to all other non-settling parties. Pet. Br. 44. The Commission expressly rejected this proposition, finding that "the Settlement between [Idaho Power] and Tacoma cannot be used to extinguish potential claims of non-settling parties. Therefore, the Commission here clarifies that the Settlement Order intended that *all* non-settling parties, not just Powerex and PPL Companies, should not have any rights foreclosed by the Settlement, and the Settlement language to that effect must be modified accordingly." Rehearing Order P 14, ER 5.

CONCLUSION

For the reasons stated, the Commission respectfully requests that the petition for review be denied and the Commission's orders affirmed.

Respectfully submitted,

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November 19, 2013

STATEMENT OF RELATED CASES

The Commission orders under review in this appeal concern a settlement of potential refund liability arising from the Pacific Northwest refund proceeding, which was the subject of this Court's decision in *Port of Seattle, Wash. v. FERC*, 499 F.3d 1016, 1023 (9th Cir. 2007). *Pub. Utils. Comm'n of Cal., et al. v. FERC*, Nos. 13-71276 & 13-71487 (9th Cir.), petitions filed April 11 and 26, 2013, held in abeyance by order of June 20, 2013 until March 3, 2014, are appeals of the Commission's orders on remand from *Port of Seattle*: *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 137 FERC ¶ 61,001 (2011), ER 331, *on reh'g*, 143 FERC ¶ 61,020 (2013).

Respectfully submitted,

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November 19, 2013

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. RULE 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 13-72220

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, that the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 8301 words.

/s/ Lona T. Perry
Lona T. Perry
Attorney for Federal Energy Regulatory Commission

November 19, 2013

ADDENDUM
STATUTES AND REGULATIONS

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STATUTES: **PAGE**

REGULATIONS:

semiannual, or other regular periodic report listed in House Document No. 103–7 (in which the report required by subsec. (j) of this section is listed on page 151), see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance.

TERMINATION OF ADMINISTRATIVE CONFERENCE OF UNITED STATES

For termination of Administrative Conference of United States, see provision of title IV of Pub. L. 104–52, set out as a note preceding section 591 of this title.

DECLARATION OF POLICY AND STATEMENT OF PURPOSE

Pub. L. 94–409, § 2, Sept. 13, 1976, 90 Stat. 1241, provided that: ''It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act [see Short Title note set out above] to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.''

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1003.	June 11, 1946, ch. 324, § 4, 60 Stat. 238.

In subsection (a)(1), the words ''or naval'' are omitted as included in ''military''.

In subsection (b), the word ''when'' is substituted for ''in any situation in which''.

In subsection (c), the words ''for oral presentation'' are substituted for ''to present the same orally in any manner''. The words ''sections 556 and 557 of this title apply instead of this subsection'' are substituted for ''the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection''.

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

CODIFICATION

Section 553 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2245 of Title 7, Agriculture.

EXECUTIVE ORDER NO. 12044

Ex. Ord. No. 12044, Mar. 23, 1978, 43 F.R. 12661, as amended by Ex. Ord. No. 12221, June 27, 1980, 45 F.R. 44249, which related to the improvement of Federal regulations, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a[1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

[1] So in original.

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 384; Pub. L. 95–251, § 2(a)(1), Mar. 27, 1978, 92 Stat. 183.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1004.	June 11, 1946, ch. 324, § 5, 60 Stat. 239.

In subsection (a)(2), the word ''employee'' is substituted for ''officer or employee of the United States'' in view of the definition of ''employee'' in section 2105.

In subsection (a)(4), the word ''naval'' is omitted as included in ''military''.

In subsection (a)(5), the word ''or'' is substituted for ''and'' since the exception is applicable if any one of the factors are involved.

In subsection (a)(6), the word ''worker'' is substituted for ''employee'', since the latter is defined in section 2105 as meaning Federal employees.

In subsection (b), the word ''When'' is substituted for ''In instances in which''.

In subsection (c)(2), the comma after the word ''hearing'' is omitted to correct an editorial error.

In subsection (d), the words ''The employee'' and ''such an employee'' are substituted in the first two sentences for ''The same officers'' and ''such officers'' in view of the definition of ''employee'' in section 2105. The word ''officer'' is omitted in the third and fourth sentences as included in ''employee'' as defined in section 2105. The prohibition in the third and fourth sentences is restated in positive form. In paragraph (C) of the last sentence, the words ''in any manner'' are omitted as surplusage.

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

CODIFICATION

Section 554 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2246 of Title 7, Agriculture.

AMENDMENTS

1978—Subsec. (a)(2). Pub. L. 95–251 substituted ''administrative law judge'' for ''hearing examiner''.

§ 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

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

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

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

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

EFFECTIVE DATE OF 2005 AMENDMENT

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

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

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

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

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

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

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

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

[1] See References in Text note below.

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

the hearing session, the presiding officer may, with due regard for the convenience of the participants, direct advance distribution of the exhibits by a prescribed date. The presiding officer may also direct the preparation and distribution of any briefs and other documents which the presiding officer determines will substantially expedite the proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.602 Submission of settlement offers (Rule 602).

(a) *Applicability.* This section applies to written offers of settlement filed in any proceeding pending before the Commission or set for hearing under subpart E. For purposes of this section, the term ''offer of settlement'' includes any written proposal to modify an offer of settlement.

(b) *Submission of offer.* (1) Any participant in a proceeding may submit an offer of settlement at any time.

(2) An offer of settlement must be filed with the Secretary. The Secretary will transmit the offer to:

(i) The presiding officer, if the offer is filed after a hearing has been ordered under subpart E of this part and before the presiding officer certifies the record to the Commission; or

(ii) The Commission.

(3) If an offer of settlement pertains to multiple proceedings that are in part pending before the Commission and in part set for hearing, any participant may by motion request the Commission to consolidate the multiple proceedings and to provide any other appropriate procedural relief for purposes of disposition of the settlement.

(c) *Contents of offer.* (1) An offer of settlement must include:

(i) The settlement offer;

(ii) A separate explanatory statement;

(iii) Copies of, or references to, any document, testimony, or exhibit, including record citations if there is a record, and any other matters that the offerer considers relevant to the offer of settlement; and

(2) If an offer of settlement pertains to a tariff or rate filing, the offer must include any proposed change in a form suitable for inclusion in the filed rate schedules or tariffs, and a number of copies sufficient to satisfy the filing requirements applicable to tariff or rate filings of the type at issue in the proceeding.

(d) *Service.* (1) A participant offering settlement under this section must serve a copy of the offer of settlement:

(i) On every participant in accordance with Rule 2010;

(ii) On any person required by the Commission's rules to be served with the pleading or tariff or rate schedule filing, with respect to which the proceeding was initiated.

(2) The participant serving the offer of settlement must notify any person or participant served under paragraph (d)(1) of this section of the date on which comments on the settlement are due under paragraph (f) of this section.

(e) *Use of non-approved offers of settlement as evidence.* (1) An offer of settlement that is not approved by the Commission, and any comment on that offer, is not admissible in evidence against any participant who objects to its admission.

(2) Any discussion of the parties with respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence.

(f) *Comments.* (1) A comment on an offer of settlement must be filed with the Secretary who will transmit the comment to the Commission, if the offer of settlement was transmitted to the Commission, or to the presiding officer in any other case.

(2) A comment on an offer of settlement may be filed not later than 20 days after the filing of the offer of settlement and reply comments may be filed not later than 30 days after the filing of the offer, unless otherwise provided by the Commission or the presiding officer.

(3) Any failure to file a comment constitutes a waiver of all objections to the offer of settlement.

(4) Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the

offer of settlement, or items not included in the settlement, that are relevant to support the claim. Reply comments may include responding affidavits.

(g) *Uncontested offers of settlement.* (1) If comments on an offer are transmitted to the presiding officer and the presiding officer finds that the offer is not contested by any participant, the presiding officer will certify to the Commission the offer of settlement, a statement that the offer of settlement is uncontested, and any hearing record or pleadings which relate to the offer of settlement.

(2) If comments on an offer of settlement are transmitted to the Commission, the Commission will determine whether the offer is uncontested.

(3) An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

(h) *Contested offers of settlement.* (1)(i) If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

(ii) If the Commission finds that the record lacks substantial evidence or that the contesting parties or contested issues can not be severed from the offer of settlement, the Commission will:

(A) Establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based; or

(B) Take other action which the Commission determines to be appropriate.

(iii) If contesting parties or contested issues are severable, the contesting parties or uncontested portions may be severed. The uncontested portions will be decided in accordance with paragraph (g) of this section.

(2)(i) If any comment on an offer of settlement is transmitted to the presiding officer and the presiding officer determines that the offer is contested, whole or in part, by any participant, the presiding officer may certify all or part of the offer to the Commission. If any offer or part of an offer is contested by a party, the offer may be certified to the Commission only if paragraph (h)(2)(ii) or (iii) of this section applies.

(ii) Any offer of settlement or part of any offer may be certified to the Commission if the presiding officer determines that there is no genuine issue of material fact. Any certification by the presiding officer must contain the determination that there is no genuine issue of material fact and any hearing record or pleadings which relate to the offer or part of the offer being certified.

(iii) Any offer of settlement or part of any offer may be certified to the Commission, if:

(A) The parties concur on a motion for omission of the initial decision as provided in Rule 710, or, if all parties do not concur in the motion, the presiding officer determines that omission of the initial decision is appropriate under Rule 710(d), and

(B) The presiding officer determines that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues.

(iv) If any contesting parties or contested issues are severable, the uncontested portions of the settlement may be certified immediately by the presiding officer to the Commission for decision, as provided in paragraph (g) of this section.

(i) *Reservation of rights.* Any procedural right that a participant has in the absence of an offer of settlement is not affected by Commission disapproval, or approval subject to condition, of the uncontested portion of the offer of settlement.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 541, 57 FR 21734, May 22, 1992; Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.603 Settlement of negotiations before a settlement judge (Rule 603).

(a) *Applicability.* This section applies to any proceeding set for hearing under subpart E of this part and to any other proceeding in which the Commission

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 19, 2013.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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