ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 12-1461

FIRSTENERGY SERVICE COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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JUNE 25, 2013
FINAL BRIEF: AUGUST 30, 2013

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and *Amici*

The parties before this Court are identified in the brief of Petitioner FirstEnergy Service Company.

B. Rulings Under Review

1. *American Transmission Systems, Inc.*, 129 FERC ¶ 61,249 (Dec. 17, 2009) ("Realignment Order"), R.145, JA 197; and

2. *American Transmission Systems, Inc.*, 140 FERC ¶ 61,226 (Sept. 20, 2012) ("Rehearing Order"), R.187, JA 257.

C. Related Cases

The orders under review in this proceeding have not previously been and are not before this Court or any other court.

Before this Court, Petitioner challenges the allocation to it of costs for certain transmission facilities approved by PJM Interconnection, L.L.C., a regional transmission organization which Petitioner joined following the orders on review here. The agency's approval of PJM Interconnection, L.L.C.'s method for allocating those costs among all members is on appeal before the U.S. Court of Appeals for the Seventh Circuit, where Petitioner has also filed a petition for review. *Ill. Commerce Comm'n v. FERC*, Nos. 13-1674, *et al.* (7th Cir. filed Mar. 29, 2013). Here, Petitioner claims that, as a new member of PJM Interconnection,

L.L.C., it should be entirely exempt from any allocation of costs approved prior to its entry.

/s/ Holly E. Cafer
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August 30, 2013

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

TABLE OF AUTHORITIES

STATUTES:

GLOSSARY

Br.	Petitioner FirstEnergy's opening brief
Commission or FERC	Federal Energy Regulatory Commission
FirstEnergy	Petitioner FirstEnergy Service Company
FPA	Federal Power Act
JA	Joint Appendix
Midwest Operator	Midcontinent Independent System Operator, Inc., formerly the Midwest Independent System Operator, Inc.
P	Denotes a paragraph number in a Commission order
PJM Operator or PJM	PJM Interconnection, L.L.C., a regional transmission organization
R.	Indicates an item in the certified index to the record
Realignment Order	*American Transmission Systems, Inc.*, 129 FERC ¶ 61,249 (2009), R.145, JA 197.
Regional Operator	Generally, a regional transmission organization or independent system operator
Rehearing Order	*American Transmission Systems, Inc.*, 140 FERC ¶ 61,226 (2012), R.187, JA 257.

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Petitioner FirstEnergy Service Company ("FirstEnergy"), a transmission-owning electric utility, proposed to transfer its membership from one regional transmission organization to another, and in support filed a complaint under section 206 of the Federal Power Act, 16 U.S.C. § 824e, seeking an exemption from certain costs otherwise allocated to it upon transfer. The question presented for this Court's review is:

Whether the Commission erred in denying FirstEnergy's complaint on the merits where FirstEnergy did not satisfy its burden to demonstrate that it is entitled to an exemption from existing cost allocation rules.

STATEMENT REGARDING JURISDICTION

Petitioner invokes this Court's jurisdiction under section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

INTRODUCTION

This case concerns whether a transmission-owning utility transferring from one regional transmission organization ("Regional Operator") to another should be allocated the costs of regionally-beneficial transmission projects approved in the region to which it is transferring, but prior to its date of entry, under the existing rules applicable to all members. The Commission held that, absent a showing by the utility that the existing rules are unjust and unreasonable, or unduly discriminatory or preferential as applied to it, those rules remain in effect. *American Transmission Systems, Inc.*, 129 FERC ¶ 61,249 (2009) ("Realignment Order"), R.145, JA 197, *reh'g denied*, 140 FERC ¶ 61,226 (2012) ("Rehearing Order"), R.187, JA 257.

FirstEnergy came to the Commission with a request to move from one Regional Operator to another, and a request for exceptions to certain requirements

of the new Regional Operator. The Commission granted the first request, on an issue not before this Court, where FirstEnergy demonstrated that it could not comply with the existing requirement, and it had proposed an alternative means of compliance. On the second request, an exemption from new regional transmission project costs approved prior to its entry, the subject of this appeal, FirstEnergy bore the burden of proving that the existing requirement is unjust and unreasonable, or unduly discriminatory or preferential. It did not do so. As the Commission found, the cost allocation might be more expensive, but FirstEnergy made no effort to show that it would not use or benefit from the previously-planned facilities. Notwithstanding the Commission's rejection of the exemption, FirstEnergy voluntarily moved forward with its transfer, and appeals the Commission's decision here.

STATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY FRAMEWORK

Section 201(b) of the Federal Power Act ("FPA") confers upon the Commission jurisdiction over all rates, terms and conditions of electric transmission service and sales of electric energy at wholesale by public utilities in interstate commerce. 16 U.S.C. § 824(b); *see generally New York v. FERC*, 535 U.S. 1 (2002). Under section 205 of the FPA, 16 U.S.C. §§ 824d(a)-(b), the Commission must assure that jurisdictional rates and services are just and

reasonable and not unduly discriminatory. "FPA section 205 allows utilities to file changes to their rates at any time and requires FERC to approve them as long as the new rates are 'just and reasonable.'" *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 254 (D.C. Cir. 2007) (citing 16 U.S.C. § 824d(d), (e)).

Section 206 of the FPA, 16 U.S.C. § 824e, authorizes the Commission to investigate whether existing rates and practices remain appropriate. Under this section, the Commission may act either on its own initiative or on a third-party complaint to determine whether an existing rate or practice is "unjust, unreasonable, unduly discriminatory or preferential." FPA § 206(a), 16 U.S.C. § 824e(a). A third-party complainant bears a dual burden: it first must show that the existing rate or practice is unjust, unreasonable, unduly discriminatory or preferential, and then must demonstrate that its own proposal is a just and reasonable replacement. *See Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (affirming FERC's denial of complaint challenging the lawfulness of New England's wholesale electricity market).

In furtherance of its statutory responsibilities, the Commission has encouraged competition and reliability improvements in the wholesale market for electric power through provision of non-discriminatory, efficient access to transmission over broader geographic areas and through the creation of regional

transmission organizations.[1] *See Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-37 (2008); *see also Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1006 (D.C. Cir. 2005) (explaining that such a regional organization "combines multiple power grids into a single transmission system"). These independent regional entities operate (but do not own) the transmission grid to provide access for all "at rates established in a single, unbundled, grid-wide tariff." *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 130 S. Ct. 693, 697 & n.1 (2010) (explaining responsibilities of an independent system operator) (quotation omitted).

II. BACKGROUND

A. Regional Transmission Organizations And FirstEnergy

Both the Midwest Independent System Operator, Inc. (which recently changed its name to Midcontinent Independent System Operator, Inc., but will be referred to herein as "Midwest Operator") and PJM Interconnection, L.L.C. ("PJM" or "PJM Operator") are independent, nonprofit regional transmission organizations. *See Wis. Pub. Power*, 493 F.3d at 245 (discussing Midwest Operator); *Pub. Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164, 1165 (D.C. Cir.

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

2007) (discussing PJM Operator). Midwest Operator currently operates the transmission grid in all or portions of 11 states. PJM Operator operates the interstate transmission facilities in the District of Columbia and all or part of 13 eastern states. (PJM was named for the states of Pennsylvania, New Jersey, and Maryland, where it first started operations.)

This case involves aspects of Petitioner FirstEnergy's[2] transfer from Midwest Operator, which it joined in 2003, to PJM Operator, which became effective June 1, 2011. Realignment Order PP 1, 8, JA 198, 199; Rehearing Order P 7, JA 258. FirstEnergy has approximately 7,300 circuit miles of transmission lines and 35 bulk electric system interconnections with six neighboring utilities, most of which are located within PJM Operator's footprint. Realignment Order P 9, JA 199. On the other hand, only three of these 35 interconnections are with utilities located in the Midwest Operator footprint. *Id*.

B. Transmission Cost Allocation

This Court is familiar with the challenges involved in allocating costs among regional market participants. *See Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1066-67 (D.C. Cir. 2008) ("*Wisconsin*") (affirming regional allocation for

[2] As explained in FirstEnergy's brief (at 1 n.1), in this case FirstEnergy refers to the FirstEnergy Service Company, acting on behalf of six affiliates, including American Transmission Systems, Inc., the transmission-owning affiliate of FirstEnergy Service Company.

reliability project costs over objections that method is inconsistent with cost causation); *Wis. Pub. Power*, 493 F.3d at 245-46 (affirming cost allocations in day-ahead and real-time competitive wholesale power markets); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1372 (D.C. Cir. 2004) (affirming allocation of administrative costs to transmission owners based on transmission usage). In industry-wide rulemakings, the Commission has sought to promote competition and reverse a nationwide decline in transmission investment by specifying coordinated, open and transparent transmission planning requirements.[3] But the Commission has repeatedly confirmed its support for regional variation in transmission cost allocation methods, subject to certain minimum standards. *See* Rehearing Order P 35 (explaining that, "[a]s the Commission has made clear, regional variation in cost allocation across [regional entities] is permissible") (citing Order No. 890 at P 559), JA 263.

The Midwest Operator and PJM Operator employ transmission cost allocation methods for regionally planned projects that differ in some respects. *See* Integration Proposal at 36-38, R.1, JA 77-79. In general, Midwest Operator allocates costs of new regionally-planned high voltage (345 kilovolt and above)

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

projects at the time they are approved, and splits the allocation among transmission customers regionally and sub-regionally. *See Wisconsin*, 545 F.3d at 1060-61 (discussing, and affirming, aspects of Midwest Operator's method); *see also* Realignment Order P 95, JA 210. Midwest Operator treats one category of regionally-planned transmission projects, so-called Multi-Value Projects, differently, with all costs of qualifying projects being allocated region-wide. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221, at P 28 (2010), *on reh'g*, 137 FERC ¶ 61,074 (2011), *aff'd in relevant part, Ill. Commerce Comm'n v. FERC*, Nos. 11-3421, *et al*., 2013 WL 2451766 (7th Cir. June 7, 2013). Transmission owners withdrawing from Midwest Operator may be assessed transmission costs as part of a contractual exit fee. *See* Realignment Order PP 4, 51 (noting FirstEnergy's acknowledgement of exit fee and requiring it to submit a filing addressing same), JA 198, 204; *see also* Rehearing Order P 7 (noting separate proceeding concerning exit fee), JA 258.

As relevant here, PJM Operator's Tariff Schedule 12 sets forth the allocation method for regionally-planned high voltage projects. The tariff allocates these costs to each transmission owner based on its share of PJM's total load, and recalculates the allocations on an annual basis. *See* Realignment Order P 98, JA 211; *see also PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,230, at PP 48-49, 62 (2012) , *on reh'g*, 142 FERC ¶ 61,216 (2013) (approving, following a remand

of Commission orders in *Illinois Commerce Commission v. FERC*, 576 F.3d 479 (7th Cir. 2009), PJM Operator's currently effective cost allocation method), *appeal docketed*, *Ill. Commerce Comm'n v. FERC*, Nos. 13-1674, *et al.* (7th Cir. filed Mar. 29, 2013). In PJM, these regional transmission costs are not allocated to withdrawing transmission owners. *See Duquesne Light Co.*, 122 FERC ¶ 61,039, *reh'g denied*, 124 FERC ¶ 61,219, at P 164 (2008) (also noting that allocation would apply to new entrants).

III. THE COMMISSION'S PROCEEDINGS ON REVIEW

A. FirstEnergy's Integration Proposal And Complaint

This case arises from two filings submitted by FirstEnergy, one under FPA section 205, 16 U.S.C. § 824d, and one under FPA section 206, 16 U.S.C. § 824e. FirstEnergy's August 17, 2009 section 205 filing requested that FERC conditionally approve, subject to the submission and approval of certain related filings, FirstEnergy's decision to withdraw as a transmission owner from the Midwest Operator, effective June 1, 2011, and immediately join PJM Operator as a transmission owner. Integration Proposal at 1-2, JA 42-43. FirstEnergy requested two specific findings, the second of which is at issue in this case. First, FirstEnergy asked the Commission to waive certain capacity auction procedures, and to substitute replacement procedures, because the timing of FirstEnergy's entry

would cause it to miss certain deadlines. *See*, *e.g.*, Realignment Order P 59, JA 205-06.

Second, addressing the matter at issue before this Court, FirstEnergy requested an exemption from any allocation of costs for regional transmission projects approved under PJM Operator's tariff prior to its June 1, 2011 planned integration into PJM. *See* Realignment Order P 2, JA 198; *see also* Integration Proposal at 35, JA 76. FirstEnergy posed this request both in its section 205 filing, and in a section 206 complaint filed October 19, 2009. *See* Complaint at 3 (noting that FirstEnergy filed the complaint in response to arguments that the requested relief would be unavailable to it under FPA section 205), R.100, JA 155; *see also* Realignment Order P 111, JA 212-13. The complaint sought a finding that the tariff requirement is unjust, unreasonable, and unduly discriminatory or preferential. Realignment Order P 3, JA 198; Complaint at 3, JA 155. FirstEnergy alleged that it cannot be just and reasonable to require it to pay both Midwest Operator's system-wide costs as an exit fee and PJM Operator's system-wide costs as a condition of entry. Complaint at 8, JA 160.

B. The Commission's Orders On Review

In the orders on review, the Commission granted FirstEnergy's request, subject to the receipt of certain additional filings and approvals, to terminate its membership in Midwest Operator and transfer to PJM Operator. Realignment

Order P 4, JA 198. As to FirstEnergy's two requested accommodations concerning PJM Operator's requirements, the Commission granted the first, a waiver, with substitute procedures, of requirements FirstEnergy would be unable to meet because of the timing of its entry, and denied the second, as described below. Realignment Order P 78 (granting waiver), JA 208.

Addressing FirstEnergy's requested exemption from an allocation of regional transmission costs approved prior to its joining PJM Operator, the Commission explained that it "cannot find . . . that allocating a portion of [those] costs to new entrants is unjust and unreasonable, or unduly discriminatory or preferential." Realignment Order P 7, JA 199; *see also id*. P 111, JA 212; Rehearing Order PP 21-23, JA 260. In response to FirstEnergy's alleged inequities, the Commission explained that FirstEnergy may balance the costs and benefits associated with changing Regional Operators to "determine whether such a move is cost-justified." Realignment Order P 113, JA 213. Even if that move is more expensive, this is not enough to support a finding that an existing tariff is necessarily unjust and unreasonable. *Id*. As this case demonstrates, the costs involved did not deter FirstEnergy from moving ahead with the transfer. *Id*. And the costs FirstEnergy owes to Midwest Operator are not duplicative of PJM-assessed transmission costs, since the former are in the nature of a contract exit fee, and are not based on a finding of benefits. Rehearing Order P 34, JA 262.

The Commission also rejected, as unfounded, FirstEnergy's allegations that maintaining the status quo would be inconsistent with cost causation or the Commission's precedent on the allocation of sunk costs. Cost causation "includes the allocation of 'costs to serve' that party including those facilities that benefit the party." Rehearing Order P 26, JA 261. And FirstEnergy does not dispute that it will use and benefit from the new facilities. *Id*. P 26 & n.27, JA 261. The Commission's prior decisions concerning sunk costs are distinguishable for several reasons, including that here, PJM Operator's regional facilities were planned for the entire region under a region-wide cost allocation method. *Id*. P 29, JA 262; *see also id*. P 30, JA 262. PJM Operator's transmission planning process also involves ongoing evaluation of prior authorizations and will take into account the addition of FirstEnergy to the regional grid, which can result in changes to planned projects. *Id*. P 29, JA 262.

Recognizing PJM Operator's prediction that FirstEnergy's move would create cost savings for both FirstEnergy and the other PJM transmission owners, the Commission encouraged FirstEnergy and the PJM transmission owners to negotiate the terms of FirstEnergy's entrance to ensure a mutually beneficial result. *Id*. PP 23, 40, JA 260, 263; Realignment Order P 114, JA 213.

SUMMARY OF ARGUMENT

In this case, the Commission approved FirstEnergy's request to transfer from one Regional Operator to another, but declined to allow FirstEnergy to bring along with it aspects of the transmission cost allocation method that it deems preferable. FirstEnergy's request requires a change to PJM Operator's existing tariff, and, under the Federal Power Act, compels FirstEnergy, as the complainant, to demonstrate that the existing PJM tariff, as applied to it, no longer is just and reasonable. As the Commission found, FirstEnergy failed entirely to carry this burden.

The Commission understood FirstEnergy's concern that the PJM method could be more expensive for FirstEnergy, but this alone is insufficient to support a finding that PJM's tariff is unjust and unreasonable. FirstEnergy does not dispute that, absent such a finding, PJM's tariff applies to it as written. As the Commission found, PJM's charges are not duplicative of any exit fees FirstEnergy must pay in order to satisfy contractual obligations to Midwest Operator upon its withdrawal. Moreover, allocating to FirstEnergy costs for transmission projects approved prior to its entry to PJM is fully consistent with longstanding cost causation principles; critically, the Commission found that FirstEnergy will benefit from the facilities at issue. In order to prevail on its complaint, FirstEnergy needed to dispute this finding, but it has not done so.

FirstEnergy devotes much of its argument to its mistaken view of the Commission's orders. Far from denying FirstEnergy's right to file a Federal Power Act complaint, the Commission addressed and denied FirstEnergy's complaint on its merits. And FirstEnergy's troubling view of the Commission's orders takes it far off course, with the result that it prematurely offers a substitute cost allocation method, one that would exclude from region-wide cost allocation those costs approved prior to a new utility's entrance to a Regional Operator. But the statutory process requires two steps: a finding that the existing rule is unjust and unreasonable must precede consideration of whether a substitute method is just and reasonable. FirstEnergy does not make it past step one.

The Commission recognized FirstEnergy's cost concerns with regard to its share of PJM's transmission project costs. But while it attempts to recast its request as a waiver, it has not shown that it cannot comply with the existing tariff, nor has it offered an alternative means of compliance, as the Commission has required to support a waiver. Recognizing the mutual benefits – to FirstEnergy and the other PJM transmission owners – from FirstEnergy's transfer, the Commission appropriately encouraged the parties to negotiate a resolution.

ARGUMENT

I. STANDARD OF REVIEW

The arbitrary and capricious standard of the Administrative Procedure Act governs judicial review of Commission orders. *See* 5 U.S.C. § 706(2)(A). Under that standard, "FERC must have 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Blumenthal*, 552 F.3d at 881 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citation omitted)). The Commission's factual findings, if supported by substantial evidence, are conclusive. *See* 16 U.S.C. § 825*l*(b).

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

493 F.3d at 260 (quoting *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002)).

II. THE COMMISSION REASONABLY DETERMINED THAT PJM'S COST ALLOCATION, AS APPLIED TO FIRSTENERGY, IS APPROPRIATE

A. FirstEnergy Failed To Demonstrate That PJM's Tariff, As Applied To FirstEnergy Following Its Integration Into PJM, Is Unjust And Unreasonable

FirstEnergy, by filing a complaint under section 206 of the Federal Power Act, bore the burden here to demonstrate that PJM's "rate or practice currently in effect is unjust, unreasonable, or unduly discriminatory or preferential." Realignment Order P 111 (citing 16 U.S.C. § 824e), JA 212. FirstEnergy's 39 pages of argument contain no reference to the burden of proof. The only acknowledgement comes as background where it states, correctly, that under FPA section 206 the "complainant or FERC . . . bears the burden of proof that the existing rate is unlawful." Br. 4. FirstEnergy is, of course, the complainant.

By failing to acknowledge its role in taking on the burden of proof by filing a FPA section 206 complaint, FirstEnergy neglects the core of this case. It is not enough for FirstEnergy to demonstrate that it has a just and reasonable proposal. That is the standard that applies under FPA section 205, 16 U.S.C. § 824d, not section 206. *See supra* p. 4. That is the standard that would have applied if PJM had joined in FirstEnergy's filing (as has been done in other regional realignment

proceedings, *see infra* part II.A.B.). *See* Rehearing Order P 32 n.36 ("PJM is entitled, under the FPA, to propose revisions to its [tariff] if it believes that the current cost allocations are unfair, or improper."), JA 262; *see also* PJM Transmission Owner Comments at 10 & n.30 (explaining that PJM transmission owners must consent to tariff changes under FPA section 205), R.93, JA 149.

As the Commission explained, in an FPA section 206 complaint proceeding initiated unilaterally, the analysis necessarily begins with rules and rates that the Commission previously has accepted as just and reasonable. Realignment Order P 112, JA 213. The complainant must demonstrate that the rules and rates have become unjust and unreasonable or are unjust and unreasonable as applied to it. *See Blumenthal*, 552 F.3d at 885 (outlining the burden allocation and upholding Commission orders finding State failed to satisfy its FPA section 206 burden). Thus, the bar here, in a FPA section 206 proceeding, is necessarily higher than in a section 205 proceeding. And FirstEnergy has not reached that bar.

FirstEnergy's essential complaint is that paying its share of PJM's regional transmission project costs is expensive, perhaps more expensive than it anticipated. *See* Realignment Order P 113, JA 213. But as the Commission explained, there is "no basis to modify the existing [Regional Operator] rules simply because a particular cost allocation makes a transmission owner's business decision more expensive." *Id*. FirstEnergy's own actions underscore the Commission's point.

FirstEnergy has the discretion "to balance the benefits it associates with its decision to join PJM under its existing tariff against the costs it anticipates it will incur in exiting the Midwest [Operator] and joining PJM to determine whether such a move is cost-justified." Realignment Order P 113, JA 213. FirstEnergy had an opportunity to reconsider its decision to join PJM following the Realignment Order, and nevertheless it completed the transfer.

As described in the following sections, the Commission addressed and found unpersuasive and unsupported FirstEnergy's arguments that application of the PJM cost allocation method to FirstEnergy is unjust and unreasonable.

1. FirstEnergy Has Not Demonstrated That Requiring It To Pay A Share Of PJM's Transmission Costs Is Inconsistent With Cost Causation Principles

FirstEnergy faults the Commission for failing, in its view, adequately to demonstrate that FirstEnergy will benefit from PJM's regional transmission facilities planned prior to its entry to PJM. *See*, *e.g.*, Br. 48. But FirstEnergy's approach suffers from a fundamental flaw. FirstEnergy, the complainant, has the burden here to demonstrate that application of PJM's existing cost allocation method is unjust and unreasonable as applied to it. That is, FirstEnergy must show that application of PJM's tariff to it would violate principles of cost causation. It has not done so. Indeed, FirstEnergy never once asserts, either before this Court or on rehearing before the Commission, that it will not use or benefit from the

transmission projects at issue. Rather, FirstEnergy concedes that the transmission projects at issue "will benefit [FirstEnergy's] wholesale customers to some unspecified degree after entering PJM." Br. 18.

Setting aside benefits entirely, FirstEnergy claims that the decision "turns on timing," and that PJM's approval of the project costs before FirstEnergy joined PJM must control. Br. 58. But, consistent with longstanding precedent, the cost causation principle cannot be so "narrowly construed." Rehearing Order P 26, JA 261. Unremarkably, "[c]ost causation also includes the allocation of 'costs to serve' [a] party including those facilities that benefit the party." *Id.* (citing *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1301 (D.C. Cir. 1992), and six other representative decisions, from this Court and others, endorsing this basic principle). And "[e]ven if a new member was not using the system when a particular project was initially authorized, we cannot find PJM's tariff unjust and unreasonable for allocating a share of the costs for such facilities to a new member, given that the new member will both use and benefit from these new facilities." *Id.* The principle that facilities caused by one customer (here, existing PJM customers) may benefit others (here, FirstEnergy as a new PJM customer), who may be properly allocated associated costs, derives from well-established Commission precedent in a variety of contexts. *Id.* P 26 n.26 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060, at P 53 (2009); *Pub. Serv.*

Co. of Colo., 59 FERC ¶ 61,311 (1992), *reh'g denied*, 62 FERC ¶ 61,013 (1993)), JA 261.

Forgetting its role as the complainant, FirstEnergy makes no effort to demonstrate that PJM's cost allocation method is unjust and unreasonable as applied to it.[4] The Commission, it states, "offers no analysis or evidence to show that these benefits will be roughly commensurate with paying a pro rata share of the projects' costs." Br. 48. But the Commission need not present analysis or evidence to support existing, previously approved tariff requirements, where FirstEnergy is tasked with the burden of proof and has not come forward with anything.

Even assuming that FirstEnergy's burden of proof is foisted upon the Commission, the Commission properly held that FirstEnergy, upon joining PJM, will benefit from the regional transmission projects at issue. Rehearing Order P 26, JA 261. The Commission recognized that "high voltage facilities may provide benefits over their entire lifetime that are not necessarily captured by a short-term snapshot analysis of benefits during the planning process." *Id*. As the Seventh Circuit recently found in a related appeal concerning Midwest Operator's cost allocation method, the Commission is not required to perform a utility-by-

[4] FirstEnergy has disclaimed any broader challenge to PJM's cost allocation method. Complaint at 16, JA 168.

utility level analysis of potential benefits. *Ill. Commerce Comm'n*, 2013 WL 2451766, at *5, slip op. at 13 (affirming orders approving system-wide allocation where the "benefits are at least roughly commensurate with those utilities' share" of costs) (quotation omitted); *see also, e.g.*, *Wisconsin*, 545 F.3d at 1067 ("Nor was it necessary that the cost sharing policy allocate costs with exacting precision.") (quotation omitted). In particular here, where FirstEnergy does not claim, let alone demonstrate, that it will not benefit from the new lines[5] (and has the burden to do so), the Commission need not offer more. *See Ill. Commerce Comm'n*, 2013 WL 2451766, at *5, *6, slip op. at 11, 13 (faulting petitioners' arguments where they challenged FERC's evidentiary basis, but offered no evidence of their own).

2. The Commission's Action Is Not Inconsistent With Precedent Concerning Allocation Of Sunk Costs

Although FirstEnergy has failed to demonstrate that PJM Operator's existing method, which allocates costs to FirstEnergy as a beneficiary of the projects at issue, violates cost causation principles, it nevertheless offers a substitute cost allocation method: allocating costs only to customers who were members of PJM at the time the associated transmission projects were approved. But unless it demonstrates that PJM's existing method is unjust and unreasonable, FirstEnergy

[5] On rehearing before the Commission, FirstEnergy did not "challenge the proposition that these [transmission project] costs may provide system-wide benefits," i.e., that they would also benefit FirstEnergy once integrated into the PJM system. Rehearing Order P 26 n.27, JA 261.

is not entitled to offer a substitute method – even if that method might also be just and reasonable. *See "Complex" Consol. Edison Co. of N.Y., Inc. v. FERC*, 165 F.3d 992, 1002 (D.C. Cir. 1999) ("these two inquiries must be kept separate from one another; to collapse them would violate the settled doctrine that there is no single just and reasonable rate"); *see also Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) (explaining that a finding of an unjust and unreasonable rate must precede consideration of a replacement).

To be sure, the Commission has approved, as just and reasonable, other cost allocation methods in other circumstances based upon FirstEnergy's preferred dividing line, whether the costs at issue were "incurred after the customer, or entity, first joins and takes service from the utility," here PJM Operator. Rehearing Order P 26, JA 261. But not one of the cases on which FirstEnergy relies involved an FPA section 206 complaint, where, as here, the complainant was first required to demonstrate that the existing method is unjust and unreasonable. And, moreover, as the Commission and this Court have repeatedly recognized, there is no single just and reasonable rate. Rehearing Order P 35, JA 263; *see also Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007) ("FERC is not required to choose the best solution, only a reasonable one"). Thus, FirstEnergy's suggestion that its preferred approach, as reflected in the Midwest Operator

method, *see Wisconsin*, 545 F.3d at 1060-61, is superior to PJM's method is not dispositive.

In any event, the Commission adequately distinguished the prior cases on which FirstEnergy relies. *See* Br. 52-53. As the Commission explained, those cases "address facilities that were not the result of a regional planning process." Rehearing Order P 27 (addressing orders excluding from region-wide allocation projects planned prior to a Regional Operator's inception, including a PJM Operator case and "other orders"), JA 261. Specifically, in the PJM Operator case, the facilities at issue "were constructed prior to any transmission owner joining PJM," were "not designed to benefit the entire [Regional Operator]," and were "built solely for the benefit of the individual transmission owner's systems." *Id*. P 30, JA 262. By contrast, here the projects at issue were "were developed as part of PJM's regional planning process and are designed to benefit the entire PJM footprint over the entirety of their useful life." *Id*.

Likewise, the Commission adequately distinguished its prior approval of a different allocation method for Midwest Operator. *See* Br. 53 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,106, *on reh'g*, 117 FERC ¶ 61,241 (2006), *aff'd*, *Wisconsin*, 545 F.3d 1058). There, the Commission approved as just and reasonable a new region-wide cost allocation method, but excluded projects that were already planned or would have gone forward

regardless of the new method. Rehearing Order P 28 (citing 114 FERC ¶ 61,106 at P 91), JA 261. As FirstEnergy points out, Br. 54, this Court's affirming opinion agreed with the Commission that the method "is not unfair," not that it is always fair, let alone required. *Wisconsin*, 545 F.3d at 1065. Rather than require the same approach in each Regional Operator, the Commission has in fact encouraged regional variation: Regional Operators "are not required to adopt a one-size-fits-all approach." Rehearing Order P 35, JA 263.

The Commission's decision to uphold such a method as "not unfair" in one region may have some precedential or persuasive effect. But this does not require the automatic application of that method in another region, particularly where the Commission did not address how the method "would apply with respect to transmission owners choosing to move from one [Regional Operator] to another." Rehearing Order P 29, JA 262. And, in any event, the Commission has not found that the Midwest Operator method is preferable for the purpose of encouraging and stabilizing Regional Operators, *id*. (citing Realignment Order P 113, JA 213), even borrowing FirstEnergy' assumption that this "should be the goal of a cost allocation policy" for Regional Operators. Rehearing Order P 31, JA 262.

Again, the Midwest Operator method was approved in a tariff change proceeding initiated by it under FPA section 205, not a complaint as here. And the Commission, as well as the Court in *Wisconsin*, gave weight to the fact that the

method resulted from a stakeholder compromise, even if not a consensus. *See* Rehearing Order P 28 n.30 (citing *Wisconsin*, 545 F.3d at 1062 ("FERC's decision is consistent with its established practice to 'give deference to regional choices . . . on how to allocate the costs of transmission expansions'") (citation omitted)), JA 261. FirstEnergy does not dispute that PJM's planning process, upon its entry, reflects the addition of FirstEnergy to PJM, and that the "ongoing evaluation" allows projects to be "added, accelerated, deferred, or cancelled." Rehearing Order P 29, JA 262. FirstEnergy fails to explain why this does not alleviate, at least in part, its concerns.

Finally, the Commission expressed significant policy reservations concerning FirstEnergy's proposal. Strict adherence to timing alone would mean that "a new customer or customer increasing its service would not be required to pay for the costs of the existing transmission system." Rehearing Order P 26, JA 261. Stating the obvious, the Commission explained that this would be inconsistent with Commission precedent. *Id*. P 26 n.28 (citing cases), JA 261. Indeed, FirstEnergy's principle could support a decision exempting it "from paying any transmission charge" so long as the costs for the facilities were incurred prior to its entry into PJM. *Id*. P 26, JA 261. FirstEnergy does not dispute this point, nor can it.

3. FirstEnergy's Payments To Midwest And PJM Operators Are Distinct And Not, Taken Together, Inappropriate

FirstEnergy claims it is unjust and unreasonable to require it to pay an exit fee to Midwest Operator, which includes certain costs incurred for transmission projects while FirstEnergy was a member of Midwest Operator, while also paying PJM Operator for the costs of transmission projects FirstEnergy will benefit from upon joining PJM. With this argument, FirstEnergy suggests there is some duplication or inherent unfairness in subjecting it "to both approaches at the very same time." Br. 51. The Commission reasonably found otherwise, and declined FirstEnergy's request to simply waive PJM's cost sharing requirement.

As the Commission explained, the two types of costs are entirely distinct. *See* Rehearing Order PP 33-34, JA 262. FirstEnergy's payment to Midwest Operator is in the form of an exit fee, imposed under its contract with Midwest Operator (i.e., the transmission owners' agreement). This fee is not based on any ongoing use of Midwest Operator's transmission grid or benefit to FirstEnergy's customers. *Id*. P 34, JA 262; *see also id*. P 24, JA 260. Indeed, FirstEnergy may not pass the exit fee through to its customers unless it demonstrates that the benefits of its transfer outweigh the costs, including the exit fee. *Id*. P 34 (citing *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61068 (2012) (requiring transmission owner seeking realignment to demonstrate "net benefits" before including realignment costs in rates)), JA 262.

On the other hand, FirstEnergy's share of PJM's transmission project costs may be passed on to FirstEnergy's customers precisely because those customers will benefit. Rehearing Order P 34, JA 262; *see also PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,198, at P 62 (2011) (allowing FirstEnergy to recover the costs at issue here from its customers subject to the outcome of the instant appeal).

As the Commission explained, "each methodology produce[s] a different result." Realignment Order P 112, JA 213; Rehearing Order P 33 (same), JA 262. One Regional Operator (Midwest Operator) charges a transmission owner a contract-based exit fee to assure recovery of costs incurred on that owner's behalf while it was a member, with no finding that its customer will continue to benefit from those projects. *See* Rehearing Order P 34, JA 262. The other (the PJM Operator) charges a new transmission owner for transmission facilities it will use and benefit from as a new member. FirstEnergy offers no arguments to this Court explaining why, in light of this distinction, either requirement is unjust and unreasonable.

Further, the Commission properly held that nothing in the PJM tariff suggests that these costs should not be allocated to an entering transmission owner, and the absence of such specific language does not render the tariff unjust and unreasonable. Rehearing Order P 32, JA 262; *see also* Realignment Order P 113 n.75, JA 213. The tariff applies, by its terms, to all transmission owners. True,

PJM Operator informed the agency that the tariff was "not designed with the scenario in mind of an altogether new Transmission Owner joining PJM," but it also characterized the Commission's description of the tariff as applying to existing and new members alike as "not unsound." PJM Comments at 12, R.90, JA 137. In any event, "PJM's stated views on this matter do not render [the] methodology unjust and unreasonable." Rehearing Order P 32 n.36, JA 262. And the Commission need not resort to intent when the tariff otherwise governs. *See Dominion Transmission, Inc. v. FERC*, 533 F.3d 845, 854 (D.C. Cir. 2008) ("plain language . . . cannot be overridden by a purported 'purpose and intent' that would significantly alter that language"). As FirstEnergy acknowledges, the issue "is not whether the tariff's language is clear" but whether the tariff is unjust and unreasonable as applied. Br. 17-18.

The Commission can and has waived tariff requirements for new Regional Operator entrants in appropriate circumstances. *See* Br. 35-39. Indeed, the Commission authorized a waiver for FirstEnergy in this case. *See supra* p.11. Specifically, FirstEnergy demonstrated that absent waiver of PJM's original capacity auctions, which FirstEnergy missed because it was not at that time a member of PJM, and absent the use of substitute auctions, it would have no means to comply with an otherwise applicable capacity requirement. *See* Rehearing Order P 40, JA 263; *see also* Realignment Order P 114, JA 213. This waiver is, by

FirstEnergy's own design, much like that granted in *Duquesne Light Co.*, 122 FERC ¶ 61,039, *reh'g denied*, 124 FERC ¶ 61,219. *See, e.g.*, Realignment Order P 70 (explaining FirstEnergy's position that its waiver "mirrors" that requested in *Duquesne*), JA 207.

By contrast, with its requested exemption from regional transmission costs, FirstEnergy has not shown that it cannot comply, nor does it seek an alternative means of compliance. Rehearing Order P 40, JA 263. It just seeks to "remove a tariff requirement entirely," *id.*, because the costs are higher than it would prefer. FirstEnergy explains that "it was not possible to integrate [FirstEnergy] into PJM without modifying the PJM Tariff" in a variety of respects, Br. 38 n.5, but has not shown how the same is required for transmission costs. And while the Commission's ability to invoke equity is discretionary, it may not invoke it "for the sake of exercise or simply because it possesses equitable discretion." *FERC v. Triton Oil & Gas Corp.*, 750 F.2d 113, 116 (D.C. Cir. 1984) (quoting *Shell Oil Co. v. FERC*, 664 F.2d 79, 83 (5th Cir. 1981)).

B. The Commission's Action Here Is Consistent With Commission Precedent Concerning Regional Realignment

FirstEnergy errs in relying on other cases involving realignment among Regional Operators. In those cases, tariff changes resulted either from a finding under FPA section 206, lacking here, that application of the existing tariff would be unjust and unreasonable, or from a filing submitted by the Regional Operator

itself under FPA section 205, typically following successful negotiations among the new entrant, the Regional Operator and other transmission owners.

FirstEnergy mistakenly relies on other cases where the Commission modified a tariff under FPA section 206. *See* Br. 39-44 (citing *Midwest Indep. Sys. Operator, Inc*., 104 FERC ¶ 61,105 (2003) (involving the integration of the so-called "Alliance" companies into PJM and Midwest Operators); and *Midwest Indep. Sys. Operator, Inc*., 103 FERC ¶ 61,090 (2003) (involving the integration of the GridAmerica companies into the Midwest Operator)). In the Alliance proceeding, the Commission instituted its own FPA section 206 investigation and, after a hearing, found certain rates of both PJM and Midwest Operator unjust and unreasonable as applied following the integration of the Alliance companies. *Midwest Indep. Sys. Operator, Inc*., 104 FERC ¶ 61,105, at P 1. Based on this finding, the Commission required the modification of both PJM's and Midwest Operator's tariffs. *Id*. Likewise, in the GridAmerica proceeding, the Commission instituted an FPA section 206 proceeding, and ultimately approved an uncontested settlement modifying the tariff. *See Midwest Indep. Sys. Operator, Inc*., 106 FERC ¶ 61,200 (2004) (explaining that approval of an uncontested settlement "does not constitute approval of, or precedent regarding, any principle or issue in these proceedings"). Neither of these circumstances – a finding that PJM's tariff is unjust and unreasonable or an uncontested settlement – is present here.

The Commission's approvals of certain tariff modifications when both the MidAmerican Energy Company and Entergy Services Company joined the Midwest Operator are also different, but for another reason, one that underscores the flaw in FirstEnergy's case here. *See* Br. 41-44 (citing *Midwest Indep. Sys. Operator, Inc*., 128 FERC ¶ 61,046 (2009) (MidAmerican), and *Midwest Indep. Sys. Operator, Inc*., 139 FERC ¶ 61,056, *on reh'g*, 141 FERC ¶ 61,128 (2012) (Entergy)). Unlike the instant proceeding, in both the MidAmerican proceeding and the Entergy proceeding, the Regional Operator itself filed under FPA section 205 to modify its own tariff. *See Midwest Indep. Sys. Operator, Inc*., 128 FERC ¶ 61,046, at P 1; *Midwest Indep. Sys. Operator, Inc*., 139 FERC ¶ 61,056, at P 1. Accordingly, the Commission was not required to and did not find that the previously existing Midwest Operator tariff was unjust and unreasonable upon the integration of either company. Here, FirstEnergy alone submitted, albeit with PJM's stated support, an FPA section 206 complaint – thus invoking the requirement that the Commission first find PJM's existing tariff unjust and unreasonable. The Commission could not, and thus appropriately ended its analysis at that point.

FirstEnergy had the same opportunity as MidAmerican and Entergy to negotiate modified terms of entry and request that PJM and/or the other PJM transmission owners seek the necessary approvals under FPA section 205, rather

than going it alone under FPA section 206. In an effort to facilitate FirstEnergy's entry to PJM, the Commission properly encouraged the parties to negotiate a mutually beneficial resolution. Realignment Order P 114, JA 213; Rehearing Order P 40, JA 263.

FirstEnergy complains that the Commission has "eviscerated" its negotiating leverage. Br. 18. But the Commission understandably reasoned that "PJM transmission owners will have both a will and an incentive to facilitate" FirstEnergy's entry to PJM. Realignment Order P 114, JA 213. The Commission's Realignment Order issued more than 18 months before FirstEnergy's planned integration date of June 1, 2011, and FirstEnergy had yet to submit several filings necessary to complete its transfer. *See id*. P 4, JA 198. And the Commission acknowledged PJM's prediction that FirstEnergy's transfer "'is likely to reduce production cost' and result in a more efficient use of the transmission system." *Id*. P 114, JA 213. The Commission even specified that the PJM transmission owners, after negotiating terms with FirstEnergy, "may submit a tariff amendment [under FPA section 205] reflecting the value of these savings, e.g., as a reduction in [FirstEnergy's transmission cost] obligations." *Id*. P 7, JA 199. Just as FirstEnergy chose to complete its transfer to PJM, it chose not to resolve the matter through negotiation.

III. FIRSTENERGY'S STATUTORY RIGHTS REMAIN INTACT

FirstEnergy's efforts to reframe the case as an abrogation of its FPA section 206 complaint rights belie the straightforward result here: FirstEnergy's complaint failed on its merits; the Commission found that PJM's tariff is not unjust and unreasonable as applied to FirstEnergy. *See, e.g.*, Rehearing Order PP 21, 29, 32, JA 260, 262. More troubling, FirstEnergy directly misstates the Commission's findings in the orders on review: The Commission did not require application of PJM's tariff to FirstEnergy "even if a particular provision is unjust and unreasonable." Br. 22. "That is not the law," Br. 22, and that is, of course, not what the Commission did here.

There are a variety of procedures that can result in modifications to a Regional Operator's tariff at the time a new transmission owner enters. But none of those circumstances is present here. The Commission did not find, as required under FPA section 206, the existing tariff to be unjust and unreasonable as applied to FirstEnergy. Nor did the Commission find that a waiver is appropriate. Likewise the parties did not negotiate a settlement, and the Regional Operator itself did not submit a filing to change its own tariff under FPA section 205.

Where the Commission pointed out that – in the absence of one of these circumstances necessary to support a tariff change – the "plain language of the tariff governs," Realignment Order P 113 n.75, JA 213, it did no more than state

the obvious. The Commission did not "assume that any filed rate is just and reasonable," Br. 25; it simply found that the PJM Operator rate is just and reasonable as applied to FirstEnergy as a new entrant. In this light, FirstEnergy "should be prepared to assume the costs attributable to [its] decisions, including all applicable charges that may be imposed under the agreements and tariffs of either [Regional Operator]." Rehearing Order P 23, JA 260. Utility members of a Regional Operator "who think they're being mistreated by the [regional tariff] can vote with their feet" and leave that Operator, *Ill. Commerce Comm'n*, 2013 WL 2451766, at *7, slip op. at 16 – or in the case of a utility such as FirstEnergy, choose not to enter a new Regional Operator in the first place.

Because there is no finding that PJM's tariff is unjust and unreasonable, FirstEnergy's efforts, Br. 22, to conjure a conflict with *Atlantic City Electric Co.*, 295 F.3d 1, wholly fail. *Atlantic City* provides that the Commission may not condition membership in a Regional Operator on the utility's surrender of statutory filing rights. *Id*. at 9-11. Here, FirstEnergy exercised its statutory right to file a complaint alleging an unjust and unreasonable tariff; it simply did not succeed in demonstrating that the tariff is, in fact, unjust and unreasonable. The Commission explained the allocation of the burden of proof to FirstEnergy, addressed FirstEnergy's merits arguments, and found that PJM's cost allocation method is

not, as alleged, unjust and unreasonable as applied to FirstEnergy. Nothing more is required.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the orders on review should be upheld in their entirety.

Respectfully submitted,

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FirstEnergy Service Company v. FERC **Docket No. ER09-1589, *et al.***
D.C. Cir. No. 12-1461

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 7,766 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum.

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August 30, 2013

ADDENDUM

STATUTES

TABLE OF CONTENTS

STATUTES: **PAGE**

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 703. Form and venue of proceeding

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

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

(i) a copy of the rule;

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

(iii) the proposed effective date of the rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

§ 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

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

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

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

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

AMENDMENTS

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

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

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

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

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

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

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

[1] See References in Text note below.

LIMITATION ON AUTHORITY PROVIDED

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

STUDY

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

§ 824f. Ordering furnishing of adequate service

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

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

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

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

(b) Request for inventory and cost statements

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

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

§ 824h. References to State boards by Commission

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

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

(b) Cooperation with State commissions

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

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

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

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

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

FirstEnergy Service Company v. FERC **Docket No. ER09-1589 *et al.***
D.C. Cir. No. 12-1461

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 30th day of August 2013, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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