ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 13-1033

SOUTHWESTERN POWER ADMINISTRATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Washington, D.C. 20426

October 15, 2013

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the brief of Petitioners.

B. Rulings Under Review

1. *North American Electric Reliability Corporation*, 140 FERC ¶ 61,048 (2012) (Penalty Order), JA 38; and

2. *North American Electric Reliability Corporation*, 141 FERC ¶ 61,242 (2012) (Rehearing Order), JA 10.

C. Related Cases

This case has not been before this Court or any other court. There are no related cases.

/s/ *Lona T. Perry*
Lona T. Perry
Senior Attorney

October 15, 2013

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GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
Customer Intervenors	Intervenors in Support of Petitioners Mid-West Electric Consumers Association, Southwestern Power Resources Association and Southeastern Federal Power Customers, Inc.
Customer Intervenors Br.	Brief for Intervenors in Support of Petitioners Mid-West Electric Consumers Association, Southwestern Power Resources Association and Southeastern Federal Power Customers, Inc.
Electric Reliability Organization	North American Electric Reliability Corporation
Federal Petitioners	Petitioners the Department of Energy, Southwestern Power Administration and the Department of the Interior
Federal Petitioners Br.	Brief for Petitioners the Department of Energy, Southwestern Power Administration and the Department of the Interior
Order No. 672	*Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006)
Penalty Order	*N. Am. Elec. Reliability Corp.*, 140 FERC ¶ 61,048 (2012), JA 38
Rehearing Order	*N. Am. Elec. Reliability Corp.*, 141 FERC ¶ 61,242 (2012), JA 10

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STATEMENT OF THE ISSUE

In the challenged orders, the Federal Energy Regulatory Commission (FERC or the Commission) affirmed a monetary penalty assessed by the North American Electric Reliability Corporation (Electric Reliability Organization) against the Southwestern Power Administration, an agency of the United States Department of Energy, for violations of mandatory electric reliability standards under section 215 of the Federal Power Act, 16 U.S.C. § 824o. The sole issue presented for review is

whether section 215 authorizes the Electric Reliability Organization to impose a monetary penalty on a federal agency.

STATUTES AND REGULATIONS

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

INTRODUCTION

In the Energy Policy Act of 2005, "Congress added section 215 to the Federal Power Act, [16 U.S.C. § 824o], which provides for the creation of a national Electric Reliability Organization charged with establishing and enforcing [mandatory reliability] standards." *Alcoa, Inc. v. FERC*, 564 F.3d 1342, 1344 (D.C. Cir. 2009). In July of 2011, under section 215(e)(1), the Electric Reliability Organization assessed a $19,500 penalty against the Southwestern Power Administration for violations of mandatory reliability standards. On Commission review of the penalty under section 215(e)(2), the Southwestern Power Administration did not dispute the applicability of the reliability standards to it, its violation of those standards, or the amount of the penalty. The Southwestern Power Administration argued only that the Electric Reliability Organization lacked authority to assess a monetary penalty against a federal agency.

In the challenged orders, *N. Am. Elec. Reliability Corp.*, 140 FERC ¶ 61,048 (2012) (Penalty Order), JA 38, *on reh'g*, 141 FERC ¶ 61,242 (2012) (Rehearing

Order), JA 10, the Commission affirmed the penalty, finding that the Electric Reliability Organization has authority to impose the penalty under Federal Power Act section 215. Section 215 authorizes the Electric Reliability Organization to impose penalties for violations of reliability standards against "a user or owner or operator of the bulk-power system," such as the Southwestern Power Administration, subject to Commission review. Section 215(e), 16 U.S.C. § 824o(e). Section 215(b)(1), 16 U.S.C. § 824o(b)(1), extends the Commission's jurisdiction for "enforcing compliance" with reliability standards to "all users, owners and operators of the bulk-power system, including but not limited to the entities described in [section 201(f), 16 U.S.C. § 824(f)]," which includes agencies of the United States, such as the Southwestern Power Administration.

STATEMENT OF FACTS

I. SECTION 215 OF THE FEDERAL POWER ACT

In the aftermath of a 1965 blackout in the northeast United States, the electric industry established the North American Electric Reliability Council (later the North American Electric Reliability Corporation), a voluntary organization that developed reliability standards for the North American bulk-power system. *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, 112 FERC ¶ 61,239 P 3 (2005). The standards were not mandatory, and violations

of those standards caused two cascading blackouts in the west coast of the United States in 1996. *Id*. P 4. In response to these blackouts, the Department of Energy convened a task force that recommended that FERC approve and oversee a self-regulatory reliability organization with responsibility for mandatory, enforceable bulk-power reliability standards. *Id*. (citing *Maintaining Reliability in a Competitive U.S. Electric Industry, Final Report of the Task Force on Electric System Reliability*, Secretary of Energy Advisory Board, U.S. Department of Energy (September 1998) at 25-27, 65-67).

In August 2003, a blackout occurred in the Midwest and Northeast United States and Ontario, Canada. *Id*. P 5. A joint United States and Canada task force determined that reliability standard violations contributed to the blackout, and recommended legislation making reliability standards mandatory and enforceable, with penalties for non-compliance. *Id*. (citing *Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations*, U.S.-Canada Power System Outage Task Force (April 5, 2004) at 140-42).

In 2005, Congress determined that voluntary reliability standards were "no longer acceptable, and enacted legislation requiring the development of mandatory, FERC-approved reliability standards." *Alcoa*, 564 F.3d at 1344. The Electricity Modernization Act of 2005 (Title XII, section 1211 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594) added section 215 to the Federal Power

Act, which authorized the Commission to certify an organization as the national "Electric Reliability Organization," which was charged with establishing and enforcing mandatory reliability standards. *Alcoa*, 564 F.3d at 1344 (citing 16 U.S.C. § 824o(a)(2)).

In February of 2006, the Commission issued Order No. 672,[1] to implement section 215. In *Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization*, 116 FERC ¶ 61062, *on reh'g*, 117 FERC ¶ 61,126 (2006), *aff'd*, *Alcoa, Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009), the Commission certified the North American Electric Reliability Corporation as the national Electric Reliability Organization. Since that time, the Commission has approved over one hundred mandatory reliability standards under section 215(d) of the Federal Power Act, 16 U.S.C. § 824o(d). Penalty Order P 3, JA 39. As contemplated by section 215(e)(4), 16 U.S.C. § 824o(e)(4), the Electric Reliability Organization has delegated certain oversight and enforcement authority to eight regional entities. Penalty Order P 3, JA 39. This delegation includes the Southwest Power Pool, a Regional Transmission Organization, which has enforcement and oversight responsibility for the Southwestern Power

[1] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards,* Order No. 672, FERC Stats. & Regs. ¶ 31,204, *on reh'g,* Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

Administration. *Id.* *See, e.g., East Texas Elec. Coop, Inc. v. FERC*, 331 F.3d 131, 133 (D.C. Cir. 2003) (describing Southwest Power Pool operation).

Section 215(b)(1), 16 U.S.C. § 824o(b)(1), titled "Jurisdiction and applicability," describes the Commission's reliability jurisdiction as follows:

> The Commission shall have jurisdiction, within the United States, over the [Electric Reliability Organization] certified by the Commission under subsection (c) of this section, any regional entities, and all users, owners and operators of the bulk-power system, including but not limited to the entities described in [section 201(f)] of this title, for purposes of approving reliability standards established under this section and enforcing compliance with this section. All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.

Section 201(f) of the Federal Power Act, 16 U.S.C. § 824(f), provides:

> No provision in [Part II of the Federal Power Act] shall apply to, or be deemed to include, the United States . . . or any agency, authority, or instrumentality of any one or more of the foregoing . . . unless such provision makes specific reference thereto.

Section 201(b)(2) of the Federal Power Act, 16 U.S.C. § 824(b)(2), provides:

> Notwithstanding [section 201(f)], the provisions of . . . [section 215] 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.

Pursuant to section 215(e)(1), 16 U.S.C. § 824o(e)(1), the Electric Reliability Organization has the authority to "impose . . . a penalty on a user or

owner or operator of the bulk-power system for a violation of a reliability standard approved by the Commission," subject to certain due process requirements. Before a penalty can take effect, the Electric Reliability Organization must file a Notice of Penalty with the Commission. Penalty Order P 6, JA 40 (citing sections 215(e)(1) and (2), 16 U.S.C. §§ 824o(e)(1) and (2)). Each penalty determination is subject to Commission review on the Commission's own motion or by application for review by the penalty recipient. *Id*. (citing section 215(e)(2), 16 U.S.C. § 824o(e)(2)). In the absence of an application for review or other action by the Commission within thirty days of the Notice, each penalty filed by the Electric Reliability Organization is affirmed by operation of law. *Id*.

II. THE PROCEEDINGS BELOW

A. The Southwestern Power Administration Violations

The Southwestern Power Administration, a subdivision of the Department of Energy, is one of four federal Power Marketing Administrations. Penalty Order P 9, JA 41. The Southwestern Power Administration markets hydroelectric power from 24 Army Corps of Engineers projects in the Southwest United States primarily to defined "preference" customers, including rural electric cooperatives and municipal utilities. *Id*. The Southwestern Power Administration operates and maintains 1,380 miles of high voltage transmission lines in a four-state area located within the Southwest Power Pool region. *Id*. Since 2007, the Southwestern Power

Administration has been registered with the Electric Reliability Organization as a balancing authority, purchasing-selling entity, resource planner, transmission owner, transmission operator, transmission planner and transmission service provider. *Id*. As such, the Southwestern Power Administration must comply with reliability standards applicable to such entities. *Id*.

On July 28, 2011, the Electric Reliability Organization submitted a Notice of Penalty filing to the Commission, assessing a $19,500 penalty against the Southwestern Power Administration for violations of two Critical Infrastructure Protection (CIP) Reliability Standards, CIP-004-1 (Cyber Security -- Personnel and Training) and CIP-007-1 (Cyber Security -- Systems Security Management). Penalty Order P 10, JA 42. The Southwestern Power Administration self-reported certain violations, and the Southwest Power Pool identified additional violations during a spot check. *Id*. A number of factors were considered in imposing the penalty, including that the Southwestern Power Administration had a prior violation of CIP-004-1. *Id*. P 12, JA 43.

Reliability standards CIP-004-1 and CIP-007-1 apply to the Southwestern Power Administration as a registered balancing authority and transmission operator. *Id*. P 9 n.17, JA 42. Reliability standard CIP-004-1 sets out requirements for personnel that have authorized cyber access or authorized unescorted physical access to Critical Cyber Assets, including requirements related to personnel risk

assessment, training, and security (including cyber security). *Id*. P 10 n.18, JA 42. CIP-007-1 sets out requirements related to security systems determined to be Critical Cyber Assets and other assets within an "Electronic Security Perimeter." *Id*.

B. The Challenged Orders

In response to the Notice of Penalty, the Southwestern Power Administration did not contest "the nature of the violations or the size of the penalty proposed," nor "that the electric reliability standards promulgated by [the Electric Reliability Organization] apply to federal entities." Department of Energy and Southwestern Power Administration Application for Review of Penalty at JA 86. Rather, Petitioners the Department of Energy, the Southwestern Power Administration and the Department of the Interior (collectively Federal Petitioners) disputed only whether the Electric Reliability Organization may assess monetary penalties against a federal agency. *Id*.

Federal Petitioners maintained that Federal Power Act section 215 does not unambiguously waive federal sovereign immunity for monetary penalties. *See* Department of Energy Request for Rehearing at JA 105-11; Department of the Interior Request for Rehearing at JA 126-27. Rather, Federal Petitioners argued that section 215 must be read in concert with Federal Power Act section 316A, 16 U.S.C. § 825o-1. Department of Energy Request for Rehearing at JA 112-14;

Department of the Interior Request for Rehearing at JA 127-29. Section 316A authorizes the Commission to assess civil penalties against "persons," a term defined in section 3(4) of the Federal Power Act, 16 U.S.C. § 796(4), to mean "an individual or a corporation." Federal Petitioners further argued that the Commission's statutory interpretation in the challenged orders contradicted the Commission's reasoning in its Order No. 672 rulemaking. Department of Energy Request for Rehearing at JA 114-17.

The Commission found that the plain language of Federal Power Act section 215 explicitly authorizes the Electric Reliability Organization to assess monetary penalties against federal agencies for violations of mandatory reliability standards. Rehearing Order P 26, JA 21-22; Penalty Order P 37, JA 51. Under section 215(b)(1), the jurisdictional scope of section 215 extends to all users, owners and operators of the bulk-power system, "including but not limited to the entities described in section 201(f) for purposes of approving reliability standards under this section *and enforcing compliance with this section*." Rehearing Order P 31, JA 23 (citing section 215(b)(1), 16 U.S.C. § 824o(b)(1)); Penalty Order P 39, JA 52. Thus, section 215(b)(1) defines the scope of "all users, owners and operators of the bulk-power system," as that term is used in section 215, to include section 201(f) federal entities. Rehearing Order P 41, JA 28. The Southwestern Power Administration is a section 201(f) federal entity and is a user, owner or operator of

the bulk-power system. *Id*. P 31, JA 23; Penalty Order P 39, JA 52. Enforcement of section 215 is covered in section 215(e), which explicitly authorizes imposing a penalty on any user or owner or operator of the bulk-power system found to be in violation of a mandatory reliability standard. Rehearing Order P 31, JA 23; Penalty Order P 40, JA 52.

Section 201(b)(2) of the Federal Power Act, 16 U.S.C. § 824(b)(2), further supports this interpretation. Penalty Order P 8, JA 41. That section provides that, "[n]otwithstanding [section 201(f)]," the provisions of enumerated sections including section 215 "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."

The Commission rejected the argument that the authority to impose penalties for section 215 violations arises under section 316A, finding instead that section 215 is an independent grant of penalty authority extending to the Commission and to the Electric Reliability Organization. Rehearing Order P 44, JA 29; Penalty Order P 45, JA 54. Sections 215(e)(1) and (3), separate and apart from section 316A, authorize the Electric Reliability Organization and the Commission to impose penalties for violations of mandatory reliability standards. Rehearing Order P 44, JA 29; Penalty Order P 45, JA 54. Other sections also demonstrate

that section 215 penalties are imposed under the authority of section 215. Section 215(e)(6) sets the standards for penalties "imposed under this section." Rehearing Order P 44, JA 29; Penalty Order P 47 & n.63, JA 55. Section 215(c)(2)(C) further requires the Electric Reliability Organization to establish rules to "provide fair and impartial procedures for enforcement of reliability standards through the imposition of penalties in accordance with subsection (e) of this section . . . ." Rehearing Order P 44, JA 29; Penalty Order P 47 & n.63, JA 55. Indeed, section 316A does not even reference the Electric Reliability Organization, and thus cannot serve as the source of the Electric Reliability Organization's penalty authority. Rehearing Order P 44, JA 29; Penalty Order P 45, JA 54.

The absence of a monetary penalty cap, Department of Energy Request for Rehearing at JA 112-13, does not indicate that Federal Power Act section 215 was not intended to grant penalty authority. Rehearing Order P 45, JA 30; Penalty Order P 48, JA 56. Although section 215 does not place a dollar cap on penalties, it does include other significant limitations. Rehearing Order P 46, JA 30; Penalty Order P 48, JA 56. Among other things, all penalties assessed by the Electric Reliability Organization are subject to Commission review, section 215(e)(2), and all are required to bear a reasonable relation to the seriousness of the violation and to consider remedial steps taken by the potential recipient of the penalty, section 215(e)(6). Rehearing Order P 46, JA 30-31.

In its Order No. 672 rulemaking, issued in 2006, the Commission found that penalties imposed under section 215 were subject to the monetary cap on civil penalties set out in section 316A. Order No. 672 P 575. The Commission, however, in no way suggested that section 316A was the source of the Commission's (or of the Electric Reliability Organization's) authority to impose penalties for reliability violations. Penalty Order P 49, JA 56. By applying the section 316A monetary cap to section 215 penalties, the Commission did not intend by that finding -- nor did Congress intend -- for other aspects of section 316A to supplant section 215's grant of limited jurisdiction to impose penalties on section 201(f) federal entities that violate mandatory reliability standards. Rehearing Order P 49, JA 32; Penalty Order P 49-50, JA 56-57.

Certain customers of federal power marketing agencies (petitioner-intervenors Southeastern Federal Power Customers, Inc., Mid-West Electric Consumers Association and Southwestern Power Resources Association, collectively Customer Intervenors), raised additional arguments on rehearing asserting that the Commission's statutory interpretation conflicted with: (1) the Anti-Deficiency Act, 31 U.S.C. § 1341, because the Commission had not determined whether the Southwestern Power Administration's appropriations would permit payment of penalties; and (2) the Flood Control Act of 1944, 16

U.S.C. § 825s, because penalties would increase rates to customers of federal power marketing agencies. *See* JA 151-52, 182-186.

The Anti-Deficiency Act precludes federal employees from making or authorizing "an expenditure or obligation exceeding an amount available in an appropriation." Penalty Order P 58, JA 60 (quoting 31 U.S.C. § 1341(a)(1)(A)). The Commission found no conflict with the Anti-Deficiency Act because the United States Government Accountability Office "has concluded that 'agency operating appropriations are available under the 'necessary expense' theory, to pay administratively imposed civil penalties'" as long as sovereign immunity has been waived. Rehearing Order P 57, JA 36 (quoting Government Accountability Office, GAO-04-261SP, Principles of Federal Appropriations Law, 3d ed. Vol. 1 at 4-144 – 4-145 (2004)); Penalty Order P 60, JA 61.

The Flood Control Act of 1944 requires the Southwestern Power Administration to transmit and dispose of power "'in such a manner as to *encourage* the most widespread use [of energy generated at applicable projects] at the lowest possible rates to consumers *consistent with sound business principles*.'" Rehearing Order P 55, JA 35 (quoting 16 U.S.C. § 825s). The Commission found that this statutory language does not exempt federal power marketing agencies from exposure to a potential cost of doing business -- in the form of Federal Power

Act section 215 penalties -- that is applicable to similarly-situated private entities. *Id*. *See also* Penalty Order P 57, JA 60.

SUMMARY OF ARGUMENT

In the challenged orders, the Commission found that Federal Power Act section 215, 16 U.S.C. § 824o, waives sovereign immunity by explicitly authorizing the Electric Reliability Organization to assess monetary penalties against federal agencies for violations of mandatory reliability standards. Section 215(b)(1), "Jurisdiction and applicability," provides the Commission jurisdiction over "all users, owners and operators of the bulk-power system, including but not limited to the entities described in [section 201(f)]" for purposes of "enforcing compliance with this section." Section 201(f) entities include federal agencies such as the Southwestern Power Administration, which has been registered with the Electric Reliability Organization as a user, owner or operator of the bulk-power system since 2007. Section 215(e), "Enforcement," authorizes the Commission (215(e)(3)), and the Electric Reliability Organization (215(e)(1)), to impose a penalty on any "user or owner or operator of the bulk-power system" violating a mandatory reliability standard.

While Federal Petitioners acknowledge that section 215(b)(1) provides the Commission with jurisdiction over section 201(f) federal entities for purposes of "enforcing compliance" with section 215, Federal Petitioners argue that the

Electric Reliability Organization has no jurisdiction to assess penalties of any kind -- monetary or otherwise -- against such entities. The key distinction, in Federal Petitioners' opinion, is that Congress did not repeat in section 215(e)(1) (authorizing the Electric Reliability Organization to assess penalties) the reference to section 201(f) federal entities found in section 215(b)(1).

The Commission rejected this argument, finding that section 215 must be read as a whole, and that the reference to "a user or owner or operator of the bulk-power system" in section 215(e) must be informed by section 215(b)(1), which specifies that users, owners and operators includes section 201(f) federal entities. Further, the Commission's penalty authority (section 215(e)(3)) and the Electric Reliability Organization's penalty authority (section 215(e)(1)) both apply to a "user or owner or operator of the bulk-power system" without reference to section 201(f) federal entities. Accordingly -- as Federal Petitioners recognize the Commission's jurisdiction to impose non-monetary penalties against section 201(f) federal entities, Federal Petitioners Br. 31 -- Federal Petitioners' interpretation requires the conclusion that the identical phrase in sections (e)(1) and (e)(3) was intended to have different meanings.

While Federal Petitioners resist interpreting section 215 as a whole, they nonetheless argue that section 215 must be read "as a whole" with Federal Power Act section 316A, which authorizes the Commission to assess civil penalties

against "any person" violating Part II of the Federal Power Act. The definition of "person" in section 3(4) of the Federal Power Act does not include federal entities.

The Commission found to the contrary that sections 215(e)(1) and (3), independently from section 316A, authorize the Electric Reliability Organization and the Commission to impose penalties for reliability standard violations. Section 316A does not even mention the Electric Reliability Organization and therefore cannot serve as a source of penalty authority for the Electric Reliability Organization. Further, while section 316A applies to a violation of "any provision of subchapter II" which includes section 215, this general catch-all penalty provision cannot supersede the express penalty authority conferred in section 215 for violations of reliability standards.

Customer Intervenors raise arguments regarding the Anti-Deficiency Act, the Flood Control Act of 1944, and the absence of an express reference to "monetary" penalties in Federal Power Act section 215. The Court should not consider these arguments because Customer Intervenors lack standing to raise them and, under its settled practice, this Court does not entertain intervenor arguments not raised by petitioners.

In any event, these arguments lack merit. The Commission's statutory interpretation does not conflict with the Anti-Deficiency Act because federal agencies may pay administrative penalties as a necessary expense where sovereign

immunity has been waived. The Flood Control Act likewise does not preclude agency payment of necessary expenses. Further, the absence of the word "monetary" does not alter the interpretation of section 215; the term "penalty" is commonly understood to encompass monetary penalties. Indeed, the statutes that Customer Intervenors proffer as examples of express waiver themselves do not include the term "monetary."

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The relevant inquiry is whether the agency has "examine[d] the relevant data and articulate[d] a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b).

This case concerns FERC's interpretation of provisions of the Federal Power Act. Generally, to review FERC's interpretation of a statute it administers, the Court applies the framework set forth in *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), under which the Court

"giv[es] effect to clear statutory text and defer[s] to an agency's reasonable interpretation of any ambiguity." *MetroPCS Cal., LLC v. FCC*, 644 F.3d 410, 412 (D.C. Cir. 2011). *See also City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868 (2013).

Here, however, Federal Petitioners assert that the canon of sovereign immunity applies to the statutory interpretation issue. *See, e.g., FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012) ("a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text"). While questioning whether sovereign immunity properly applies in suits between federal agencies,[2] the Commission nevertheless concluded that "the requirements for waiver are met using the highest level of scrutiny, i.e. that waiver has been clearly and unambiguously expressed in the statutory text." Penalty Order P 53 & n.72, JA 58. *See also* Rehearing Order P 32 & n. 68, JA 24 ("Although we noted in [the Penalty Order] that a less rigorous standard might be more applicable in this kind of case, involving the imposition of a penalty on a federal entity for violations of a federal

[2] *See* Rehearing Order P 12 n.25, JA 15; Penalty Order P 53 n.72, JA 58 (citing *EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conservation and Recovery Act*, 2000 WL 33716984 at *3 (O.L.C. June 14, 2000) ("[t]he doctrine of sovereign immunity does not apply to enforcement actions by one federal government entity against another"); *Administrative Assessment of Civil Penalties Against Federal Agencies Under The Clean Air Act*, 1997 WL 1188105 at *2 (O.L.C. July 16, 1997) (applying the "clear statement principle" of interpretation applicable to issues raising separation of powers concerns)).

statute, we found the language of FPA section 215 to be sufficiently clear to meet the highest level of scrutiny.")

Under the sovereign immunity canon, "[a]ny ambiguities in the statutory language are to be construed in favor of immunity so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *FAA*, 132 S. Ct. at 1448. However, "Congress need not state its intent in any particular way. We have never required that Congress use magic words." *Id*. *See also Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006) (Congress need not use "magic words" to waive sovereign immunity). Further, while the Court should not "'extend the waiver [of sovereign immunity] beyond that which Congress intended,'" "'[n]either, however, should [the Court] assume the authority to narrow the waiver that Congress intended.'" *Smith v. United States*, 507 U.S. 197, 203 (1993) (quoting *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979)). *See also Bowen v. City of New York*, 476 U.S. 467, 479 (1986) (the court "must be careful not to 'assume the authority to narrow the waiver that Congress intended,' or construe the waiver 'unduly restrictively.'") (citations omitted).

The sovereign immunity canon, moreover, "does not 'displac[e] the other traditional tools of statutory construction.'" *FAA*, 132 S. Ct. at 1448 (quoting *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008)). Rather, the Court

requires "that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools." *Id*. The interpretation favoring immunity only applies if, following application of the traditional tools of statutory construction, ambiguity remains. *Id*. Conversely, in the absence of an ambiguity, there is no need to apply the doctrine of sovereign immunity. *See Richlin*, 553 U.S. at 590 ("There is no need for us to resort to the sovereign immunity canon because there is no ambiguity left for us to construe.")

II. FEDERAL POWER ACT SECTION 215 AUTHORIZES PENALTIES FOR RELIABILITY STANDARD VIOLATIONS AGAINST FEDERAL ENTITIES THAT ARE USERS, OWNERS OR OPERATORS OF THE BULK-POWER SYSTEM.

A. Section 215 Defines User, Owner Or Operator Of The Bulk-Power System To Include Section 201(f) Federal Entities.

As the Commission found, "[s]ection 215 of the [Federal Power Act] explicitly states that federal entities, as [Federal Power Act] section 201(f) entities, are subject to penalties for violation of mandatory Reliability Standards." Penalty Order P 39, JA 51. *See also* Rehearing Order P 26, JA 21-22 ("section 215 unequivocally and unambiguously authorizes the imposition of monetary penalties on federal entities that are found to be in violation of a mandatory reliability standard").

- Section 215(b)(1), "Jurisdiction and applicability," provides that the Commission shall have jurisdiction over "all users, owners and operators

of the bulk-power system, including but not limited to the entities described in [section 201(f)], for purposes of approving reliability standards established under this section and enforcing compliance with this section." 16 U.S.C. § 824o(b)(1).

- Section 201(f) entities are "the United States, a State or any political subdivision of a state, . . . or any agency, authority, or instrumentality of any one or more of the foregoing ." 16 U.S.C. § 824(f).
- Section 215(e)(1), "Enforcement," authorizes the Electric Reliability Organization to "impose . . . a penalty on a user or owner or operator of the bulk-power system for a violation of a reliability standard," subject to Commission review under section 215(e)(2). 16 U.S.C. § 824o(e)(1).

Thus, section 215(b)(1) "explicitly states that jurisdiction over the defined entities, i.e. all users, owners and operators of the Bulk-Power System, including '201(f) entities,' extends to *enforcing compliance* with FPA section 215." Penalty Order P 39, JA 52. The Southwestern Power Administration -- which operates 1380 miles of high voltage transmission lines, *id*. P 9, JA 41 -- is a user, owner or operator of the bulk-power system, as evidenced by its registration as a transmission operator and balancing authority, among other registered functions, in

the Electric Reliability Organization compliance registry.[3] *Id*. P 39, JA 52. *See* Brief for the Petitioners (Federal Petitioners Br.) at 13, 28 (acknowledging that the Southwestern Power Administration is registered with the Electric Reliability Organization and is subject to the section 215 reliability standards that apply to users, owners and operators of the bulk-power system); Brief of Intervenors In Support of Petitioner (Customer Intervenors Br.) at 6-7 ("The Intervenors do not contest the applicability of the Section 215 reliability standards to Federal Entities or the obligation of Federal Entities to comply with these standards.").

Enforcement of compliance with section 215 requirements is, in turn, addressed by section 215(e), which authorizes the imposition of penalties by the Electric Reliability Organization or the Commission. Penalty Order P 40, JA 53; Rehearing Order P 31, JA 23. Section 215(e)(1) "unambiguously authorizes the Electric Reliability Organization, subject to the specific review process required in [Federal Power Act] section 215(e)(2), to assess a penalty against a user, owner or operator of the Bulk-Power System, which is defined by [section 215(b)(1)] to

[3] Under the Commission's regulations, "[e]ach user, owner and operator of the Bulk-Power System within the United States (other than Alaska and Hawaii) shall register with the Electric Reliability Organization and the Regional Entity for each region within which it uses, owns or operates Bulk-Power System facilities, in such manner as prescribed in the Rules of the Electric Reliability Organization and each applicable Regional Entity." 18 C.F.R. § 39.2(c). Since May 31, 2007, the Southwestern Power Administration has been registered with the Electric Reliability Organization as a balancing authority, purchasing-selling entity, resource planner, transmission owner, transmission operator, transmission planner and transmission service provider. Penalty Order P 11, JA 42.

include federal entities." Penalty Order P 40, JA 53. *See also* Rehearing Order P 34, JA 25. Thus, section 215(e)(1), read in conjunction with section 215(b)(1), unambiguously authorized the Electric Reliability Organization, subject to Commission review, to assess a penalty against the Southwestern Power Administration. Penalty Order P 53, JA 58; Rehearing Order P 34, JA 25. Although the waiver of sovereign immunity "require[s] several steps to discern," it is nevertheless "unequivocally expressed in statutory text." *In re Sealed Case*, 551 F.3d 1047, 1053 (D.C. Cir. 2009).

Federal Power Act section 201(b)(2), 16 U.S.C. § 824(b)(2), supports this interpretation, as it lists "section 215 among the provisions of the [Federal Power Act] that are applicable to the kinds of federal and state entities described in [Federal Power Act] section 201(f)." Penalty Order P 8 & n.13, JA 41 (citing *N. Am. Elec. Reliability Corp.*, 129 FERC ¶ 61,033 P 35 (2009), *reh'g denied*, 130 FERC ¶ 61,002 (2010)). *See also, e.g., N. Am. Elec. Reliability Corp.*, 137 FERC ¶ 61,044 P 15 (2011) (section 201(b)(2) demonstrates that Congress intended for federal entities to be subject to the section 215 mandatory reliability standards), discussed in Penalty Order PP 7-8, JA 40-41. Section 201(b)(2), as amended by the Energy Policy Act of 2005, states in relevant part:

> Notwithstanding [section 201(f)], the provisions of . . . [section 215] . . . 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.

16 U.S.C. § 824(b)(2). This provision further establishes the Commission's jurisdiction over otherwise exempt utilities for the purpose of implementing and enforcing the enumerated provisions, including section 215. *N. Am. Reliability Corp.*, 129 FERC ¶ 61,033 P 35. *See also, N. Am. Elec. Reliability Corp.*, 137 FERC ¶ 61,044 P 15 (discussing 201(b)(2)).

B. Federal Petitioners' Interpretation, That "User, Owner Or Operator" Has Multiple Meanings Within Section 215, Is Implausible.

Federal Petitioners assert that Federal Power Act section 215(b)(1) "does not define the term 'user or owner or operator' as including the federal government for all aspects addressed by section 215." Federal Petitioners Br. 28-29. They conclude that Congress intended "user or owner or operator" to have different meanings in 215(b)(1), establishing the Commission's jurisdiction to enforce compliance, and 215(e)(1), authorizing the Electric Reliability Organization to impose penalties, because section (b)(1) refers to section 201(f) federal entities, and section (e)(1) does not repeat the reference. Federal Petitioners Br. 29-30. Accordingly, in their view, the Electric Reliability Organization has no authority to assess penalties of any kind -- monetary or otherwise -- against section 201(f) federal entities. *Id*. at 30. Nevertheless, Federal Petitioners agree that section 201(f) federal entities are subject to the section 215 reliability standards, *id*. at 13,

even though the second sentence of section 215(b)(1), requiring that "users, owners and operators" comply with the mandatory reliability standards, does not reference section 201(f). *See* Penalty Order P 8, JA 41. Federal Petitioners also agree that section 201(f) federal entities are subject to non-monetary Commission-imposed "remedies" for reliability standard violations, *id*. at 31, even though section 215(e)(3), setting out the Commission's penalty authority, applies to "a user or owner or operator" also without reference to section 201(f) federal entities. *See* Rehearing Order P 41, JA 28.

The Commission found Federal Petitioners' interpretation of section 215 implausible. *See* Penalty Order P 53, JA 58 ("We find no plausible interpretation of the language of [Federal Power Act] section 215(b) and 215(e) advanced in the record before us that would allow us to differentiate federal entities from any other user, owner or operator of the Bulk-Power System with respect to our or the [Electric Reliability Organization's] authority to undertake enforcement actions."); Rehearing Order P 33, JA 24 ("These entities then argue for an interpretation of [Federal Power Act] section 215 that is *implausible* and requires that each subsection be considered without reference to any other subsection or the applicable definitional provisions of the [Federal Power Act].").

Federal Petitioners themselves argue that "courts 'do not . . . construe statutory phrases in isolation; [they] read statutes as a whole.'" Federal Petitioners

Br. 44 (arguing that section 215 must be read "as a whole" with Federal Power Act section 316A) (quoting *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010)). As the Commission found, "this rule of construction applies not only to the [Federal Power Act] as a whole but also *within* the context of [Federal Power Act] section 215." Rehearing Order P 40, JA 28. Thus, the Commission rejected the argument that sovereign immunity could only be waived if section 215(e)(1) repeated the reference to section 201(f) federal entities found in section 215(b)(1). *Id*. *See* Federal Petitioners Br. 35 (distinguishing section 215 from a provision waiving sovereign immunity for rate refunds "in a single, focused subsection"). Rather, section 215 must be read as a whole, and the reference to "a user or owner or operator of the bulk-power system" in section 215(e) must be informed by section 215(b)(1), which specifies that users, owners and operators includes section 201(f) federal entities. *Id*. "[S]ection 215(b) serves to define the scope of 'all users, owners and operators of the Bulk-Power System' as that term is to be applied to the remainder of FPA section 215." *Id*. P 41, JA 28.

Therefore, the only plausible interpretation of section 215 "is to read 'user or owner or operator of the bulk-power system' as having a consistent meaning throughout section 215 that encompasses entities, like [the Southwestern Power Administration], that are included in section 201(f)." Rehearing Order P 41, JA 28. Under settled rules of statutory construction, "there is a presumption that a

given term is used to mean the same thing throughout a statute." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). *See also, e.g., Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co*., 522 U.S. 479, 501 (1998) (relying upon the "established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning"); *Gustafson v. Alloyd Co., Inc*., 513 U.S. 561, 568 (1995) (a statutory term "should be construed, if possible, to give it a consistent meaning throughout the Act"); *Estate of Parsons v. Palestinian Auth*., 651 F.3d 118, 125 (D.C. Cir. 2011) (noting general presumption "that Congress intends identical terms to have identical meanings in related provisions").

Here, given the "interrelationship and close proximity of these provisions," they present "'a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" *Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 250 (1996) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)). *See also United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Associates, Ltd*., 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear.").

Further, section 215(e) uses the exact same phrase -- "user or owner or operator of the bulk-power system," with no reference to section 201(f) federal entities -- in both the provision governing the Commission's enforcement authority (section 215(e)(3)) and the provision governing the Electric Reliability Organization's enforcement authority (section 215(e)(1)). Rehearing Order P 41, JA 28. There is no indication that Congress intended these phrases to differ in scope. *Id*. Nevertheless, Federal Petitioners acknowledge that the Commission has authority to impose non-monetary penalties against section 201(f) federal entities, but they contend the Electric Reliability Organization does not. Federal Petitioners Br. 31. This interpretation, therefore, requires the conclusion that the identical phrase in subsections (e)(1) and (e)(3) has different meanings. The Commission correctly found such a reading of the statute implausible. Rehearing Order P 41, JA 28. *See, e.g*., *Estate of Cowart v. Nicklos Drilling Co*., 505 U.S. 469, 479 (1992) (rejecting differing interpretations of the identical phrase "person entitled to compensation" in sections 33(f) and 33(g) of the Longshore and Harbor Workers' Compensation Act as "contrary to the basic canon of statutory construction that identical terms within an Act bear the same meaning").

Federal Petitioners point to Energy Policy Act of 2005 provisions that added or amended sections of the Federal Power Act to apply to an entity "described in section 201(f)." *See* Federal Petitioners Br. 34-36 (discussing Federal Power Act

sections 3(22), 16 U.S.C. § 796(22) (the definition of "electric utility"); 206(e), 16 U.S.C. § 824e(e) (FERC jurisdiction over short-term sales); 211A, 16 U.S.C. § 824j-1 (open access requirements); 221, 16 U.S.C. § 824u (reporting false information); and 222, 16 U.S.C. § 824v (market manipulation)). While the Federal Power Act initially may have "focus[ed] on private industry abuses," *id*. at 3, these provisions, as well as section 215, reflect Congressional recognition of the need to regulate federal entities that are participants in national energy markets and significant presences on the national grid. *See, e.g.*, Penalty Order P 55, JA 59 (exempting federal entities from enforcement of reliability standards would jeopardize the ability of the Electric Reliability Organization to ensure reliable operation of the bulk-power system).

Federal Petitioners assert that these provisions evidence Congress "acting explicitly" to waive sovereign immunity in comparison to section 215, *id*. at 34, but -- as Federal Petitioners themselves argued to the Commission below -- "[i]n each instance, Congress applies the amendments to federal entities by inserting language that indicated the new requirements applied to entities 'described in section 201(f),' the same phrase used to apply Section 215 to federal entities." Department of Energy and Southwestern Power Administration Application for Review of Penalty at JA 95-96. In using this language, Congress "express[ed] [its] intention clearly" to subject federal agencies to those provisions. *Id*.

C. The Commission's Interpretation Advances The Statutory Purpose of Federal Power Act Section 215.

Fundamentally, Federal Petitioners object to giving "a private entity" authority to impose a monetary penalty on a federal agency. Federal Petitioners Br. 31. Congress, however, did not impose this structure "casually," *id*. at 41, but rather debated the appropriate regulatory structure prior to enacting section 215, and made a deliberate choice. Senators Daschle and Thomas proposed competing designs for reliability regulation, with Senator Daschle placing responsibility for mandatory reliability standards exclusively on FERC, and Senator Thomas creating a self-regulatory model premised upon the existing North American Electric Reliability Corporation voluntary system, with FERC oversight. *See* 148 Cong. Rec. 3217-18 (2002).

Senator Thomas gave several reasons for his proposed organization, including that FERC lacked the technical expertise and manpower to undertake primary responsibility for developing and enforcing reliability standards, and the international implications of authorizing FERC to set standards affecting Canada and Mexico. *Id*. With the conversion to a mandatory system, Senator Thomas envisioned that "[t]he new reliability organization will have enforcement powers, with real teeth to ensure reliability. The amendment provides that mandatory reliability rules will apply to all users of the transmission grid. There are no loopholes. No one will be exempt." *Id*. at 3218.

The Supreme Court has found sovereign immunity waived where, *inter alia*, the alternative interpretation preserving immunity would undermine the statutory purpose. *See West v. Gibson*, 527 U.S. 212, 219 (1999) (finding that statute waived federal sovereign immunity for compensatory damages awarded by the EEOC where the alternative interpretation "would undermine th[e] remedial scheme"). *See also, e.g.*, *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 521 (1984) ("the waiver of sovereign immunity is accomplished not by a 'ritualistic formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy").

Here, Federal Petitioners' interpretation would prohibit the Electric Reliability Organization from imposing penalties of any kind against federal entities. *See* Penalty Order P 55, JA 59. As this Court recognized in *Alcoa*, Congress enacted section 215 upon determining that voluntary compliance with reliability standards had proved inadequate, and that mandatory, enforceable standards were required. 564 F.3d at 388. Section 215(e) "Enforcement" relies upon the imposition of penalties as the primary mechanism to enforce the mandatory standards. Penalty Order P 41, JA 53. Accordingly, "any exemption of a large class of customers from the imposition of penalties for violations of a mandatory Reliability Standard would undermine [the Electric Reliability Organization's] enforcement regime, which is an integral part of ensuring the

reliable operation of the Bulk-Power System." Penalty Order P 55, JA 59. Bonneville Power Administration, another federal power marketing agency, alone owns and operates over 15,000 miles of transmission lines and markets about 30 percent of the electric power used in the Northwest. *Id*. P 55 n. 73, JA 59. Should any entity object to a penalty imposed by the Electric Reliability Organization, that entity may obtain Commission review of that penalty, Federal Power Act section 215(e)(2), 16 U.S.C. § 824o(e)(2), and thus the penalty authority does not rest entirely with the Electric Reliability Organization.

D. Federal Power Act Section 316A Does Not Create Ambiguity.

1. Section 215 Is An Independent Grant Of Penalty Authority To The Commission And To The Electric Reliability Organization.

Federal Petitioners contend that Federal Power Act section 316A, 16 U.S.C. § 825o-1, which authorizes the Commission to assess civil penalties against "any person" violating Part II of the Federal Power Act, supports "[t]he conclusion that the [Electric Reliability Organization] may not impose a monetary penalty on a federal agency." Federal Petitioner Br. 39. *See also* Customer Intervenor Br. 15-18 (same). Section 3(4) of the Federal Power Act, 16 U.S.C. § 796(4), defines "person" as "an individual or corporation" which does not include federal entities. Federal Petitioners Br. 40.

The Commission found that the authority of the Electric Reliability Organization and the Commission to impose a penalty for a violation of a

reliability standard derives from the independent enforcement and penalty regime established by Federal Power Act section 215, rather than section 316A. Penalty Order P 45, JA 54; Rehearing Order P 44, JA 29. Sections 215(e)(1) and (3), separate and apart from section 316A, authorize the Electric Reliability Organization and the Commission to impose penalties for violations of reliability standards. Penalty Order P 45, JA 54; Rehearing Order P 44, JA 29. Indeed, "section 316A does not mention the [Electric Reliability Organization] and therefore cannot serve as a source of penalty authority for [the Electric Reliability Organization]." Rehearing Order P 44, JA 29. *See also* Penalty Order P 45, JA 54.

Other section 215 provisions also demonstrate that section 215 penalties are imposed under section 215, and not another section or part. Penalty Order P 47 n.63, JA 55. Section 215(e)(6) provides that "any penalty *imposed under this section* shall bear a reasonable relation to the seriousness of the violation . . . ." Rehearing Order P 44, JA 29; Penalty Order P 47 & n.63, JA 55. Section 215(c)(2)(C) requires the Electric Reliability Organization to establish rules to "provide fair and impartial procedures for enforcement of reliability standards through the imposition of penalties in accordance with subsection (e) of this section . . . ." Rehearing Order P 44, JA 29; Penalty Order P 47 & n.63, JA 55. Thus, based upon the plain language of the statute, the Commission concluded that the Electric Reliability Organization's authority to impose a penalty for violation

of a reliability standard derives directly from section 215, and not from the Commission's general penalty authority under section 316A. Penalty Order P 45, JA 55; Rehearing Order P 47, JA 31.

Federal Petitioners point out that section 316A applies to a violation of "any provision of subchapter II," which includes section 215. Federal Petitioners Br. 44. *See also* Customer Intervenors Br. 15. In Federal Petitioners' view, section 316A is the more "specific" provision with regard to "the entities that are subject to a monetary penalty imposed by the [Electric Reliability Organization] under section 215(e)(1)." Federal Petitioners Br. 48-49. Again, however, section 316A does not even mention the Electric Reliability Organization, and cannot therefore be the source of the Electric Reliability Organization's penalty authority. Penalty Order P 45, JA 54; Rehearing Order P 44, JA 29.

Further, while section 316A generally addresses Commission authority to impose civil penalties, the Commission correctly concluded that this general "catch-all provision providing for the imposition of penalties for violations of Part II of the [Federal Power Act] that are not otherwise covered" could not supersede the express penalty authority conferred in section 215 for violations of reliability standards. Penalty Order P 48 n.64, JA 56. "Under generally-accepted rules of statutory construction, the enforcement authority set forth in section 215 specifically addressing who is liable for penalties prevails over the more

generalized penalty provision set forth in section 316A." Rehearing Order P 50, JA 33 (citing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012)); Penalty Order P 48 & n.64, JA 56. "'It is an old and familiar rule that, where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.'" *RadLAX*, 132 S. Ct. at 2071 (quoting *United States v. Chase*, 135 U.S. 255, 260 (1890)). This applies even where the specific provision, as here, is not a "subset" of the general provision. *Id*. at 2072. "When the conduct at issue falls within the scope of *both* provisions, the specific presumptively governs, whether or not the specific provision also applies to some conduct that falls outside the general." *Id*.

The Commission was therefore "satisfied that the waiver of immunity effected through [Federal Power Act] section 215 is not rendered ambiguous by [Federal Power Act] section 316A or any limitations it may have to 'persons' under the [Federal Power Act]." Rehearing Order P 47, JA 31. *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 618-19 (1992), discussed in Federal Petitioners' brief at 38, 42-43, does not support a different conclusion. In the cited pages, 618-19, the Court considered citizen suit provisions in environmental statutes that

authorized suits "against any person (including . . . the United States)," and authorized the district court to apply "appropriate civil penalties" under civil penalty statutes incorporated by reference. *See* pages 615-17 (explaining statutory scheme). The Court found ambiguity because the civil penalties statutes incorporated by reference did not include the United States in the definition of "person." *See id*. at 617. Thus, while the citizen suit provisions waived sovereign immunity as far as subjecting the United States to suit, the waiver did not extend to the imposition of civil penalties. *Id*. at 619. *See also* Federal Petitioner Br. at 42-43 (discussing holding). No analogous ambiguity exists here as section 215 incorporates no other provision -- including section 316A -- by reference.

Indeed, as the Commission noted, Congress rejected two versions of what subsequently became section 215(e)(6) that expressly provided that section 316A would govern section 215 penalties. Rehearing Order P 47 n.83, JA 31. In September 2002, the first version of what subsequently became subsection 215(e)(6) was included in a conference committee draft of a House omnibus energy bill, H.R. 4. *Id*. The conference committee generated several "offers" of legislative language that included differing versions of the provision. The first two proposed House offers, on September 13, 2002 (HR4 Offer 001 at 18),[4] and

[4] HR4 Offer 001 is available at: http://www.nerc.com/AboutNERC/keyplayers/Bills%20Introduced%20in%20Congress%20DL/House_OFFER_001_091302.pdf.

September 18, 2002 (HR4 Offer 002 at 14),[5] explicitly provided that section 316A would govern section 215 penalties. *Id*. On September 30, 2002, a Staff Discussion Draft, (HR4 Offer 005 at 15),[6] deleted any reference to section 316A, thereby making the proposed section 216(e)(6) identical to the enacted section 215(e)(6). *Id*. Notably, all three offers amended section 316A by striking references to specific provisions and inserting the general reference to "Part II" of the Act. *See* HR4 Offer 001 at 25; HR4 Offer 002 at 20; HR4 Offer 005 at 19.

2. The Absence Of A Monetary Cap In Federal Power Act Section 215 Does Not Undermine Its Validity As An Independent Grant Of Penalty Authority.

Federal Petitioners contend that the absence of a monetary cap on section 215 penalties indicates a "lack of any clear substantive limit on the penalty authority in section 215(e)" which "suggests that section 316A supplies those limits." Federal Petitioners Br. 46. This argument assumes in effect that section 215 is not a valid penalty provision in the absence of a specific monetary limit.

The Commission rejected this assumption, finding that "if [Federal Power Act] section 316A did not exist or were otherwise withdrawn from the [Federal

[5] HR4 Offer 002 is available at: http://www.nerc.com/AboutNERC/keyplayers/Bills%20Introduced%20in%20Congress%20DL/House_OFFER_001_091802.pdf.

[6] HR4 Offer 005 is available at: http://www.nerc.com/AboutNERC/keyplayers/Bills%20Introduced%20in%20Congress%20DL/House_OFFER_005_100102.pdf.

Power Act], the penalty authorities described in [Federal Power Act] section 215 would still exist and could be carried out (even if uncapped)." Rehearing Order P 45, JA 30. While section 215 lacks a monetary cap, the section 215 penalty authority is not "unbounded." Federal Petitioners Br. 46. Under section 215(e)(2), all penalties assessed by the Electric Reliability Organization are "subject to review by the Commission, on its own motion or upon application by the user, owner or operator that is the subject of the penalty." Penalty Order P 48, JA 56; Rehearing Order P 46, JA 30. Under section 215(e)(6), all penalties also are required to bear a reasonable relation to the seriousness of the violation and to take into consideration remedial steps taken by the potential recipient of the penalty. Penalty Order P 48, JA 56; Rehearing Order P 46, JA 31.

Federal Petitioners assert that the Commission has acknowledged that "section 316A limits authority to impose a penalty under section 215" in its Order No. 672 rulemaking and in *Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 PP 3-5 & n.15 (2006). Federal Petitioners Br. 47-48. *See also* Customer Intervenors Br. 18-19. In Order No. 672 -- in the absence of a monetary cap in section 215 -- the Commission determined that section 215 penalties should be subject to the same monetary caps that apply to civil penalties under 316A. Rehearing Order P 50, JA 33 (citing Order No. 672 P 575). In the cited portion of *Statement of Administrative Policy*,

117 FERC ¶ 61,317 PP 3-5 & n.15, the Commission likewise adopted procedures not specified in section 215.

In looking to section 316A on matters not specified in section 215, the Commission in no way held that section 316A was the source of the Commission's or of the Electric Reliability Organization's authority to impose penalties for reliability violations. Penalty Order P 49, JA 56; Rehearing Order P 49, JA 32. *See* Federal Petitioners Br. 47-49; Customer Intervenors Br. 19. The terms of Section 316A cannot replace matters that are specified in section 215, such as the universe of entities subject to 215 penalties. Penalty Order P 49, JA 56; Rehearing Order P 50, JA 33. Thus, the Commission did not intend (nor did Congress intend) for section 316A "to *supplant* section 215's grant of limited jurisdiction to impose penalties on 201(f) entities that violate a mandatory Reliability Standard." Rehearing Order PP 49-50, JA 32-33; Penalty Order P 49, JA 56.

The Commission's reasonable interpretation of its own orders should be afforded deference. *See, e.g., Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 740 (D.C. Cir. 2011) (Court gives substantial deference to FERC's interpretation of its own orders). Even if the Commission had departed from prior precedent in these orders, the rationale behind the Commission's interpretation is fully explained. *See, e.g., Assoc. Gas Distrib. v. FERC*, 824 F.2d 981, 1038 (D.C. Cir. 1987) ("While it is true that the Commission has not, so far as we can

discover, explicitly addressed the fact of this policy change, its overall reasoning provides ample explanation for modifying the policy.").

In any event, even if it desired to do so, the Commission could not by regulation revise the terms of section 215 specifying who is subject to compliance and penalties. Rehearing Order P 50, JA 32. Applying the term 'person' in section 316A to replace the specific terms in section 215 identifying which entities are subject to compliance requirements and penalties -- "user, owner or operator" including section 201(f) federal entities -- would constitute "a revision of the specific terms in section 215 as to who is eligible for penalties, which the Commission cannot do." *Id*. *See, e.g.*, *Miller v. United States*, 294 U.S. 435, 440 (1935) ("The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act -- not to amend it."); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 11 (D.C. Cir. 2002) ("FERC cannot rely on one of its own regulations to trump the plain meaning of a statute.").

Federal Petitioners further suggest that "unbounded" penalty authority in section 215 would permit the Electric Reliability Organization or the Commission to impose criminal penalties under section 215. Federal Petitioners Br. 46 (citing section 316 of the Federal Power Act, 16 U.S.C. § 825o(a) (providing for criminal penalties)). Criminal matters are referred to the Department of Justice for prosecution; the Commission (and the Electric Reliability Organization under its

jurisdiction) engages only in civil enforcement. *See Enforcement of Statutes, Orders, Rules and Regulations*, 113 FERC ¶ 61,068 P 5 n.10 (2005) (discussing enforcement authority following enactment of the Energy Policy Act of 2005, finding that criminal matters must be referred to the Attorney General). *See also id*. at P 4 n.5 (citing 16 U.S.C. § 825m(a)) (providing that the Attorney General "may institute the necessary criminal proceedings under this chapter").

III. CUSTOMER INTERVENORS' ADDITIONAL ARGUMENTS ARE JURISDICTIONALLY AND PROCEDURALLY BARRED AND IN ANY EVENT LACK MERIT.

Customer Intervenors raise several issues that Federal Petitioners did not raise: (1) arguments regarding the Flood Control Act of 1944, 16 U.S.C. § 825s (Customer Intervenors Br. 20-24); (2) arguments regarding the Anti-Deficiency Act, 31 U.S.C. § 1341 (Customer Intervenors Br. 24-31); and (3) the argument that Federal Power Act section 215 does not authorize monetary penalties as it does not include the term "monetary." Customer Intervenors Br. 14. These claims are jurisdictionally barred because Customer Intervenors lack standing to raise them. Further, this Court, under its settled procedure, should not consider intervenor claims that were not raised by petitioners. In any event, the claims lack merit, as demonstrated below.

A. Customer Intervenors Have Not Demonstrated Standing.

To obtain consideration of their issues on the merits, Customer Intervenors must demonstrate Article III standing. *Deutsche Bank Nat. Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013) (it is "circuit law that intervenors must demonstrate Article III standing"). *See also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 732-33 (D.C. Cir. 2003); *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 538 (D.C. Cir. 1999). To establish constitutional standing, Customer Intervenors must show: (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Customer Intervenors bear the burden of proof in establishing standing. *Id*. at 560-61.

Because Customer Intervenors are not the object of FERC's action, standing is not precluded, but it is "'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)). Customer Intervenors may not base standing on FERC's alleged failure to follow the law. "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen*, 468 U.S. at 754; *Humane Society of the U.S. v. Hodel*, 840 F.2d 45, 51 (D.C. Cir. 1988) (same). Customer Intervenors contend penalties will divert funds from the federal treasury, Customer Intervenors Br. 24, but "the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and

indirect' to support standing." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006) (quoting *Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 433 (1952)).

Customer Intervenors also allege the possibility of future rate increases, i.e., the Commission's interpretation of Federal Power Act section 215 would "prevent preference customers from continuing to realize the benefits of receiving federal power at the lowest possible rates." Customer Intervenors Br. 24. *See also id*. at 22. However, only Customer Intervenor Southwestern Power Resources Association represents customers of the Southwestern Power Administration.[7] Customers of other federal power marketing agencies would suffer no rate injury even if Southwestern's rates did increase. The precedential effect of the Commission's decision alone is insufficient to confer standing. *See Telecomm. Research and Action Ctr. v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990) ("[Petitioner's] interest in the Commission's legal reasoning and its potential precedential effect does not by itself confer standing where, as here, it is

[7] Customer Intervenor Southwestern Power Resources Association represents customers of the Southwestern Power Administration, but the Mid-West Electric Consumers Association represents customers of the Western Area Power Administration, and Southeastern Federal Power Customers represents customers of the Southeastern Power Administration. *See* March 15, 2013 Motion for Leave to Intervene of Mid-West Electric Consumers Association, Inc. and the Southwestern Power Resources Association in Case No. 13-1033, at 2; March 15, 2013 Motion of Southeastern Power Administration for Leave to Intervene in Case No. 13-1033, at 2.

'uncoupled' from any injury in fact caused by the substance of the FCC's adjudicatory action.").

Any alleged injury to Southwestern's own customers from possible future rate increases is, moreover, too speculative to support standing. Any change in the the Southwestern Power Administration's rates would be the subject of a future rate proceeding, in which the Southwestern Administrator submits the proposed rates to the Deputy Secretary of Energy for interim approval, and the Deputy Secretary submits the rates to the Commission for final approval. *See, e.g., United States Dep't of Energy Sw. Power Admin*., 143 FERC ¶ 62,067 at 1 & n.2 (2013) (citing Department of Energy Delegation Order No. 00-037.00, 2013 WL 4289104), cited Customer Intervenors Br. at 29. "The potential for 'future economic injury,' even assuming it is 'readily quantifiable' into a possible rate increase in the future, is not enough to show the requisite injury for Article III standing." *PNGTS Shippers' Group v. FERC*, 592 F.3d 132, 137 (D.C. Cir. 2010). *See also id*. at 138 (rejecting standing based on "a conceivable but not imminent effect on shippers' rates"); *Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1027 (D.C. Cir. 2012) (where rates have not been determined, theory of injury from alleged rate increase "'stacks speculation upon hypothetical upon speculation, which does not establish an actual or imminent injury'") (quoting *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011)).

B. The Court Should Not Consider Customer Intervenors' Claims That Were Not Raised By Federal Petitioners.

Under its settled procedure, the Court should not consider Customer Intervenors' claims that were not raised by Federal Petitioners. As this Court has repeatedly held, "'absent extraordinary circumstances, intervenors 'may join only on a matter that has been brought before the court' by a petitioner.'" *East Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1305 (D.C. Cir. 2007) (quoting *Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1126 (D.C. Cir. 2002)). *See also Nat'l Ass'n of Clean Water Agencies v. EPA*, No. 11-1131, 2013 WL 4417438 at *45 (D.C. Cir. Aug. 20, 2013); *Ala. Mun. Distrib. Group v. FERC*, 300 F.3d 877, 879 (D.C. Cir. 2002); *Rio Grande Pipeline*, 178 F.3d at 539.

This Court has made an exception to this rule where the intervenor "satisfies the statutory requirements for a petitioner to seek judicial review of the Commission's order." *Cal. Dep't*, 306 F.3d at 300. Here, however, as discussed, Customer Intervenors lack standing. Further, Customer Intervenors filed their motions to intervene on March 15, 2013, outside the statutory 60-day period for filing petitions for review of the December 20, 2012 Rehearing Order. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b). Customer Intervenors "have thus failed to satisfy a statutory requirement to guarantee judicial review of their claim." *East Ky.*, 489 F.3d at 1305 (citing *Cal. Dep't*, 306 F.3d at 1126-27).

C. Customer Intervenors' Claims In Any Event Lack Merit.

1. The Commission's Interpretation Of The Federal Power Act Does Not Conflict With The Anti-Deficiency Act.

Customer Intervenors argue that the Commission's award of penalties against the Southwestern Power Administration conflicts with the Anti-Deficiency Act. Customer Intervenors Br. 24-31. The Commission found no conflict. Penalty Order P 58, JA 60. The Anti-Deficiency Act, 13 U.S.C. § 1341, makes it unlawful for agency officials to "make or authorize an expenditure or obligation exceeding an amount available in an appropriation." *U.S. Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012). The Comptroller General has developed the "necessary expense" doctrine to determine whether a specific proposed expenditure is a legally authorized purpose for which federal funds may be expended. *Id.* at 1349. The necessary expense doctrine recognizes the authority of agencies to incur expenses that are necessary, proper or incident to the execution of the agency's objectives. Government Accountability Office, GAO-04-26SP, *Principles of Federal Appropriations Law*, 3d ed. Vol. I at 4-20 (2004) ("*Principles*") (available at http://www.gao.gov/assets/210/202437.pdf).

As the Commission found, the Government Accountability Office *Principles* guide "provides that when a waiver of sovereign immunity is clear and the agency has been found to be liable for a fine or penalty, the appropriation becomes available as a 'necessary expense' if it is needed to cover an administratively

imposed civil penalty." Penalty Order P 60 & n.77, JA 61 (citing *Principles* at 4-144 – 4-145). Thus, while, "[a]s a general proposition, no authority exists for the federal government to use appropriated funds to pay fines or penalties incurred as a result of its activities," Customer Intervenors Br. 29 (citing *Principles* at 4-140), that general rule does not apply in the event sovereign immunity is waived. *Principles* at 4-145. Where there is waiver, the Comptroller General has held "that agency operating appropriations are available, under the 'necessary expense' theory, to pay administratively imposed civil penalties." *Id*. (citing B-191747, *National Oceanic and Atmospheric Agency Payment of Civil Penalty for Violation of Local Air Quality Standards* at 4 (June 6, 1978) (finding civil penalties under the Clean Air Act, as to which sovereign immunity had been waived, to be a necessary expense arising from normal agency operations and, as such, "we see no legal objection to the use of its appropriations to pay the fine") (available at http://www.gao.gov/assets/420/413769.pdf)).

The Commission rejected the argument, Customer Intervenors Br. 27-30, that it is required to analyze the Southwestern Power Administration's or any other agency's appropriations or other applicable legislation to find no conflict with the Anti-Deficiency Act. Rehearing Order P 57, JA 36. The waiver of sovereign immunity itself provides the statutory authority to use agency appropriations to pay penalties. Rehearing Order P 57 & n.98, JA 36 (citing *Principles* at 4-144 – 4-145;

EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conservation and Recovery Act, 2000 WL 33716984 (O.L.C. June 14, 2000)). As the Commission observed, in *EPA Assessment*, the Office of Legal Counsel concluded that the legislative authorization of penalties under the Resource Conservation and Recovery Act, *EPA Assessment* at *1, served also as the legislative authority permitting the agency to pay the penalties from its appropriation. *Id*. at *4. *See* Rehearing Order P 57 n.98, JA 36. "An agency would 'typically have authority to pay the penalties that have been lawfully assessed against it in the course of its conduct of agency business, pursuant to the 'necessary expense' principle of appropriations law.'" *Id*. (quoting *EPA Assessment* at *4). "In our view, the payment of administrative expenses in the course of implementing a statutory program, such as statutorily-authorized administrative penalties assessed by another federal agency, constitutes a cost of doing business and therefore 'bears a logical relationship to the objectives of [the assessed agency's] general appropriation, and will make a direct contribution to the agency's mission.'" *EPA Assessment* at *5 (quoting *Indemnification of Department of Justice Employees*, 1986 WL 213232 at *8 (O.L.C. Feb. 6, 1986)).

Customer Intervenors also argue that regarding monetary penalties as a necessary expense is contrary to the Electric Reliability Organization's Sanction

Guidelines and the Commission's Order No. 672 rulemaking. Customer Intervenors Br. 31. Customer Intervenors failed to raise these arguments on rehearing, and, therefore, these claims are barred. Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b). In any event, the cited authorities counsel against setting penalties in such a way that the subject user, owner or operator will have the incentive to incur the penalty rather than comply with the reliability standard. *See* Order No. 672 P 455; Sanctions Guidelines at page 4, Section 2.10. Customer Intervenors attempt to connect the concept of a necessary expense recovered through appropriations with a penalty that will produce such incentives, but there is no connection. As the Commission found, here, "regardless of their ability to pass penalty costs on to customers, federal entities such as [the Southwestern Power Administration] still have a strong incentive to develop a culture of compliance if subject to monetary penalties, whether in response to congressional oversight or in response to the concerns of their preference customers." Penalty Order P 56, JA 59-60.

2. The Commission's Interpretation Of The Federal Power Act Does Not Conflict With The Flood Control Act of 1944.

Customer Intervenors argue that imposing civil penalties on the Southwestern Power Administration will result in higher rates to preference customers, in contravention of the Flood Control Act of 1944. Customer Intervenor Br. 20-24. The Commission reasonably rejected these claims.

First, while Customer Intervenors assert that "the Commission's expectation in this case is that the Southwestern Power Administration will raise rates to preference customers," Customer Intervenors Br. 28; *id*. at 20, the Commission had no such expectation. Rather, in the passages cited by Customer Intervenors, the Commission was simply responding to assertions by the Southwestern Power Administration (Penalty Order P 59, JA 60) and Customer Intervenors (Rehearing Order PP 51, 54, JA 34-35), that the Southwestern Power Administration could pass costs through to customers.

However, even assuming that the penalty against the Southwestern Power Administration would "'translate' into higher rates for preference customers," the Commission found that "imposition of a monetary penalty on a federal entity for violation of a mandatory reliability standard does not impermissibly conflict with the policies stated in the Flood Control Act." Rehearing Order PP 54-55, JA 35. "[U]nder the Flood Control Act, applicable federal entities are required to transmit and dispose of power 'in such a manner as to *encourage* the most widespread use [of energy generated at applicable projects] at the lowest possible rates to consumers *consistent with sound business principles*." Rehearing Order P 55, JA 35 (quoting 16 U.S.C. § 825s). The Commission "[d]id not understand this to mean that federal entities are therefore exempt from exposure to a potential cost of doing business -- in the form of section 215 penalties -- that is applicable to

similarly-situated, private entities that are not covered by the Flood Control Act." *Id*.

As the Ninth Circuit has found in interpreting comparable statutory language, the quoted language does not require that the federal power marketing agency charge the lowest possible rates. *See, e.g., Alcoa, Inc. v. Bonneville Power Admin*., 698 F.3d 774, 789 (9th Cir. 2012) (finding that the comparable language of 16 U.S.C. § 838g(1) -- "with a view to encouraging the widest possible diversified use of electric power at the lowest possible rates consistent with sound business principles" -- does not "dictate that [Bonneville] always charge the lowest possible rates.") "The words 'with a view to encouraging' [or here "in such manner as to encourage"] do not constitute a statutory command that prices charged to consumers always be the lowest possible." *Cal. Energy Comm'n v. Bonneville Power Admin*., 909 F.2d 1298, 1308 (9th Cir. 1990) (interpreting 16 U.S.C. § 838g).

"In addition, the direction to charge the lowest possible rates is tempered by the addition of the clause 'consistent with sound business principles.'" *Id*. at 1308. Thus, the Commission reasonably concluded that this language did not preclude imposing on Federal entities the same penalties that are applicable to similarly-situated private entities as a cost of doing business. Rehearing Order P 55, JA 35; Penalty Order P 57, JA 60. The statutory purpose of providing access to lower-

cost power to publicly-owned wholesale customers like rural electric cooperatives and municipal utilities is not affected by the penalties. Penalty Order P 57, JA 60.

Indeed, "nearly every action by [the federal marketing agency] has some arguable impact on future rates." *Cal. Energy Comm'n*, 909 F.2d at 1308. Here, the Commission noted that Customer Intervenors' interpretation "could, by extension, preclude the imposition of *any* regulatory requirement that imposes an additional compliance cost on an applicable covered federal entity, including requirements to protect water quality or fish and wildlife in the operation of a hydroelectric facility." Rehearing Order P 55, JA 35.

While Customer Intervenors attempt to distinguish the cost of complying with reliability standards from the cost of penalties, Customer Intervenors Br. 21-22, that distinction assumes that penalties are not also a legitimate cost of doing business in the bulk power market. *See* Rehearing Order P 55, JA 35. As discussed above, the Government Accountability Office has found that penalties for non-compliance can be paid as a necessary expense. Penalty Order P 60, JA 61. Thus, while incurring "non-necessary expenses" may be inconsistent with the obligation to maintain "the lowest possible rates to consumers consistent with sound business principles," *McCarthy v. Middle Tenn. Elec. Membership Corp*., 466 F.3d 399, 410 (6th Cir. 2006), valid expenses may lawfully be included in the

rates charged to preference customers. *Pacific Nw. Generating Coop. v. Bonneville Power Admin.*, 596 F.3d 1065, 1081 & n.10 (9th Cir. 2010).

3. The Absence Of The Term "Monetary" In Section 215 Does Not Undermine The Commission's Interpretation.

Customer Intervenors argue that Federal Power Act section 215 "does not include the ability to impose monetary civil penalties" because "no provision of Section 215 discusses monetary penalties explicitly." Customer Intervenors Br. 14. Congress is not, however, required to use "magic words" to waive sovereign immunity. *FAA*, 132 S. Ct. at 1448; *Webman*, 441 F.3d at 1026. Customer Intervenors "fail to cite a single sovereign immunity case in which the word 'penalty' was found to be insufficiently explicit to allow the imposition of a monetary penalty, nor is that term commonly understood to exclude a monetary fine." Rehearing Order P 36, JA 25. To the contrary, "[a] penalty is commonly understood to be the exacting of a sum of money as punishment for performing a prohibited act." *Marker v. Pac. Mezzanine Fund, L.P.*, 309 F.3d 744, 750 (10th Cir. 2002) (citing *Black's Law Dictionary* at 1020 (5th ed. 1979)). *See also, e.g.*, *Cudjoe v. Dept. of Veterans Affairs*, 426 F.3d 241, 247 (3d Cir. 2005), discussed in the Rehearing Order at P 38 n.74, JA 26 ("a civil penalty is defined as 'a fine assessed for a violation of a statute or regulation'") (quoting *Black's Law Dictionary* 1168 (8th ed. 2004)); *In re Castletons, Inc.*, 990 F.2d 551, 557-58 (10th Cir. 1993) ("We start our analysis with the definition that "[a] penalty is a sum of

money which the law exacts the payment of by way of punishment for doing some act which is prohibited, or omitting to do some act which is required to be done.") (quoting *State v. Franklin*, 63 Utah 442, 226 P. 674, 676 (1924)).

Accordingly, the caselaw does not require an explicit reference to "monetary" penalties to find sovereign immunity waived as to such penalties. Rehearing Order PP 37-38, JA 25-26. For example, Customer Intervenors point to the statute at issue in *United States v. Tenn. Air Pollution Control Bd.*, 185 F.3d 529, 532 (6th Cir. 1999), as an "unequivocal expression of waiver" as to civil monetary penalties. Customer Intervenors Br. 10-11. As the Commission observed, that case found sovereign immunity waived for civil monetary penalties based upon the phrase "any administrative remedy or sanction," which does not reference monetary penalties. Rehearing Order P 38, JA 26-27 (citing *Tenn. Air Pollution Control Bd.*, 185 F.3d at 532) (finding that "[t]he words 'any administrative remedy or sanction,' as used in [the statute at issue], clearly encompass the civil penalty imposed by the Board in the case at bar"). Similarly, the Resource Conservation and Recovery Act, 42 U.S.C. § 6961, cited Customer Intervenors Br. 9-10, "uses the word 'penalty' to include a monetary penalty, without the explicit use of the word 'monetary.'" Rehearing Order P 37, JA 25-26 (citing *United States v. Colo.*, 990 F.2d 1565, 1569-70 n.4 (10th Cir. 1993) (noting that section 6961 was amended to clearly provide that federal agencies are not

immune from state civil penalties)). "Indeed, the very provision of the [Federal Power Act] that these entities point to as an example of a clear grant of authority to impose a monetary fine, [Federal Power Act] section 316A [*see* Customer Intervenors Br. 15-16], uses the terms 'penalty' and 'civil penalty' but does not use the term 'monetary.'" Rehearing Order P 36, JA 25.

Customer Intervenors also contend that the Commission failed to address section 215(c)(2)(C) -- referring to the "imposition of penalties in accordance with [section 215(e)] (including limitations on activities, functions, or operations, or other appropriate sanctions)" -- which does not explicitly reference monetary penalties. Customer Intervenors Br. 14. To the contrary, the Commission found that the language of section 215(c)(2)(C) encompasses monetary as well as non-monetary penalties. *See* Penalty Order P 47 & n.63, JA 55 (citing Order No. 672 P 570) (finding, based upon the language of section 215(c)(2)(C), that section 215 contemplates the imposition of both non-monetary and monetary penalties); Rehearing Order P 44, JA 30 (same). Use of the word "including" makes clear that "penalties" are not limited to the examples provided. *See West*, 527 U.S. at 217 ("the preceding word 'including' makes clear that the authorization is not limited to the specified remedies there mentioned"); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941) (same). The phrase "other appropriate sanctions" likewise indicates breadth, rather than limitation. *See, e.g.*, *Sch. Comm. of Town of*

Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 369 (1985) ("The statute directs the court to 'grant such relief as [it] determines is appropriate.' The ordinary meaning of these words confers broad discretion on the court."); *Hopkins v. Price Waterhouse*, 920 F.2d 967, 975 (D.C. Cir. 1990) ("By its choice of such expansive statutory language, authorizing the courts to '*order such affirmative action as may be appropriate*,' Congress could hardly have made more plain its intention that courts exercise broad discretion in crafting effective equitable remedies for employment discrimination.").

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the petition for review be denied and that the orders on appeal be upheld in all respects.

Respectfully submitted,

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October 15, 2013

Southwestern Power Administration v. FERC,
No. 13-1033

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 13,029 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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October 15, 2013

ADDENDUM
STATUTES AND REGULATIONS

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STATUTES: **PAGE**

trative Services Act of 1949, as amended, at end of section.

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

1930—Act June 23, 1930, substituted provisions permitting the commission to appoint, prescribe the duties, and fix the salaries of, a secretary, a chief engineer, a general counsel, a solicitor, and a chief accountant, and to appoint such other officers and employees as are necessary in the execution of its functions and fix their salaries, and authorizing the detail of officers from the Corps of Engineers, or other branches of the United States Army, to serve the commission as engineer officers, or in any other capacity, in field work outside the seat of government, and the detail, assignment or transfer to the commission of engineers in or under the Departments of the Interior or Agriculture for work outside the seat of government for provisions which required the commission to appoint an executive secretary at a salary of $5,000 per year and prescribe his duties, and which permitted the detail of an officer from the United States Engineer Corps to serve the commission as engineer officer; and inserted provisions permitting the commission to make certain expenditures necessary in the execution of its functions, and allowing the payment of expenditures upon the presentation of itemized vouchers approved by authorized persons.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

§ 793a. Repealed. Pub. L. 87–367, title I, § 103(5), Oct. 4, 1961, 75 Stat. 787

Section, Pub. L. 86–626, title I, § 101, July 12, 1960, 74 Stat. 430, authorized the Federal Power Commission to place four additional positions in grade 18, one in grade 17 and one in grade 16 of the General Schedule of the Classification Act of 1949.

§§ 794, 795. Omitted

CODIFICATION

Section 794, which required the work of the commission to be performed by and through the Departments of War, Interior, and Agriculture and their personnel, consisted of the second paragraph of section 2 of act June 10, 1920, ch. 285, 41 Stat. 1063, which was omitted in the revision of said section 2 by act June 23, 1930, ch. 572, § 1, 46 Stat. 798. The first and third paragraphs of said section 2 were formerly classified to sections 793 and 795 of this title.

Section 795, which related to expenses of the commission generally, consisted of the third paragraph of section 2 of act June 10, 1920, ch. 285, 41 Stat. 1063. Such section 2 was amended generally by act June 23, 1930, ch. 572, § 1, 46 Stat. 798, and is classified to section 793 of this title. The first and second paragraphs of said section 2 were formerly classified to sections 793 and 794 of this title.

§ 796. Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

(1) ''public lands'' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include ''reservations'', as hereinafter defined;

(2) ''reservations'' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) ''corporation'' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include ''municipalities'' as hereinafter defined;

(4) ''person'' means an individual or a corporation;

(5) ''licensee'' means any person, State, or municipality licensed under the provisions of section 797 of this title, and any assignee or successor in interest thereof;

(6) ''State'' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) ''municipality'' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

(8) ''navigable waters'' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

(9) ''municipal purposes'' means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) ''Government dam'' means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) ''project'' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appro-

may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

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

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with 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 commission's regulatory responsibilities affecting the provision of electric service.

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

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 classi-

fication 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

[1] See References in Text note below.

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

Pub. L. 100–473, § 4, Oct. 6, 1988, 102 Stat. 2300, 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.''

LIMITATION ON AUTHORITY PROVIDED

Pub. L. 100–473, § 3, Oct. 6, 1988, 102 Stat. 2300, 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

Pub. L. 100–473, § 5, Oct. 6, 1988, 102 Stat. 2301, 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 determina-

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

STATE AUTHORITIES; CONSTRUCTION

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

§ 824j–1. Open access by unregulated transmitting utilities

(a) Definition of unregulated transmitting utility

In this section, the term ''unregulated transmitting utility'' means an entity that—

(1) owns or operates facilities used for the transmission of electric energy in interstate commerce; and

(2) is an entity described in section 824(f) of this title.

(b) Transmission operation services

Subject to section 824k(h) of this title, the Commission may, by rule or order, require an unregulated transmitting utility to provide transmission services—

(1) at rates that are comparable to those that the unregulated transmitting utility charges itself; and

(2) on terms and conditions (not relating to rates) that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential.

(c) Exemption

The Commission shall exempt from any rule or order under this section any unregulated transmitting utility that—

(1) sells not more than 4,000,000 megawatt hours of electricity per year;

(2) does not own or operate any transmission facilities that are necessary for operating an interconnected transmission system (or any portion of the system); or

(3) meets other criteria the Commission determines to be in the public interest.

(d) Local distribution facilities

The requirements of subsection (b) of this section shall not apply to facilities used in local distribution.

(e) Exemption termination

If the Commission, after an evidentiary hearing held on a complaint and after giving consideration to reliability standards established under section 824*o* of this title, finds on the basis of a preponderance of the evidence that any exemption granted pursuant to subsection (c) of this section unreasonably impairs the continued reliability of an interconnected transmission system, the Commission shall revoke the exemption granted to the transmitting utility.

(f) Application to unregulated transmitting utilities

The rate changing procedures applicable to public utilities under subsections (c) and (d) of section 824d of this title are applicable to unregulated transmitting utilities for purposes of this section.

(g) Remand

In exercising authority under subsection (b)(1) of this section, the Commission may remand transmission rates to an unregulated transmitting utility for review and revision if necessary to meet the requirements of subsection (b) of this section.

(h) Other requests

The provision of transmission services under subsection (b) of this section does not preclude a request for transmission services under section 824j of this title.

(i) Limitation

The Commission may not require a State or municipality to take action under this section that would violate a private activity bond rule for purposes of section 141 of title 26.

(j) Transfer of control of transmitting facilities

Nothing in this section authorizes the Commission to require an unregulated transmitting utility to transfer control or operational control of its transmitting facilities to a Transmission Organization that is designated to provide nondiscriminatory transmission access.

(June 10, 1920, ch. 285, pt. II, § 211A, as added Pub. L. 109–58, title XII, § 1231, Aug. 8, 2005, 119 Stat. 955.)

§ 824k. Orders requiring interconnection or wheeling

(a) Rates, charges, terms, and conditions for wholesale transmission services

An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

ing that information be submitted annually to the Commission by transmitting utilities which is adequate to inform potential transmission customers, State regulatory authorities, and the public of potentially available transmission capacity and known constraints.

(June 10, 1920, ch. 285, pt. II, § 213, as added Pub. L. 102–486, title VII, § 723, Oct. 24, 1992, 106 Stat. 2919.)

STATE AUTHORITIES; CONSTRUCTION

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

§ 824m. Sales by exempt wholesale generators

No rate or charge received by an exempt wholesale generator for the sale of electric energy shall be lawful under section 824d of this title if, after notice and opportunity for hearing, the Commission finds that such rate or charge results from the receipt of any undue preference or advantage from an electric utility which is an associate company or an affiliate of the exempt wholesale generator. For purposes of this section, the terms ''associate company'' and ''affiliate'' shall have the same meaning as provided in section 16451 of title 42.[1]

(June 10, 1920, ch. 285, pt. II, § 214, as added Pub. L. 102–486, title VII, § 724, Oct. 24, 1992, 106 Stat. 2920; amended Pub. L. 109–58, title XII, § 1277(b)(2), Aug. 8, 2005, 119 Stat. 978.)

REFERENCES IN TEXT

Section 16451 of title 42, referred to in text, was in the original ''section 2(a) of the Public Utility Holding Company Act of 2005'' and was translated as reading ''section 1262'' of that Act, meaning section 1262 of subtitle F of title XII of Pub. L. 109–58, to reflect the probable intent of Congress, because subtitle F of title XII of Pub. L. 109–58 does not contain a section 2 and section 1262 of subtitle F of title XII of Pub. L. 109–58 defines terms.

AMENDMENTS

2005—Pub. L. 109–58 substituted ''section 16451 of title 42'' for ''section 79b(a) of title 15''.

EFFECTIVE DATE OF 2005 AMENDMENT

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

STATE AUTHORITIES; CONSTRUCTION

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

§ 824n. Repealed. Pub. L. 109–58, title XII, § 1232(e)(3), Aug. 8, 2005, 119 Stat. 957

Section, Pub. L. 106–377, § 1(a)(2) [title III, § 311], Oct. 27, 2000, 114 Stat. 1441, 1441A–80, related to authority regarding formation and operation of regional transmission organizations.

§ 824o. Electric reliability

(a) Definitions

For purposes of this section:

(1) The term ''bulk-power system'' means—

(A) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and

(B) electric energy from generation facilities needed to maintain transmission system reliability.

The term does not include facilities used in the local distribution of electric energy.

(2) The terms ''Electric Reliability Organization'' and ''ERO'' mean the organization certified by the Commission under subsection (c) of this section the purpose of which is to establish and enforce reliability standards for the bulk-power system, subject to Commission review.

(3) The term ''reliability standard'' means a requirement, approved by the Commission under this section, to provide for reliable operation of the bulk-power system. The term includes requirements for the operation of existing bulk-power system facilities, including cybersecurity protection, and the design of planned additions or modifications to such facilities to the extent necessary to provide for reliable operation of the bulk-power system, but the term does not include any requirement to enlarge such facilities or to construct new transmission capacity or generation capacity.

(4) The term ''reliable operation'' means operating the elements of the bulk-power system within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a cybersecurity incident, or unanticipated failure of system elements.

(5) The term ''Interconnection'' means a geographic area in which the operation of bulk-power system components is synchronized such that the failure of one or more of such components may adversely affect the ability of the operators of other components within the system to maintain reliable operation of the facilities within their control.

(6) The term ''transmission organization'' means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

(7) The term ''regional entity'' means an entity having enforcement authority pursuant to subsection (e)(4) of this section.

(8) The term ''cybersecurity incident'' means a malicious act or suspicious event that disrupts, or was an attempt to disrupt, the operation of those programmable electronic devices and communication networks including hardware, software and data that are essential to the reliable operation of the bulk power system.

[1] See References in Text note below.

(b) Jurisdiction and applicability

(1) The Commission shall have jurisdiction, within the United States, over the ERO certified by the Commission under subsection (c) of this section, any regional entities, and all users, owners and operators of the bulk-power system, including but not limited to the entities described in section 824(f) of this title, for purposes of approving reliability standards established under this section and enforcing compliance with this section. All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.

(2) The Commission shall issue a final rule to implement the requirements of this section not later than 180 days after August 8, 2005.

(c) Certification

Following the issuance of a Commission rule under subsection (b)(2) of this section, any person may submit an application to the Commission for certification as the Electric Reliability Organization. The Commission may certify one such ERO if the Commission determines that such ERO—

(1) has the ability to develop and enforce, subject to subsection (e)(2) of this section, reliability standards that provide for an adequate level of reliability of the bulk-power system; and

(2) has established rules that—

(A) assure its independence of the users and owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its directors and balanced decisionmaking in any ERO committee or subordinate organizational structure;

(B) allocate equitably reasonable dues, fees, and other charges among end users for all activities under this section;

(C) provide fair and impartial procedures for enforcement of reliability standards through the imposition of penalties in accordance with subsection (e) of this section (including limitations on activities, functions, or operations, or other appropriate sanctions);

(D) provide for reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards and otherwise exercising its duties; and

(E) provide for taking, after certification, appropriate steps to gain recognition in Canada and Mexico.

(d) Reliability standards

(1) The Electric Reliability Organization shall file each reliability standard or modification to a reliability standard that it proposes to be made effective under this section with the Commission.

(2) The Commission may approve, by rule or order, a proposed reliability standard or modification to a reliability standard if it determines that the standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest. The Commission shall give due weight to the technical expertise of the Electric Reliability Organization with respect to the content of a proposed standard or modification to a reliability standard and to the technical expertise of a regional entity organized on an Interconnection-wide basis with respect to a reliability standard to be applicable within that Interconnection, but shall not defer with respect to the effect of a standard on competition. A proposed standard or modification shall take effect upon approval by the Commission.

(3) The Electric Reliability Organization shall rebuttably presume that a proposal from a regional entity organized on an Interconnection-wide basis for a reliability standard or modification to a reliability standard to be applicable on an Interconnection-wide basis is just, reasonable, and not unduly discriminatory or preferential, and in the public interest.

(4) The Commission shall remand to the Electric Reliability Organization for further consideration a proposed reliability standard or a modification to a reliability standard that the Commission disapproves in whole or in part.

(5) The Commission, upon its own motion or upon complaint, may order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out this section.

(6) The final rule adopted under subsection (b)(2) of this section shall include fair processes for the identification and timely resolution of any conflict between a reliability standard and any function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission applicable to a transmission organization. Such transmission organization shall continue to comply with such function, rule, order, tariff, rate schedule or agreement accepted, approved, or ordered by the Commission until—

(A) the Commission finds a conflict exists between a reliability standard and any such provision;

(B) the Commission orders a change to such provision pursuant to section 824e of this title; and

(C) the ordered change becomes effective under this subchapter.

If the Commission determines that a reliability standard needs to be changed as a result of such a conflict, it shall order the ERO to develop and file with the Commission a modified reliability standard under paragraph (4) or (5) of this subsection.

(e) Enforcement

(1) The ERO may impose, subject to paragraph (2), a penalty on a user or owner or operator of the bulk-power system for a violation of a reliability standard approved by the Commission under subsection (d) of this section if the ERO, after notice and an opportunity for a hearing—

(A) finds that the user or owner or operator has violated a reliability standard approved by the Commission under subsection (d) of this section; and

(B) files notice and the record of the proceeding with the Commission.

(2) A penalty imposed under paragraph (1) may take effect not earlier than the 31st day after the ERO files with the Commission notice of the penalty and the record of proceedings. Such penalty shall be subject to review by the Commission, on its own motion or upon application by the user, owner or operator that is the subject of the penalty filed within 30 days after the date such notice is filed with the Commission. Application to the Commission for review, or the initiation of review by the Commission on its own motion, shall not operate as a stay of such penalty unless the Commission otherwise orders upon its own motion or upon application by the user, owner or operator that is the subject of such penalty. In any proceeding to review a penalty imposed under paragraph (1), the Commission, after notice and opportunity for hearing (which hearing may consist solely of the record before the ERO and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the penalty), shall by order affirm, set aside, reinstate, or modify the penalty, and, if appropriate, remand to the ERO for further proceedings. The Commission shall implement expedited procedures for such hearings.

(3) On its own motion or upon complaint, the Commission may order compliance with a reliability standard and may impose a penalty against a user or owner or operator of the bulk-power system if the Commission finds, after notice and opportunity for a hearing, that the user or owner or operator of the bulk-power system has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a reliability standard.

(4) The Commission shall issue regulations authorizing the ERO to enter into an agreement to delegate authority to a regional entity for the purpose of proposing reliability standards to the ERO and enforcing reliability standards under paragraph (1) if—

(A) the regional entity is governed by—

(i) an independent board;

(ii) a balanced stakeholder board; or

(iii) a combination independent and balanced stakeholder board.

(B) the regional entity otherwise satisfies the provisions of subsection (c)(1) and (2) of this section; and

(C) the agreement promotes effective and efficient administration of bulk-power system reliability.

The Commission may modify such delegation. The ERO and the Commission shall rebuttably presume that a proposal for delegation to a regional entity organized on an Interconnection-wide basis promotes effective and efficient administration of bulk-power system reliability and should be approved. Such regulation may provide that the Commission may assign the ERO's authority to enforce reliability standards under paragraph (1) directly to a regional entity consistent with the requirements of this paragraph.

(5) The Commission may take such action as is necessary or appropriate against the ERO or a regional entity to ensure compliance with a reliability standard or any Commission order affecting the ERO or a regional entity.

(6) Any penalty imposed under this section shall bear a reasonable relation to the seriousness of the violation and shall take into consideration the efforts of such user, owner, or operator to remedy the violation in a timely manner.

(f) Changes in Electric Reliability Organization rules

The Electric Reliability Organization shall file with the Commission for approval any proposed rule or proposed rule change, accompanied by an explanation of its basis and purpose. The Commission, upon its own motion or complaint, may propose a change to the rules of the ERO. A proposed rule or proposed rule change shall take effect upon a finding by the Commission, after notice and opportunity for comment, that the change is just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of subsection (c) of this section.

(g) Reliability reports

The ERO shall conduct periodic assessments of the reliability and adequacy of the bulk-power system in North America.

(h) Coordination with Canada and Mexico

The President is urged to negotiate international agreements with the governments of Canada and Mexico to provide for effective compliance with reliability standards and the effectiveness of the ERO in the United States and Canada or Mexico.

(i) Savings provisions

(1) The ERO shall have authority to develop and enforce compliance with reliability standards for only the bulk-power system.

(2) This section does not authorize the ERO or the Commission to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services.

(3) Nothing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard, except that the State of New York may establish rules that result in greater reliability within that State, as long as such action does not result in lesser reliability outside the State than that provided by the reliability standards.

(4) Within 90 days of the application of the Electric Reliability Organization or other affected party, and after notice and opportunity for comment, the Commission shall issue a final order determining whether a State action is inconsistent with a reliability standard, taking into consideration any recommendation of the ERO.

(5) The Commission, after consultation with the ERO and the State taking action, may stay the effectiveness of any State action, pending the Commission's issuance of a final order.

(j) Regional advisory bodies

The Commission shall establish a regional advisory body on the petition of at least two-thirds of the States within a region that have

more than one-half of their electric load served within the region. A regional advisory body shall be composed of one member from each participating State in the region, appointed by the Governor of each State, and may include representatives of agencies, States, and provinces outside the United States. A regional advisory body may provide advice to the Electric Reliability Organization, a regional entity, or the Commission regarding the governance of an existing or proposed regional entity within the same region, whether a standard proposed to apply within the region is just, reasonable, not unduly discriminatory or preferential, and in the public interest, whether fees proposed to be assessed within the region are just, reasonable, not unduly discriminatory or preferential, and in the public interest and any other responsibilities requested by the Commission. The Commission may give deference to the advice of any such regional advisory body if that body is organized on an Interconnection-wide basis.

(k) Alaska and Hawaii

The provisions of this section do not apply to Alaska or Hawaii.

(June 10, 1920, ch. 285, pt. II, § 215, as added Pub. L. 109–58, title XII, § 1211(a), Aug. 8, 2005, 119 Stat. 941.)

STATUS OF ERO

Pub. L. 109–58, title XII, § 1211(b), Aug. 8, 2005, 119 Stat. 946, provided that: ''The Electric Reliability Organization certified by the Federal Energy Regulatory Commission under section 215(c) of the Federal Power Act [16 U.S.C. 824*o*(c)] and any regional entity delegated enforcement authority pursuant to section 215(e)(4) of that Act [16 U.S.C. 824*o*(e)(4)] are not departments, agencies, or instrumentalities of the United States Government.''

ACCESS APPROVALS BY FEDERAL AGENCIES

Pub. L. 109–58, title XII, § 1211(c), Aug. 8, 2005, 119 Stat. 946, provided that: ''Federal agencies responsible for approving access to electric transmission or distribution facilities located on lands within the United States shall, in accordance with applicable law, expedite any Federal agency approvals that are necessary to allow the owners or operators of such facilities to comply with any reliability standard, approved by the [Federal Energy Regulatory] Commission under section 215 of the Federal Power Act [16 U.S.C. 824*o*], that pertains to vegetation management, electric service restoration, or resolution of situations that imminently endanger the reliability or safety of the facilities.''

§ 824p. Siting of interstate electric transmission facilities

(a) Designation of national interest electric transmission corridors

(1) Not later than 1 year after August 8, 2005, and every 3 years thereafter, the Secretary of Energy (referred to in this section as the ''Secretary''), in consultation with affected States, shall conduct a study of electric transmission congestion.

(2) After considering alternatives and recommendations from interested parties (including an opportunity for comment from affected States), the Secretary shall issue a report, based on the study, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.

(3) The Secretary shall conduct the study and issue the report in consultation with any appropriate regional entity referred to in section 824*o* of this title.

(4) In determining whether to designate a national interest electric transmission corridor under paragraph (2), the Secretary may consider whether—

(A) the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity;

(B)(i) economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy; and

(ii) a diversification of supply is warranted;

(C) the energy independence of the United States would be served by the designation;

(D) the designation would be in the interest of national energy policy; and

(E) the designation would enhance national defense and homeland security.

(b) Construction permit

Except as provided in subsection (i) of this section, the Commission may, after notice and an opportunity for hearing, issue one or more permits for the construction or modification of electric transmission facilities in a national interest electric transmission corridor designated by the Secretary under subsection (a) of this section if the Commission finds that—

(1)(A) a State in which the transmission facilities are to be constructed or modified does not have authority to—

(i) approve the siting of the facilities; or

(ii) consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State;

(B) the applicant for a permit is a transmitting utility under this chapter but does not qualify to apply for a permit or siting approval for the proposed project in a State because the applicant does not serve end-use customers in the State; or

(C) a State commission or other entity that has authority to approve the siting of the facilities has—

(i) withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; or

(ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible;

(2) the facilities to be authorized by the permit will be used for the transmission of electric energy in interstate commerce;

(3) the proposed construction or modification is consistent with the public interest;

(4) the proposed construction or modification will significantly reduce transmission

has entered into a contract for the sale of electric energy at wholesale or transmission service subject to the jurisdiction of the Commission has engaged in fraudulent market manipulation activities materially affecting the contract in violation of section 824v of this title.

(f) ERCOT utilities

This section shall not apply to a transaction for the purchase or sale of wholesale electric energy or transmission services within the area described in section 824k(k)(2)(A) of this title.

(June 10, 1920, ch. 285, pt. II, § 220, as added Pub. L. 109–58, title XII, § 1281, Aug. 8, 2005, 119 Stat. 978.)

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in subsec. (c)(2), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to chapter 1 (§ 1 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1 of Title 7 and Tables.

§ 824u. Prohibition on filing false information

No entity (including an entity described in section 824(f) of this title) shall willfully and knowingly report any information relating to the price of electricity sold at wholesale or the availability of transmission capacity, which information the person or any other entity knew to be false at the time of the reporting, to a Federal agency with intent to fraudulently affect the data being compiled by the Federal agency.

(June 10, 1920, ch. 285, pt. II, § 221, as added Pub. L. 109–58, title XII, § 1282, Aug. 8, 2005, 119 Stat. 979.)

§ 824v. Prohibition of energy market manipulation

(a) In general

It shall be unlawful for any entity (including an entity described in section 824(f) of this title), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of title 15), in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.

(b) No private right of action

Nothing in this section shall be construed to create a private right of action.

(June 10, 1920, ch. 285, pt. II, § 222, as added Pub. L. 109–58, title XII, § 1283, Aug. 8, 2005, 119 Stat. 979.)

§ 824w. Joint boards on economic dispatch

(a) In general

The Commission shall convene joint boards on a regional basis pursuant to section 824h of this title to study the issue of security constrained economic dispatch for the various market regions. The Commission shall designate the appropriate regions to be covered by each such joint board for purposes of this section.

(b) Membership

The Commission shall request each State to nominate a representative for the appropriate regional joint board, and shall designate a member of the Commission to chair and participate as a member of each such board.

(c) Powers

The sole authority of each joint board convened under this section shall be to consider issues relevant to what constitutes ''security constrained economic dispatch'' and how such a mode of operating an electric energy system affects or enhances the reliability and affordability of service to customers in the region concerned and to make recommendations to the Commission regarding such issues.

(d) Report to the Congress

Within 1 year after August 8, 2005, the Commission shall issue a report and submit such report to the Congress regarding the recommendations of the joint boards under this section and the Commission may consolidate the recommendations of more than one such regional joint board, including any consensus recommendations for statutory or regulatory reform.

(June 10, 1920, ch. 285, pt. II, § 223, as added Pub. L. 109–58, title XII, § 1298, Aug. 8, 2005, 119 Stat. 986.)

SUBCHAPTER III—LICENSEES AND PUBLIC UTILITIES; PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 825. Accounts and records

(a) Duty to keep

Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however*, That nothing in this chapter shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

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

ed June 25, 1948, ch. 646, §1, 62 Stat. 909; Pub. L. 102–486, title VII, §725(a), Oct. 24, 1992, 106 Stat. 2920; Pub. L. 109–58, title XII, §1295(d), Aug. 8, 2005, 119 Stat. 985.)

AMENDMENTS

2005—Subsec. (c). Pub. L. 109–58 substituted ''This section'' for ''This subsection''.

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

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, substituted ''United States attorney'' for ''district attorney''. See section 541 of Title 28, Judiciary and Judicial Procedure.

STATE AUTHORITIES; CONSTRUCTION

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

§ 825*o*. Penalties for violations; applicability of section

(a) Statutory violations

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $1,000,000 or by imprisonment for not more than 5 years, or both.

(b) Rules violations

Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, or any rule or regulation imposed by the Secretary of the Army under authority of subchapter I of this chapter shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $25,000 for each and every day during which such offense occurs.

(June 10, 1920, ch. 285, pt. III, §316, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 862; amended July 26, 1947, ch. 343, title II, §205(a), 61 Stat. 501; Pub. L. 102–486, title VII, §725(a), Oct. 24, 1992, 106 Stat. 2920; Pub. L. 109–58, title XII, §1284(d), Aug. 8, 2005, 119 Stat. 980.)

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58, §1284(d)(1), substituted ''$1,000,000'' for ''$5,000'' and ''5 years'' for ''two years''.

Subsec. (b). Pub. L. 109–58, §1284(d)(2), substituted ''$25,000'' for ''$500''.

Subsec. (c). Pub. L. 109–58, §1284(d)(3), struck out subsec. (c) which read as follows: ''This subsection shall not apply in the case of any provision of section 824j, 824k, 824*l*, or 824m of this title or any rule or order issued under any such provision.''

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

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted ''Title 10, Armed Forces'' which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

STATE AUTHORITIES; CONSTRUCTION

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

§ 825*o*–1. Enforcement of certain provisions

(a) Violations

It shall be unlawful for any person to violate any provision of subchapter II of this chapter or any rule or order issued under any such provision.

(b) Civil penalties

Any person who violates any provision of subchapter II of this chapter or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than $1,000,000 for each day that such violation continues. Such penalty shall be assessed by the Commission, after notice and opportunity for public hearing, in accordance with the same provisions as are applicable under section 823b(d) of this title in the case of civil penalties assessed under section 823b of this title. In determining the amount of a proposed penalty, the Commission shall take into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner.

(June 10, 1920, ch. 285, pt. III, §316A, as added Pub. L. 102–486, title VII, §725(b), Oct. 24, 1992, 106 Stat. 2920; amended Pub. L. 109–58, title XII, §1284(e), Aug. 8, 2005, 119 Stat. 980.)

AMENDMENTS

2005—Pub. L. 109–58 substituted ''subchapter II of this chapter'' for ''section 824j, 824k, 824*l*, or 824m of this title'' in subsecs. (a) and (b) and ''$1,000,000'' for ''$10,000'' in subsec. (b).

STATE AUTHORITIES; CONSTRUCTION

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

§ 825p. Jurisdiction of offenses; enforcement of liabilities and duties

The District Courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation oc-

Pub. L. 110–289, §3011(b)(3), inserted ''36,'' after ''35,''.
Pub. L. 110–246, §15316(c)(6), substituted '', 53(e), 54B(h), or 6428'' for ''or 6428 or 53(e)''.
Pub. L. 110–185 inserted ''or 6428'' after ''section 35''.
2006—Subsec. (b)(2). Pub. L. 109–432 inserted ''or 53(e)'' after ''section 35''.
2002—Subsec. (b)(2). Pub. L. 107–210 inserted '', or from section 35 of such Code'' before period at end.
1997—Subsec. (b)(2). Pub. L. 105–34 inserted before period at end '', or enacted by the Taxpayer Relief Act of 1997''.
1986—Subsec. (b)(2). Pub. L. 99–514 substituted ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954''.

EFFECTIVE AND TERMINATION DATES OF 2010 AMENDMENT

Amendment by section 1401(d)(1) of Pub. L. 111–148 applicable to taxable years ending after Dec. 31, 2013, see section 1401(e) of Pub. L. 111–148, set out as an Effective Date note under section 36B of Title 26, Internal Revenue Code.
Amendment by section 10909(b)(2)(P) of Pub. L. 111–148 inapplicable to taxable years beginning after Dec. 31, 2011, and this section is amended to read as if such amendment had never been enacted, see section 10909(c) of Pub. L. 111–148, set out as a note under section 1 of Title 26, Internal Revenue Code.
Amendment by section 10909(b)(2)(P) of Pub. L. 111–148 applicable to taxable years beginning after Dec. 31, 2009, see section 10909(d) of Pub. L. 111–148, set out as a note under section 1 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 2009 AMENDMENT

Amendment by section 1001(e)(2) of Pub. L. 111–5 applicable to taxable years beginning after Dec. 31, 2008, see section 1001(f) of Pub. L. 111–5, set out as an Effective Date note under section 36A of Title 26, Internal Revenue Code.
Amendment by section 1004(b)(8) of Pub. L. 111–5 applicable to taxable years beginning after Dec. 31, 2008, see section 1004(d) of Pub. L. 111–5, set out as an Effective and Termination Dates of 2009 Amendment note under section 24 of Title 26, Internal Revenue Code.
Amendment by section 1531(c)(1) of Pub. L. 111–5 applicable to obligations issued after Feb. 17, 2009, see section 1531(e) of Pub. L. 111–5, set out as a note under section 54 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 2008 AMENDMENT

Amendment by section 3011(b)(3) of Pub. L. 110–289 applicable to residences purchased on or after Apr. 9, 2008, in taxable years ending on or after such date, see section 3011(c) of Pub. L. 110–289, set out as a note under section 26 of Title 26, Internal Revenue Code.
Amendment by section 3081(c) of Pub. L. 110–289 applicable to taxable years ending after Mar. 31, 2008, see section 3081(d) of Pub. L. 110–289, set out as a note under section 168 of Title 26, Internal Revenue Code.
Amendment of this section and repeal of Pub. L. 110–234 by Pub. L. 110–246 effective May 22, 2008, the date of enactment of Pub. L. 110–234, except as otherwise provided, see section 4 of Pub. L. 110–246, set out as an Effective Date note under section 8701 of Title 7, Agriculture.
Amendment by section 15316(c)(6) of Pub. L. 110–246 applicable to obligations issued after June 18, 2008, see section 15316(d) of Pub. L. 110–246, set out as a note under section 54 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109–432 applicable to taxable years beginning after Dec. 20, 2006, see section 402(c) of Pub. L. 109–432, set out as a note under section 53 of Title 26, Internal Revenue Code.

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–34 applicable to taxable years beginning after Dec. 31, 1997, see section 101(e) of Pub. L. 105–34, set out as a note under section 24 of Title 26, Internal Revenue Code.

CONSTRUCTION OF 2002 AMENDMENT

Nothing in amendment by Pub. L. 107–210, other than provisions relating to COBRA continuation coverage and reporting requirements, to be construed as creating new mandate on any party regarding health insurance coverage, see section 203(f) of Pub. L. 107–210, set out as a note under section 2918 of Title 29, Labor.

COORDINATION WITH REFUND PROVISION

Pub. L. 101–508, title XI, §11116, Nov. 5, 1990, 104 Stat. 1388–415, provided that: ''For purposes of section 1324(b)(2) of title 31 of the United States Code, section 32 of the Internal Revenue Code of 1986 [26 U.S.C. 32] (as amended by this Act) shall be considered to be a credit provision of the Internal Revenue Code of 1954 enacted before January 1, 1978.''

SUBCHAPTER III—LIMITATIONS, EXCEPTIONS, AND PENALTIES

SHORT TITLE

Certain provisions of this subchapter and subchapter II of chapter 15 of this title were originally enacted as section 3679 of the Revised Statutes, popularly known as the Anti-Deficiency Act. That section was repealed as part of the general revision of this title by Pub. L. 97–258, and its provisions restated in sections 1341, 1342, 1349 to 1351, and 1511 to 1519 of this title.

§ 1341. Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 923; Pub. L. 101–508, title XIII, §13213(a), Nov. 5, 1990, 104 Stat. 1388–621.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
1341(a)	31:665(a), (d)(2)(last sentence related to spending and obligations).	R.S. §3679(a), (d)(2)(last sentence related to spending and obligations); Mar. 3, 1905, ch. 1484, §4(1st par.), 33 Stat. 1257; Feb. 27, 1906, ch. 510, §3, 34 Stat. 48; restated Sept. 6, 1950, ch. 896, §1211, 64 Stat. 765.
1341(b)	31:669(words after semicolon).	Aug. 23, 1912, ch. 350, §6(words after semicolon), 37 Stat. 414.

In subsection (b), the words ''another amount available for obligation'' are substituted for ''any other fund'' for consistency in the revised title.

REFERENCES IN TEXT

Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, referred to in subsec. (a)(1)(C), (D), is classified to section 902 of Title 2, The Congress.

AMENDMENTS

1990—Subsec. (a)(1)(C), (D). Pub. L. 101–508 added subpars. (C) and (D).

§ 1342. Limitation on voluntary services

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term ''emergencies involving the safety of human life or the protection of property'' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 923; Pub. L. 101–508, title XIII, §13213(b), Nov. 5, 1990, 104 Stat. 1388–621; Pub. L. 104–92, title III, §310(a), Jan. 6, 1996, 110 Stat. 20.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
1342	31:665(b). 31:665(d)(2)(last sentence related to voluntary services).	R.S. §3679(b), (d)(2)(last sentence related to voluntary services); Mar. 3, 1905, ch. 1484, §4(1st par.), 33 Stat. 1257; Feb. 27, 1906, ch. 510, §3, 34 Stat. 48; restated Sept. 6, 1950, ch. 896, §1211, 64 Stat. 765.

The words ''District of Columbia government'' are added because of section 47–105 of the D.C. Code.

AMENDMENTS

1996—Pub. L. 104–92 temporarily amended section by inserting ''All officers and employees of the United States Government or the District of Columbia government shall be deemed to be performing services relating to emergencies involving the safety of human life or the protection of property.'' after first sentence and by striking out at end ''As used in this section, the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property''. See Effective and Termination Dates of 1996 Amendment note below.

1990—Pub. L. 101–508 inserted at end ''As used in this section, the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.''

EFFECTIVE AND TERMINATION DATES OF 1996 AMENDMENT

Section 310(a) of Pub. L. 104–92 provided that the amendment made by that section is for the period Dec. 15, 1995, through Jan. 26, 1996.

§ 1343. Buying and leasing passenger motor vehicles and aircraft

(a) In this section, buying a passenger motor vehicle or aircraft includes a transfer of the vehicle or aircraft between agencies.

(b) An appropriation may be expended to buy or lease passenger motor vehicles only—

(1) for the use of—

(A) the President;

(B) the secretaries to the President; or

(C) the heads of executive departments listed in section 101 of title 5; or

(2) as specifically provided by law.

(c)(1) Except as specifically provided by law, an agency may use an appropriation to buy a passenger motor vehicle (except a bus or ambulance) only at a total cost (except costs required only for transportation) that—

(A) includes the price of systems and equipment the Administrator of General Services decides is incorporated customarily in standard passenger motor vehicles completely equipped for ordinary operation;

(B) includes the value of a vehicle used in exchange;

(C) is not more than the maximum price established by the agency having authority under law to establish a maximum price; and

(D) is not more than the amount specified in a law.

(2) Additional systems and equipment may be bought for a passenger motor vehicle if the Administrator decides the purchase is appropriate. The price of additional systems or equipment is not included in deciding whether the cost of the vehicle is within a maximum price specified in a law.

(d) An appropriation (except an appropriation for the armed forces) is available to buy, maintain, or operate an aircraft only if the appropriation specifically authorizes the purchase, maintenance, or operation.

(e) This section does not apply to—

(1) buying, maintaining, and repairing passenger motor vehicles by the United States Capitol Police;

(2) buying, maintaining, and repairing vehicles necessary to carry out projects to improve, preserve, and protect rivers and harbors; or

(3) leasing, maintaining, repairing, or operating motor passenger vehicles necessary in

§ 825s. Sale of electric power from reservoir projects; rate schedules; preference in sale; construction of transmission lines; disposition of moneys

Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of Energy who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Secretary of Energy. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of Energy is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

(Dec. 22, 1944, ch. 665, § 5, 58 Stat. 890; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501; Pub. L. 95–91, title III, §§ 301(b), 302(a)(1), Aug. 4, 1977, 91 Stat. 578.)

CODIFICATION

Section was not enacted as part of the Federal Power Act which generally comprises this chapter.

CHANGE OF NAME

Department of War designated Department of the Army and title of Secretary of War changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted ''Title 10, Armed Forces'' which in sections 3010 to 3013 continued military Department of the Army under administrative supervision of Secretary of the Army.

TRANSFER OF FUNCTIONS

''Secretary of Energy'' substituted in text for ''Secretary of the Interior'' in two places and for ''Federal Power Commission'' pursuant to Pub. L. 95–91, §§ 301(b), 302(a)(1), which are classified to sections 7151(b) and 7152(a)(1) of Title 42, The Public Health and Welfare.

Functions of Secretary of the Interior under this section transferred to Secretary of Energy by section 7152(a)(1) of Title 42.

Federal Power Commission terminated and its functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

SECTION AS UNAFFECTED BY SUBMERGED LANDS ACT

Provisions of this section as not amended, modified or repealed by the Submerged Lands Act [43 U.S.C. 1301 et seq.], see section 1303 of Title 43, Public Lands.

§ 825s–1. Southwestern area sale and transmission of electric power; disposition of receipts; creation of continuing fund; use of fund

All receipts from the transmission and sale of electric power and energy under the provisions of section 825s of this title, generated or purchased in the southwestern power area, shall be covered into the Treasury of the United States as miscellaneous receipts, except that the Treasury shall set up and maintain from such receipts a continuing fund of $300,000, including the sum of $100,000 in the continuing fund established under the Administrator of the Southwestern Power Administration in the First Supplemental National Defense Appropriation Act, 1944 (57 Stat. 621), which shall be transferred to the fund established; and said fund of $300,000 shall be placed to the credit of the Secretary and shall be subject to check by him to defray emergency expenses necessary to insure continuity of electric service and continuous operation of the facilities, and to cover all costs in connection with the purchase of electric power and energy and rentals for the use of facilities for the transmission and distribution of electric power and energy to public bodies, cooperatives, and privately owned companies: *Provided*, That expenditures from this fund to cover such costs in connection with the purchase of electric power and energy and rentals for the use of facilities are to be made only in such amounts as may be approved annually in appropriation Acts.

(Oct. 12, 1949, ch. 680, title I, § 101, 63 Stat. 767; Aug. 31, 1951, ch. 375, title I, § 101, 65 Stat. 249.)

REFERENCES IN TEXT

The First Supplemental National Defense Appropriation Act, 1944, referred to in text, was act Dec. 23, 1943, ch. 380, title I, § 101, 57 Stat. 621, which was not classified to the Code.

CODIFICATION

Section was not enacted as part of the Federal Power Act which generally comprises this chapter.

Section as originally enacted contained a provision relating to maximum expenditures for the fiscal year 1952.

AMENDMENTS

1951—Act Aug. 31, 1951, inserted proviso.

USE OF FUND TO PAY FOR PURCHASE POWER AND WHEELING EXPENSES TO MEET CONTRACTUAL OBLIGATIONS DURING PERIODS OF BELOW-AVERAGE HYDROPOWER GENERATION

Pub. L. 101–101, title III, Sept. 29, 1989, 103 Stat. 660, provided: ''That the continuing fund established by the

SOURCE: Order 672, 71 FR 8736, Feb. 17, 2006, unless otherwise noted.

§ 39.1 Definitions.

As used in this part:

Bulk-Power System means facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof), and electric energy from generating facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy.

Cross-Border Regional Entity means a Regional Entity that encompasses a part of the United States and a part of Canada or Mexico.

Cybersecurity Incident means a malicious act or suspicious event that disrupts, or was an attempt to disrupt, the operation of those programmable electronic devices and communications networks including hardware, software and data that are essential to the Reliable Operation of the Bulk-Power System.

Electric Reliability Organization or ''*ERO*'' means the organization certified by the Commission under § 39.3 the purpose of which is to establish and enforce Reliability Standards for the Bulk-Power System, subject to Commission review.

Electric Reliability Organization Rule means, for purposes of this part, the bylaws, a rule of procedure or other organizational rule or protocol of the Electric Reliability Organization.

Interconnection means a geographic area in which the operation of Bulk-Power System components is synchronized such that the failure of one or more of such components may adversely affect the ability of the operators of other components within the system to maintain Reliable Operation of the facilities within their control.

Regional Advisory Body means an entity established upon petition to the Commission pursuant to section 215(j) of the Federal Power Act that is organized to advise the Electric Reliability Organization, a Regional Entity, or the Commission regarding certain matters in accordance with § 39.13.

Regional Entity means an entity having enforcement authority pursuant to § 39.8.

Regional Entity Rule means, for purposes of this part, the bylaws, a rule of procedure or other organizational rule or protocol of a Regional Entity.

Reliability Standard means a requirement approved by the Commission under section 215 of the Federal Power Act, to provide for Reliable Operation of the Bulk-Power System. The term includes requirements for the operation of existing Bulk-Power System facilities, including cybersecurity protection, and the design of planned additions or modifications to such facilities to the extent necessary to provide for Reliable Operation of the Bulk-Power System, but the term does not include any requirement to enlarge such facilities or to construct new transmission capacity or generation capacity.

Reliable Operation means operating the elements of the Bulk-Power System within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a Cybersecurity Incident, or unanticipated failure of system elements.

Transmission Organization means a regional transmission organization, independent system operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

§ 39.2 Jurisdiction and applicability.

(a) Within the United States (other than Alaska and Hawaii), the Electric Reliability Organization, any Regional Entities, and all users, owners and operators of the Bulk-Power System, including but not limited to entities described in section 201(f) of the Federal Power Act, shall be subject to the jurisdiction of the Commission for the purposes of approving Reliability Standards established under section 215 of the Federal Power Act and enforcing compliance with section 215 of the Federal Power Act.

(b) All entities subject to the Commission's reliability jurisdiction under

paragraph (a) of this section shall comply with applicable Reliability Standards, the Commission's regulations, and applicable Electric Reliability Organization and Regional Entity Rules made effective under this part.

(c) Each user, owner and operator of the Bulk-Power System within the United States (other than Alaska and Hawaii) shall register with the Electric Reliability Organization and the Regional Entity for each region within which it uses, owns or operates Bulk-Power System facilities, in such manner as prescribed in the Rules of the Electric Reliability Organization and each applicable Regional Entity.

(d) Each user, owner or operator of the Bulk-Power System within the United States (other than Alaska and Hawaii) shall provide the Commission, the Electric Reliability Organization and the applicable Regional Entity such information as is necessary to implement section 215 of the Federal Power Act as determined by the Commission and set out in the Rules of the Electric Reliability Organization and each applicable Regional Entity. The Electric Reliability Organization and each Regional Entity shall provide the Commission such information as is necessary to implement section 215 of the Federal Power Act.

§ 39.3 Electric Reliability Organization certification.

(a) Any person may submit an application to the Commission for certification as the Electric Reliability Organization no later than April 4, 2006. Such application shall comply with the requirements for filings in proceedings before the Commission in part 385 of this chapter.

(b) After notice and an opportunity for public comment, the Commission may certify one such applicant as an Electric Reliability Organization, if the Commission determines such applicant:

(1) Has the ability to develop and enforce, subject to § 39.7, Reliability Standards that provide for an adequate level of reliability of the Bulk-Power System, and

(2) Has established rules that:

(i) Assure its independence of users, owners and operators of the Bulk-Power System while assuring fair stakeholder representation in the selection of its directors and balanced decisionmaking in any Electric Reliability Organization committee or subordinate organizational structure;

(ii) Allocate equitably reasonable dues, fees and charges among end users for all activities under this part;

(iii) Provide fair and impartial procedures for enforcement of Reliability Standards through the imposition of penalties in accordance with § 39.7, including limitations on activities, functions, operations, or other appropriate sanctions or penalties;

(iv) Provide reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing Reliability Standards, and otherwise exercising its duties; and

(v) Provide appropriate steps, after certification by the Commission as the Electric Reliability Organization, to gain recognition in Canada and Mexico.

(c) The Electric Reliability Organization shall submit an assessment of its performance three years from the date of certification by the Commission, and every five years thereafter. After receipt of the assessment, the Commission will establish a proceeding with opportunity for public comment in which it will review the performance of the Electric Reliability Organization.

(1) The Electric Reliability Organization's assessment of its performance shall include:

(i) An explanation of how the Electric Reliability Organization satisfies the requirements of § 39.3(b);

(ii) Recommendations by Regional Entities, users, owners, and operators of the Bulk-Power System, and other interested parties for improvement of the Electric Reliability Organization's operations, activities, oversight and procedures, and the Electric Reliability Organization's response to such recommendations; and

(iii) The Electric Reliability Organization's evaluation of the effectiveness of each Regional Entity, recommendations by the Electric Reliability Organization, users, owners, and operators of the Bulk-Power System, and other interested parties for improvement of the Regional Entity's performance of

Southwestern Power Administration, et al. **Docket No. NP11-238**
D.C. Cir. No. 13-1033

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 l5th day of October 2013, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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