In the United States Court of Appeals for the Ninth Circuit

No. 13-74361

CALIFORNIA PUBLIC UTILITIES COMMISSION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES (continued): **PAGE**

STATUTES:

TABLE OF AUTHORITIES

STATUTES (continued): **PAGE**

REGULATIONS:

GLOSSARY

Br.	Opening Brief of Petitioner California Public Utilities Commission
California	Petitioner California Public Utilities Commission
Chairman's Determination	*San Diego Gas & Elec. Co.*, Notice of Determination By The Chairman (Oct. 2, 2013), R.66, Pet. ER 3
Chief Judge	FERC's Chief Administrative Law Judge
Commission or FERC	Federal Energy Regulatory Commission
First Abeyance Order	*San Diego Gas & Elec. Co.*, 144 FERC ¶ 63,018 (2013), R.55, Pet. ER 11
Hearing Order	*San Diego Gas & Elec. Co.*, 141 FERC ¶ 61,273 (2012), R.26, Pet. ER 299
Initial Decision	*San Diego Gas & Elec. Co.*, 146 FERC ¶ 63,017 (2014)
Interlocutory Motion Order	*San Diego Gas & Elec. Co.*, 144 FERC ¶ 63,027 (2013), R.63, Pet. ER 5
Notice Rejecting Rehearing	*San Diego Gas & Elec. Co.*, Notice Rejecting Rehearing Request (Nov. 18, 2013), R.72, Pet. ER 1
P	Denotes a paragraph number in a Commission order
Pet. ER	Petitioner's Excerpts of Record
R.	An item in the certified index to the record
San Diego	Intervenor San Diego Gas & Electric Company
Second Abeyance Order	*San Diego Gas & Elec. Co.*, 144 FERC ¶ 63,022 (2013), R.59, Pet. ER 8

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INTRODUCTION

This case arises from a rate filing by San Diego Gas & Electric Company ("San Diego") to recover costs related to wildfires through its transmission rates that are subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC" or "Commission") under the Federal Power Act. The petitioner, the California Public Utilities Commission ("California"), along with multiple interested parties, intervened in the FERC proceeding raising issues regarding the reasonableness of San Diego's recovery.

After filing a protest and participating in settlement discussions for nearly a year, California sought an indefinite suspension of the Commission proceeding. California requested abeyance until an unknown future date tied to if and when San Diego elects to petition California to recover the portion of the wildfire costs subject to California's jurisdiction. The Commission's Chief Administrative Law Judge ("Chief Judge") denied California's request and denied California's subsequent motion for interlocutory review by the full Commission. Next, the Chairman of the Commission, acting in his individual capacity as Motions Commissioner, denied California's motion to seek interlocutory appeal to the full Commission. California requested rehearing of the Chairman's decision, which the Commission rejected as impermissible. California seeks appellate review of these interlocutory procedural decisions.

COUNTER-STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review the challenged orders under 16 U.S.C. § 825*l*(b) because California has not shown that it is aggrieved by the challenged orders. As explained *infra* in Part I.A of the Argument, California lacks standing because its claimed injuries are self-inflicted and otherwise speculative. *See City of Redding v. FERC*, 693 F.3d 828, 835 (9th Cir. 2012) (petitioners must show that they are aggrieved by, and meet the constitutional

standing requirements of injury-in-fact, redressibility, and causation regarding, the challenged FERC orders).

Additionally, the Federal Power Act limits this Court's jurisdiction to review only final Commission orders. *See Steamboaters v. FERC*, 759 F.2d 1382, 1387 (9th Cir. 1985) (the Court can only review "orders of definitive substantive impact, where judicial abstention would result in irreparable injury to a party"). As discussed *infra* in Part I.B of the Argument, these interlocutory procedural decisions are not final orders. Further, the availability of recourse to California through normal Commission procedures undermines any suggestion that California was irreparably harmed by the Commission's procedural decision.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to review California's challenges to non-final interlocutory orders, where California has not exhausted its administrative remedies and where the alleged injury is self-inflicted and otherwise purely speculative.

2. Assuming jurisdiction, whether the Commission reasonably denied California's request to hold a FERC proceeding in abeyance until such time as California reaches a decision on a yet-to-be filed request by San Diego to recover certain costs through its state-regulated rates.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE FACTS

I. BACKGROUND

A. Statutory And Regulatory Background

1. The Federal Power Act

Section 201 of the Federal Power Act gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale of wholesale electric energy in interstate commerce. 16 U.S.C. §§ 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). The Commission, however, "shall not have jurisdiction, except as specifically provided . . . , over facilities used in local distribution . . . ." Federal Power Act § 201(b)(1), 16 U.S.C. § 824(b)(1).

The Federal Power Act reserves for the States jurisdiction over retail sales of electricity and over local distribution facilities. *See id*.; *see also Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006) (explaining the jurisdictional divide between the federal government and states under section 201(b) of the Federal Power Act). "[T]ransmission occurs pursuant to FERC-

approved tariffs; local distribution occurs under rates set by a state's public service commission." *Niagara Mohawk*, 452 F.3d at 824.

2. The Commission's Hearing Procedures

For matters set for hearing at the Commission, the Commission's regulations allow interlocutory appeal of a ruling of the Presiding Judge to the full Commission only upon a demonstration of "extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person." 18 C.F.R § 385.715(a). An interlocutory appeal is first considered by the Presiding Judge. *Id*. § 385.715(b). If the Presiding Judge denies interlocutory appeal, that decision can be appealed to the "Motions Commissioner." *Id*. § 385.715(c). (In this case, the Motions Commissioner was the FERC Chairman.) If the Motions Commissioner denies the appeal, then the ruling of the Presiding Judge is to be reviewed in the ordinary course of the proceeding as if the interlocutory appeal had not been made. *See id*. § 385.715(d).

Generally, at the conclusion of a FERC hearing, the Presiding Judge issues a written initial decision. *Id*. § 385.708(b). Briefs on exceptions are due thirty days after service of the initial decision. *Id*. § 385.711(a). If briefs on exceptions are filed, the Commission reviews the initial decision and issues an order which is final for purposes of rehearing under Rule 713. *Id*. § 385.712(c). If no briefs on

exceptions are filed, unless the Commission issues an order staying the effectiveness of the decision, the initial decision becomes a "final" Commission decision ten days after exceptions were due. *Id*. § 385.708(d).

B. Procedural History

1. San Diego's Filings With The State Commission

In October 2007, southern California experienced several wildfires. San Diego paid approximately $159.2 million in damage claims and legal costs to settle claims by third-parties for damage to their property arising from three wildfires. *San Diego Gas & Elec. Co.*, 146 FERC ¶ 63,017 at P 32 (2014) ("Initial Decision"). Applying the Commission's Uniform System of Accounts, San Diego allocated 14.6 percent, $23.2 million, of the wildfire costs to its FERC-jurisdictional transmission rates. The other 85.4 percent is attributable to state-jurisdictional distribution rates. *Id.*

San Diego filed to recover a portion of the wildfire costs through its state-jurisdictional rates with California. *See* San Diego Answer To Motion To Hold In Abeyance, R.57, Pet. ER 196, n.30 (discussing the multiple filings with the California Commission to recover wildfire costs).[1] California rejected each of San Diego's filings, without prejudice to San Diego refiling with a more complete

[1] "Pet. ER" refers to Petitioner's Excerpts of Record. "R." refers to a record item. "P" refers to the internal paragraph number within a FERC order.

record. *See* Br. 9-10. San Diego indicated that it may file a new rate application with California after it settled or litigated all wildfire-related claims. *See* San Diego Answer, Pet. ER 196. To date, San Diego has not made any such filing.

2. San Diego's Transmission Rate Filing With FERC

On August 15, 2012, San Diego made its required annual formula rate filing with the Commission. *See* San Diego Answer to Protests at 2-3, FERC Docket No. ER12-2454, Sept. 19, 2012, Pet. ER 309-10 (describing its rate filing). Along with other costs incurred during the annual rate period, San Diego sought to recover, through its FERC-jurisdictional transmission rates, $23.2 million in wildfire costs. *San Diego Gas & Elec. Co.*, 141 FERC ¶ 61,273, P 3 (2012), Pet. ER 299-300 ("Hearing Order").

Over ten parties, including California, intervened. *See id*. at P 13, Pet. ER 303. Several parties, including California, raised issues concerning wildfire costs. *See id*. at P 20, Pet. ER 304 (the protesting parties included M-S-R Public Power Agency, the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, CA (collectively), and the California Department of Water Resources State Water Project). California separately raised three objections to uninsured wildfire expenses, including whether those costs were adequately supported and recoverable. *See* California Intervention and Protest, Sept. 4, 2012, Pet. ER 319-28. California expressly requested that San Diego's rate filing be set for

evidentiary hearing so "[California] and/or its staff (and other parties) should be given the opportunity to challenge the costs in question." *Id.*, Pet. ER 327.

Consistent with California's request, the Commission set San Diego's filing for hearing and settlement judge procedures. On May 10, 2013, the parties (including California) reached a settlement on all issues except for San Diego's proposed recovery of $23.2 million of wildfire costs. *See* Order Terminating Settlement Judge Procedures at P 1, R.42, Pet. ER 273. Accordingly, on June 11, 2013, the remaining issue of the wildfire costs was set for hearing. *Id.* P 2, Pet. ER 273.

3. The Chief Judge's Abeyance Orders

On August 15, 2013, California petitioned to hold the FERC hearing in abeyance until San Diego "eventually files" with California to recover the wildfire costs associated with state-regulated utility assets. *See* California Abeyance Motion at 10, R.54, Pet. ER 227. California argued that participation in the Commission proceeding could subject it, in future state retail proceedings, to an allegation that it prejudged the recoverability of the wildfire costs. *Id.* at 7-9, Pet. ER 224-26. California argued that San Diego would not be harmed by holding the FERC proceeding in abeyance because San Diego would continue to collect through its transmission rates the full $23.2 million it sought, subject to true-up of under- or over-collections. *Id.* at 10, Pet. ER 227.

The FERC Chief Judge cut short the answer period and granted California's motion. *San Diego Gas & Elec. Co.*, 144 FERC ¶ 63,018 (2013), Pet. ER 11 ("First Abeyance Order"). Upon learning that at least one party opposed California's motion, the Chief Judge allowed answers to be filed. *See San Diego Gas & Elec. Co.*, 144 FERC ¶ 63,022, at P 1 (2013), Pet. ER 8 ("Second Abeyance Order").

San Diego and FERC trial staff opposed California's request. *See id*. at P 3, Pet. ER 8. San Diego argued that the requested abeyance is open-ended and could span many years since there is no pending state proceeding. *See* San Diego Answer to Abeyance Motion at 12-15, Pet. ER 197-200. Also, San Diego observed that abeyance would impermissibly intrude on the Commission's exclusive jurisdiction over transmission. *See id*. at 6-8, Pet. ER 191-93. Finally, San Diego countered California's assertion that its participation would prejudge issues before it, either as a matter of law or as a matter of fact. *See id*. at 9-11, Pet. ER 194-96. San Diego argued that abeyance would not promote rate certainty and would not result in judicial economy or efficient resolution of the issues. *See id*. at 15-17, Pet. ER 200-02.

FERC Trial Staff also opposed abeyance. *See* Trial Staff Answer To Motion To Hold In Abeyance, R.58, Pet. ER 206. Trial Staff argued that suspending San Diego's rate hearing for an indefinite period would create rate uncertainty –

thereby undermining the purpose of formula rates. *See id*. at 5, Pet. ER 210. Additionally, Trial Staff noted that rate recovery in a California proceeding would be subject to different legal standards, procedures, and evidentiary requirements than in a Commission proceeding. *See id*. at 6-7, Pet. ER 211-12. Trial Staff also argued that the circumstances in this case differ from those where abeyance was granted in the past. *Id*.

The Chief Judge considered all the arguments and vacated the First Abeyance Order and denied California's request. *See* Second Abeyance Order at P 1, Pet. ER 8. The Chief Judge found that the Commission proceeding is independent of any state proceeding and that administrative efficiency would not be served by holding the federal case in abeyance. *See id.* at P 4, Pet. ER 9. Additionally, the Chief Judge noted that leaving the wildfire cost issue undecided and subject to refund for an indefinite period of time would create rate uncertainty. *See id*. The Chief Judge determined that California failed to provide any compelling reason to hold the FERC proceeding in abeyance, and that any benefit FERC would gain by waiting for San Diego to litigate recovery of wildfire costs in a state retail proceeding is speculative and uncertain because there is currently no timeframe for San Diego to make its filing and no open proceeding for California to address the issue. *Id*. Finally, the Chief Judge found that rate recovery with

California would be subject to different legal standards, procedures, and evidentiary requirements in any event. *Id*.

4. Order Of Chief Judge Denying Motion For Interlocutory Appeal

Through FERC Rule 715, 18 C.F.R. § 385.715, California sought an interlocutory appeal of the Second Abeyance Order. *See* California Motion For Interlocutory Appeal, R.61, Pet. ER 158. California argued that denying the Abeyance Motion would result in California ratepayers being irreparably harmed in the amount of $23 million because California would be unable to participate in the FERC proceeding. *Id*. at 8, Pet. ER 169.

In response, San Diego argued that no rule, regulation, or statute bars California from participating in a FERC proceeding due to concerns of prejudging an issue that may later come before it; that California has not shown irreparable harm to any person that would justify an interlocutory appeal; and that cases cited by California granting interlocutory appeals do not support its Motion. *See* San Diego Answer To Motion For Interlocutory Appeal, R.62, Pet. ER 147.

The Chief Judge denied California's request on the basis that it had not shown "extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person." *See San Diego Gas & Elec. Co*., 144 FERC ¶ 63,027, at P 4 (2013), Pet. ER 6 ("Interlocutory Motion Order") (citing 18 C.F.R.

§ 385.715(a)). The Chief Judge observed that California "failed to cite a single case, rule, or regulation finding that an agency's litigation position in a separate forum amounts to prejudging an issue that may come before it as an adjudicator in an unrelated proceeding." *Id*. Additionally, he found that California's "alleged inability to participate is based on nothing more than its own preference to do so prior to conducting its own proceeding at some future date." *Id*. Because California failed to show a compelling reason to hold the FERC proceeding in abeyance, the Chief Judge found that "[a]n indefinite abeyance and the associated open-ended rate uncertainty herein would not benefit administrative or judicial economy, or wholesale or California ratepayers." *Id*.

5. Chairman's Determination

On October 2, 2013, the Chairman of the Commission, acting as Motions Commissioner pursuant to Rule 715(c)(5), denied California's September 26, 2013 interlocutory appeal to the full Commission finding California failed to demonstrate extraordinary circumstances. *San Diego Gas & Elec. Co.*, Notice of Determination By The Chairman, FERC Docket No. ER12-2454, Oct. 2, 2013, Pet. ER 3 ("Chairman's Determination") (citing 18 C.F.R. § 385.715(c)(5)).

6. Notice Rejecting Rehearing

On November 1, 2013, California requested rehearing of the Chairman's determination to not refer California's interlocutory appeal to the full Commission. *See* California Rehearing Request, R.68, Pet. ER 25. California's rehearing request also included a request that the Commission stay the rate hearing pending consideration of the rehearing request and, alternatively, if rehearing were denied, that the Commission stay the hearing pending appellate review. *See id.* at 34, Pet. ER 64. On November 18, 2013, the Commission issued a notice rejecting the rehearing request. Notice Rejecting Rehearing, R.72, Pet. ER 1. The notice explains that FERC Rule 713, which governs rehearing requests, only allows for rehearing of final Commission orders, and that "[a] determination under Rule 715 is interlocutory and does not fall within the scope of Rule 713." *Id.* (citing 18 C.F.R. § 385.713(a)).

This appeal followed.

C. FERC's Motion To Dismiss California's Appeal

The Commission filed with this Court a motion to dismiss California's petition for review, on the basis that the decisions are not final Commission orders subject to review under section 313 of the Federal Power Act, 16 U.S.C. § 825*l*. In the alternative, FERC sought to hold the appellate proceeding in abeyance pending the completion of the FERC rate proceeding, in which California could have

challenged the Chief Judge's denial of its request to hold the FERC proceeding in abeyance. *See* 18 C.F.R. § 385.715(c)(6) (if motion to pursue interlocutory review denied, the contested ruling of the presiding judge will be reviewed in the ordinary course of the proceeding). This Court denied the motion without prejudice to renewing arguments in the answering brief. *See Cal. Pub. Util. Comm'n v. FERC*, No. 13-74361 (May 14, 2014). The Court directed all parties to brief the issue of this Court's jurisdiction to review the challenged FERC decisions. *Id*. at 2.

SUMMARY OF ARGUMENT

Having rejected San Diego's initial attempts to recover part of the wildfire costs through state-jurisdictional rates, California then objected to San Diego's recovery of the other portion of the wildfire costs through FERC-regulated rates. California requested, and FERC directed, that the matter be set for hearing and settlement judge procedures. After participating in the FERC proceeding for months, California changed tactics and abruptly sought to suspend the FERC case on the basis that it could not prejudge the issue. FERC declined to do so. California then had two options. One, it could continue to represent the interest of California ratepayers and take the minimal risk (if any) of prejudgment arguments in a yet-to-be-filed future state proceeding on San Diego's cost recovery through distinct California-regulated rates. Or two, California could sit out the FERC

proceeding and put all of its efforts into appealing plainly procedural interlocutory orders. California chose the latter.

California's petition should be denied for lack of jurisdiction. First, California lacks Article III standing because its claimed injury is speculative and not fairly traceable to the challenged FERC decisions. California's injury, sitting out the FERC rate proceeding because of the perceived risk to its future ability to be a neutral decision-maker in its own proceedings, is not grounded in either law or precedent. Further, California's feared injury will only materialize if and when San Diego makes a retail rate filing with California, and only then if a participant in that proceeding challenges California's impartiality.

The finality requirements under the Federal Power Act and the Administrative Procedure Act require that this Court dismiss California's petition. California is seeking to appeal non-final procedural decisions issued in the middle of an on-going administrative hearing – one that California itself requested.

On the merits, the Commission is owed considerable deference on decisions regarding how to shape its own proceedings. Here, the Commission's decision to decline to indefinitely hold in abeyance its own proceeding regarding FERC-jurisdictional rates was consistent with past precedent and reasonably explained. The Commission justifiably concluded that no administrative efficiency would be

gained by a suspension, and that substantial rate uncertainty would result if the FERC proceeding were suspended.

ARGUMENT

I. THE COURT LACKS JURISDICTION

This Court lacks jurisdiction on two distinct bases. First, California has not demonstrated, nor can it, that it has standing to appeal. Second, California is statutorily barred from seeking appeal of interlocutory, non-final decisions.

A. California Has Not Established Standing And Aggrievement

"Section 313 of the [Federal Power Act] 'limits judicial review to those parties who have been aggrieved by an order of the Commission.'" *Redding*, 693 F.3d at 835 (quoting FPA section 313(b), 16 U.S.C. § 825*l*(b), and *Port of Seattle v. FERC*, 499 F.3d 1016, 1028 (9th Cir. 2007)) (some internal quotation marks omitted). "Additionally, a party must meet the constitutional standing requirements of injury-in-fact, redressability, and causation." *Id.*; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Thus, a party's "injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1147 (2013) (internal quotation marks omitted); *see also Lujan*, 504 U.S. at 560-61; *Redding*, 693 F.3d at 835 ("'both aggrievement and

standing require that petitioners establish, at a minimum, injury in fact to a protected interest'") (quoting *Port of Seattle*, 499 F.3d at 1028).

California bears the burden to establish its aggrievement and standing. *See Clapper*, 133 S.Ct. at 1148; *Lujan*, 504 U.S. at 561; *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 969 (9th Cir. 2013). Nonetheless, its opening brief asserts, without any explanation, that "[b]ecause [California] could not further participate as an advocate in the FERC proceeding given a potential due process challenge to [California's] subsequent adjudication of [San Diego's] retail rate recovery of the same uninsured wildfire costs in [state commission] proceedings, [California's] right, as a State commission, to intervene before the FERC to protect the interests of California ratepayers was effectively thwarted, resulting in irreparable harm." Br. 20 (citing 16 U.S.C. § 825*l*(b)).

1. California's Alleged Injury Is Speculative

California appears to assert a procedural injury, namely that the Commission's decision to not suspend the agency hearing effectively foreclosed California's ability to participate in the agency proceeding. "To satisfy the injury in fact requirement, a plaintiff asserting a procedural injury must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1038 (9th Cir. 2006) (citations omitted).

"Furthermore, he or she 'needs [to] establish the reasonable probability of the challenged action's threat to [his or her] concrete interest.'" *Id.*; *see also Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 433 (D.C. Cir. 2002) (in claims of procedural injury, a particularized concrete injury still required); *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 269 (D.C. Cir. 2007) (same).

Other than speculation of possible future bias or prejudgment challenges in a potential future state proceeding, California cites no law or regulations prohibiting California from participating in the then-pending FERC proceeding. As the Presiding Judge notes, "[California's] alleged inability to participate is based on nothing more than its own preference to do so prior to conducting its own proceeding at some future date." Second Abeyance Order at P 4, Pet. ER 6; *see also Del. Dep't of Natural Res. & Env't Control v. FERC*, 558 F.3d 575, 578 (D.C. Cir. 2009) (state agency had no standing to assert "Alphonse ahead of Gaston" argument where alleged injury was state's conjectural concern that FERC's approval of project would create political pressure for state to approve state-jurisdictional permits for project).

California's claims that it might be subject to prejudgment challenges in a potential future retail rate proceeding are neither certain nor imminent. *See N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011) (rejecting standing theory of petitioner transmission developer because the alleged injury

"rests on a chain of hypothetical events, none of which is certain to occur"); *see also Rapid Transit Advocates, Inc. v. S. Cal. Rapid Transit Dist.*, 752 F.2d 373, 378 (9th Cir.1985) (harm not imminent and plaintiffs lacked standing to challenge agency decision to fund design and engineering work for a possible project where regulatory review may never be completed); *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 666-68 (D.C. Cir. 1996) (no standing where injury was "speculative" and based on "conjecture"). Such speculation does not demonstrate injury-in-fact. *See Lujan*, 504 U.S. at 564 (mere possibility of injury does not support a finding of "actual or imminent" injury; "Such 'some day' intentions . . . do not support a finding of the 'actual or imminent' injury that our cases require.").

2. California's Alleged Injury Is Self-Inflicted And Not Traceable To FERC's Orders

The second element of standing is to show "a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . traceable to the challenged action of the defendant . . . .'" *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)); *see also Fla. Audubon Soc'y*, 94 F.3d at 664–65 (petitioner asserting procedural injury must show "that it is substantially probable that the procedural breach will cause the essential injury to the [petitioner's] own interest").

California's alleged injury arises primarily, if not entirely, from its own decision to refrain from participation in Commission proceedings. Thus,

California's injury was of its own making and is not "fairly traceable" to the Commission's actions. *See, e.g., Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006) ("an organization is not injured by expending resources to challenge the regulation itself; we do not recognize such self-inflicted harm"); *Nat'l Family Planning & Reproductive Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (no standing where the asserted injury appears "largely of its own making"). The Commission's denial of the abeyance request did not foreclose, or in any way infringe upon, California's ability to participate in the hearing on the wildfire costs. *See* Initial Decision, 146 FERC ¶ 63,017 at P 66 (detailing California's opportunities to participate in San Diego's rate hearing). California retained full party rights to participate in the wildfire cost rate proceeding. *See* 18 C.F.R. § 385.505 (during an agency hearing, a participant has the right to present evidence, including rebuttal evidence, to make objections and arguments, and to conduct cross-examination). California's decision to sit on its rights broke any causal relationship between the Commission's orders and California's alleged harm.

Moreover, an intervening act of an independent third party – San Diego – is required before any risk of injury to California. California claims that holding the FERC proceeding in abeyance would have allowed California to formulate a

position before the FERC "fully informed by the results of a [California commission] proceeding adjudicating the reasonableness of a portion of the wildfire costs." Br. 44. But, as California notes, San Diego "may" seek to recover the wildfire costs through a state proceeding but, to date, San Diego has not yet done so. Br. 10; *see also* Br. 2 (San Diego "could file" an application with California, but has not); Br. 40 (if San Diego does not seek retail rate recovery, its shareholders will shoulder the wildfire expenses). Because San Diego "controls the initiation of a proceeding before [California]" (Br. 43), California's alleged harm is not directly traceable to FERC's decision not to suspend the Commission's rate proceeding. *See Ass'n of Pub. Agency Customers*, 733 F.3d at 953 (to establish standing, petitioner must show that there are no independent actions of third parties that break the causal link between agency's action and petitioner's harm).

3. California's Alleged Injury Is Not Likely To Be Redressed By A Favorable Decision From This Court

Finally, Article III standing requires a showing that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38). Here, California, before it decided to try to halt the FERC proceeding, filed a protest in response to San Diego's filing raising several issues with San Diego's recovery of wildfire costs. Although California claims that its protest was simply to "preserve"

its arguments (Motion For Interlocutory Appeal at 6, Pet. ER 167), that preservation (along with any determinations made in its previous state proceedings on San Diego's recovery) could subject California to prejudgment claims in any event. Thus, California's alleged "injury" cannot be redressed by a favorable decision from this Court, because merely suspending FERC's proceeding does not absolve California from any "prejudgments" it already made. By engaging in the FERC proceeding from its inception, and taking a position on San Diego's recovery of wildfire costs in its protest, assuming arguendo that California could be subject to claims of prejudgment, it potentially could be subject to such claims regardless of the outcome of this appeal.

Moreover, although California claims that a finding in a state proceeding that San Diego's wildfire costs were imprudent would "cast doubt" on their recoverability through FERC-jurisdictional rates (Br. 33, 44), the Initial Decision already considered and rejected this claim. *See* Initial Decision, 146 FERC ¶ 63,017 at PP 55-60. In the FERC proceeding, the Presiding Judge acknowledged the argument raised by California in its protest that San Diego violated the state safety regulation, GO-95. *See id.* P 55. Nonetheless, the Presiding Judge found that, even if San Diego had been found to have violated California's safety rule (GO-95), "such a violation standing alone would be insufficient to shift the presumption [of prudency] against [San Diego]." *Id.* P 57.

Here, California has not suffered an injury, concrete or otherwise, that is in any way actual or imminent, or that is caused by the Commission's action challenged here; thus, it cannot meet the constitutional standing requirements. *See Lujan*, 504 U.S. at 560.

B. California Seeks Review Of Non-Final Interlocutory Orders Unreviewable Under The Federal Power Act

California seeks review of procedural decisions on its motion for abeyance – not one of which is a final decision on the merits. This Court, like other courts of appeal, has interpreted section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*, to impose a finality requirement that restricts review to "orders of definitive substantive impact, where judicial abstention would result in irreparable injury to a party." *Steamboaters*, 759 F.2d at 1387 (adopting three-factor test set forth in *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235 (D.C. Cir. 1980)). Similarly, the Administrative Procedure Act limits judicial review to only "final agency action." *See* 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."); *see also DRG Funding Corp. v. Sec'y of Housing & Urban Dev.*, 76 F.3d 1212, 1220 (D.C. Cir. 1996) (Ginsburg, J., concurring) (the finality requirement imposed by the Administrative Procedure Act permits interlocutory appeals only in exceptional cases"); *Alaska v. FERC*, 980 F.2d 761, 764 (D.C. Cir. 1992) (same); *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 288-89 (5th Cir. 1999) (same).

The court's test for determining whether an order is reviewable considers whether: (1) the order is final; (2) the order would inflict irreparable harm if not immediately reviewed; and (3) judicial review would invade matters reserved to Commission discretion. *Steamboaters*, 759 F.2d at 1388. As discussed below, California fails to satisfy the *Steamboaters* test.

1. The Decisions Under Review Are Not Final Commission Orders

By their very nature, the Chief Judge's decision to deny abeyance, followed by decisions by the Chief Judge and Chairman to deny interlocutory review, are procedural and not final. "An agency order is final when it 'imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process.'" *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003) (quoting *Papago*, 628 F.2d at 239); *see also Columbia Riverkeeper v. U.S. Coast Guard*, No. 12-73385, 2014 WL 3824247, at *7 (9th Cir. Aug. 5, 2014) (same). Orders declining to suspend a hearing and thereby requiring parties to continue with a procedural process do not fix any legal relationship. *See California v. FTC*, 549 F.2d 1321, 1324 (9th Cir. 1977) (premature interruption of the administrative process is only justified where it clearly appears that the agency is operating outside the scope of its authority); *see also Aluminum Co. of Am. v. ICC*, 790 F.2d 938, 942 (D.C. Cir. 1986) ("if the denial of a procedural right

constitutes final agency action, then the doctrine of finality is indeed an empty box"). Nor did FERC's decisions deny a right to California.

As discussed *supra* Part I.A.1, the orders simply decline to suspend the FERC process. S*ee id*. at 941 ("It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding."). California, as a party, continued to have a right to participate in the hearing but chose to abstain. Even if FERC's procedural decisions arguably limited California's scope of participation, California's ability to raise its claims to the Commission after the hearing made these rulings non-final. *See Alaska v. FERC*, 980 F.2d at 763 (immediate interlocutory appeal is not available so long as party has the "ability to raise its claims on postjudgment appeal") (citations omitted).

Commission regulations provide additional context to show that California seeks review of non-final orders. Rule 715 of the Commission's Rules of Practice and Procedure – the Commission regulation that California invoked to seek interlocutory review of the Presiding Judge's ruling – shows that appellate review under Federal Power Act section 313(b) is inapplicable here. *See* 18 C.F.R. § 385.715. Commission Rule 715 allows interlocutory appeals to the full Commission only upon a finding of "extraordinary circumstances." *Id.* § 385.715(a). If the Presiding Judge and Motions Commissioner deny

interlocutory review by the Commission, "the ruling of the presiding officer will be reviewed in the ordinary course of the proceeding as if the appeal had not been made." *Id.* § 385.715(d). The Secretary's notice rejecting California's rehearing request is also consistent with the finding of no Commission action. *See* Notice Rejecting Rehearing, Pet. ER 1 (stating that under FERC's regulation governing rehearing, Rule 713, California's request for rehearing does not lie). Moreover, this Court has found that notices from the Commission Secretary rejecting rehearing are not final Commission orders. *See Am. Rivers v. FERC*, 170 F.3d 896, 897 (9th Cir. 1999) ("FERC's Notice Rejecting Request for Rehearing does not qualify as a reviewable order."). Therefore, there is no final Commission action for this Court to review under section 313(b) of the Federal Power Act.

2. California Was Not Irreparably Harmed By The Decisions

Non-final orders are only reviewable "when parties face the prospect of irreparable injury, with no practical means of procuring effective relief after the close of the proceeding." *Papago*, 628 F.2d at 241 (citations omitted). Here, California provides no excuse for its failure to file a brief on exceptions to the Initial Decision consistent with the Commission's regulations. The existence of this administrative remedy at the Commission, of which California did not avail itself, demonstrates that the interlocutory decisions were not final Commission orders and that California is not irreparably harmed by them. *See Cities of*

Anaheim v. FERC, 692 F.2d 773, 778 (D.C. Cir. 1982) ("[T]he availability of relief from the final order . . . is sufficient to preclude the ruling denying admission of evidence from being considered a final order."). "Absent a 'clear showing of irreparable injury'" beyond the usual time and expense to pursue an administrative remedy, "the 'failure to exhaust administrative remedies serves as a bar to judicial intervention in the agency process.'" *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 108 (D.C. Cir. 1986) (quoting *Renegotiation Bd. v. Bannercroft Clothing Co.*, 415 U.S. 1, 24 (1974)).

California had the right to file a brief on exceptions under 18 C.F.R. § 385.711, within 30 days of the Presiding Judge's Initial Decision in San Diego's rate hearing. A brief on exceptions was the correct procedural avenue for California to challenge the Commission's earlier denial of its abeyance motion and obtain a final, reviewable Commission order on that issue. California chose not to file a brief. If California had timely filed a brief on exceptions, even limited to issues concerning its own alleged inability to participate in the hearing, the Commission could have addressed California's arguments regarding its ability to participate in the hearing in an order on the Initial Decision. *See* 18 C.F.R. §§ 385.708(d)(1), 385.711(a) & (d), 385.713(a) (detailing participant's right to file exceptions to initial decision and process for the Commission's review of an initial decision). The burden of filing a brief on exceptions can hardly be considered

irreparable harm. *See California v. FTC*, 549 F.2d at 1323 (litigation expense of administrative process is not irreparable injury to excuse exhaustion of administrative remedy).

3. Review At This Stage Would Invade The Province Of The Agency

Shortly after enactment of the Federal Power Act, the Supreme Court held that matters of procedure are reserved to Commission discretion and entirely unreviewable. *See FPC v. Metro. Edison Co.*, 304 U.S. 375, 384-85 (1938) (excluding procedural determinations from judicial review provision in the Federal Power Act); *see also Cities of Anaheim v. FERC*, 723 F.2d 656, 660 (9th Cir. 1984) (recognizing the Supreme Court's decision in *Metropolitan Edison* as narrowing the scope of judicial review under the Federal Power Act to exclude FERC procedural orders).

There is a logical reason to avoid review of the agency's procedural determinations. Immediate judicial intervention would undermine the authority of the agency by judging the lawfulness of the agency's action before the Commission itself has an opportunity to consider it. *See Papago*, 628 F.2d at 243 (judging preliminary determinations of the Commission would "undermine the Commission's primary jurisdiction"). California's failure to pursue a remedy before the Commission in a brief on exceptions deprived the Commission of the ability to decide this issue in the first instance. The statute makes plain that

appellate review lies only for determinations made by the Commission, and only after the party has sought rehearing of the Commission's decision. *See Sierra Ass'n For Env't v. FERC*, 791 F.2d 1403, 1407 (9th Cir. 1986) ("16 U.S.C. § 825*l* requires that no objection to an order of FERC may be considered on review unless the same objection was first specifically raised in an application for rehearing directed to FERC"). Allowing appellate review of preliminary procedural determinations would contravene the purpose of the rehearing requirement "to give the Commission notice of its alleged errors so that it may have the opportunity to correct them." *See id*. (quoting *City of Vanceburg v. FERC*, 571 F.2d 630, 642 (D.C. Cir. 1977)). *See also Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 154-55 (D.C. Cir. 2006) (recognizing the multiple benefits of exhaustion of administrative remedies, including production of a useful record for subsequent judicial consideration).

II. ASSUMING JURISDICTION, THE ORDERS SHOULD BE AFFIRMED ON THE MERITS

Even if the Court were to find jurisdiction over the claims raised by California, these procedural determinations were reasonable and a proper exercise of the Commission's discretion.

A. Standard Of Review

FERC determinations are reviewed under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Review under this standard is "highly deferential." *Cal. Trout v. FERC*, 572 F.3d 1003, 1012 (9th Cir. 2009). "[A]gency decisions may be set aside only if 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008) (quoting 5 U.S.C. § 706(2)(A)). The Court "may reverse under the arbitrary and capricious standard if the agency relied on factors that Congress did not intend it to consider, or offered an explanation for its decision that runs counter to the evidence or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

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

B. The FERC Chief Judge And Chairman Acted Within Their Considerable Discretion To Deny Abeyance And Interlocutory Review

At the outset, the decisions under review relate to matters almost entirely within the Commission's discretion. *See, e.g.*, *Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos*., 498 U.S. 211, 230 (1991) (The question of "how best to handle related, yet discrete, issues in terms of procedures" is a matter committed to agency discretion; "[t]he [lower] court clearly overshot the mark" if it required FERC to resolve a particular issue in a particular proceeding in a particular way); *Tenn. Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) ("An agency has broad discretion to determine when and how to hear and decide the matters that come before it."). Therefore, these discretionary procedural judgments are due substantial deference.

Additionally, the decisions provide sufficient reasoning to support their conclusions. *See Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 552 (D.C. Cir. 2010) (a court will uphold an agency's decision as long as the agency's "path may reasonably be discerned" – a "point-by-point rebuttal is not necessarily required") (citations omitted). The original decision denying abeyance appropriately considered the efficiency to be gained by doing so. *See* Second Abeyance Order at P 4, Pet. ER 9. In denying the request for abeyance, the Chief Judge reasoned that the FERC proceeding is completely independent of any

prospective state proceeding, and that administrative efficiency would not be served by holding the case in abeyance. *Id*. The Chief Judge weighed the substantial concern of rate uncertainty given the indefinite period of delay against California's failure to provide any compelling reason for such delay. The decisions rejecting interlocutory review applied the appropriate standard of whether there exist "extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person." 18 C.F.R. § 385.715(a). Both the Chief Judge and Chairman found that California failed to demonstrate extraordinary circumstances.

In particular, the Chief Judge found that California "failed to cite a single case, rule, or regulation finding that an agency's litigation position in a separate forum amounts to prejudging an issue that may come before it as an adjudicator in an unrelated proceeding." Interlocutory Motion Order at P 4, Pet. ER 6. The Chief Judge reasoned that "[a]n indefinite abeyance and the associated open-ended rate uncertainty herein would not benefit administrative or judicial economy, or wholesale or California ratepayers." *Id*. Finally, the Secretary, acting on California's rehearing request and motion for stay pending appellate review, appropriately rejected California's rehearing request as impermissible under Commission regulations. *See* Notice Rejecting Rehearing, Pet. ER 1 (citing 18

C.F.R. 385.713(a) (rehearing only lies with final Commission orders)). By insisting on immediate interlocutory review, and by failing to follow the Commission's regulations by failing to file a brief on exceptions in the normal course of review of an administrative law judge's initial decision, California failed to request or receive a final Commission order ruling on the interlocutory procedural rulings (as well as any merits rulings) by individual agency officials.

Contrary to California's position (Br. 47), the denial of abeyance in this proceeding is fully consistent with Commission precedent. Each of the three Commission cases that California cites is factually distinguishable. In all three, the Commission held one proceeding in abeyance to await resolution of another *pending* case. *See PJM Interconnection, L.L.C.*, 118 FERC ¶ 61,154, at PP 8-9 (2007) (holding one FERC hearing in abeyance awaiting resolution of another ongoing FERC hearing); *Entergy Servs., Inc.*, 111 FERC ¶ 61,145, at PP 16, 18-19 (2005) (involved two directly-related, ongoing FERC proceedings); and *Cal. Indep. Sys. Operator, Corp.*, 139 FERC ¶ 61,072, at P 4 (2012) (FERC proceeding held in abeyance pending resolution of ongoing state proceeding, the resolution of which could completely eliminate the need for the FERC proceeding). Here, the Chief Judge declined to suspend San Diego's rate hearing, in part, because abeyance would have been open-ended in the absence of any pending proceeding before the state commission. *See* Second Abeyance Order at PP 3, 4, Pet. ER 8-9;

see also Interlocutory Motion Order at P 4, Pet. ER 6 (noting no open proceeding at California commission in which to address the prudence issue).

These three cited cases are also distinguishable in that the Commission held a proceeding in abeyance where resolution of the other proceeding likely would directly impact the suspended case. In this case, recovery of the wildfire costs through FERC-jurisdictional rates is independent of whatever would happen in a future California retail rate proceeding. The costs San Diego seeks are distinct and the practices and procedures are distinct. *See* Second Abeyance Order P 4, Pet. ER 9 ("when [San Diego] files for recovery at [California], it will be subject to different legal standards, procedures, and evidentiary requirements than at the federal level").

California argues that an abeyance would have been more convenient for California because it "would have allowed [California] to formulate a position before the FERC fully informed by the results of a [California] proceeding adjudicating the reasonableness of the vast majority of these same wildfire costs, and advocate at the FERC on that basis." Br. 44. However, the Commission reasonably balanced California's interest in efficiency with the need for rate certainty. *See* Interlocutory Motion Order at P 4, Pet. ER 6 ("open-ended rate uncertainty" would not benefit administrative economy); *see also* Second Abeyance Order at P 4, Pet. ER 9 (same). It was reasonable to deny California's

request for an indefinite abeyance that would solely benefit California, but potentially harm San Diego's ratepayers.

The Commission's action here is consistent with prior Commission precedent. In *Central Vermont Public Service Corp.*, the Commission declined to stay a proceeding based on the New Hampshire Public Utilities Commission's inability to participate. 40 FERC ¶ 61,258 (1987). There, New Hampshire argued that its statutory code of ethics required it to abstain from public comment about matters pending before it. *See id*. at 61,867 n.1. Notwithstanding New Hampshire's limitations, the Commission rejected those arguments as an insufficient basis to delay hearing on Central Vermont's rate filing. The Commission reasoned, "[w]hile we can sympathize with the constraints that New Hampshire law might place on the [New Hampshire Commission's] ability to comment on the rate of return issue, we nevertheless conclude that our obligation to base our decisions on information in the public record outweighs any interest of comity that might be implicated here." *Id*. at 61,866 (declining to withhold Commission action in a rate case "on the mere possibility that a party, even a state commission, might wish to challenge that rate"); *see also Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) ("the power to initiate rate changes rests with the utility and cannot be appropriated by FERC in the absence of a finding that the existing rate was unlawful"). Absent a timetable for San Diego's filing

with California, granting an abeyance would create a deadlock that would undermine the very rate certainty intended by the Commission under its formula rate policy. *See* Second Abeyance Order at P 3, Pet. ER 9 (citing *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, P 386 (2006)).

C. California's Motion For Stay Pending Appeal Was Moot

California argues for the first time on appeal that the Commission failed to act on its motion to stay pending appellate review that was part of its rehearing request. *See Sierra Ass'n For Env't*, 791 F.2d at 1407 ("16 U.S.C. § 825*l* requires that no objection to an order of FERC may be considered by the court on review unless the same objection was first specifically raised in an application for rehearing directed to FERC"). To the contrary, the Commission's Notice Rejecting Rehearing explained that rehearing (and therefore appeal) does not lie on plainly interlocutory decisions. *See* Notice Rejecting Rehearing, Pet. ER 1. By rejecting California's request for rehearing of a non-final order as impermissible, California was informed that it failed to satisfy all of the statutory prerequisites to judicial review. Therefore, it followed that California's related motion for stay pending judicial review of interlocutory, procedural orders was moot as a result of the unavailability of judicial review.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of jurisdiction. If not, the orders should be affirmed on the merits.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Commission states that it is not aware of any case related to this one.

/s/ Karin L. Larson
Karin L. Larson

CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, that this brief is proportionately spaced and its type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). This brief is 8,052 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Karin L. Larson
Karin L. Larson

ADDENDUM
Statutes & Regulations

TABLE OF CONTENTS

PAGE

dicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

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

(i) a copy of the rule;

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

(iii) the proposed effective date of the rule.

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

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

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

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.

vertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

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

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

part, including for the purpose of considering the use of alternative dispute resolution procedures;

(8) Rule on, and dispose of, procedural matters, including oral or written motions;

(9) Summarily dispose of a proceeding or part of a proceeding, as provided in Rule 217;

(10) Certify a question to the Commission, as provided in Rule 714;

(11) Permit or deny appeal of an interlocutory ruling, as provided in Rule 715;

(12) Rule on motions to intervene, as provided in Rule 214;

(13) Separate any issue or group of issues from other issues in a proceeding and treat such issue or group of issues as a separate phase of the proceeding;

(14) Maintain order, as follows:

(i) Ensure that any disregard by any person of rulings on matters of order and procedure is noted on the record or, if appropriate, is made the subject of a special written report to the Commission;

(ii) In the event any person engages in disrespectful, disorderly, or contumacious language or conduct in connection with the hearing, recess the hearing for such time as necessary to regain order;

(iii) Request that the Commission take appropriate action, including removal from the proceeding, against a participant or counsel, if necessary to maintain order.

(15) Modify any time period, if such modification is in the interest of justice and will result in no undue prejudice to any participant;

(16) Limit the number of expert witnesses who may testify on any issue, consistent with the rule against repetitious testimony in Rule 509(a);

(17) Limit the number of persons, other than staff, representing a similar interest who may examine witnesses or make or argue motions or objections;

(18) Require; or authorize the admission of, further evidence upon any issue at any time before the close of the evidentiary record;

(19) Rule on motions for reconsideration of an initial decision as provided in Rule 717;

(20) Take any other action necessary or appropriate to the discharge of the duties of a presiding officer, consistent with applicable law and policy.

(c) *Disqualification.* (1) A presiding officer may withdraw from a proceeding, if that officer believes himself or herself disqualified.

(2) The Commission may, for good cause, order the removal of any presiding officer from a proceeding, on motion filed with the Commission or otherwise.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 375, 49 FR 21315, May 21, 1984; Order 466, 52 FR 6970, Mar. 6, 1987; Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.505 Right of participants to present evidence (Rule 505).

Consistent with the provisions of this part, a participant has the right to present such evidence, including rebuttal evidence, to make such objections and arguments, and to conduct such cross-examination, as may be necessary to assure true and full disclosure of the facts.

§ 385.506 Examination of witnesses during hearing (Rule 506).

(a) *Prepared written direct and rebuttal testimony.* Unless the presiding officer orders such testimony to be presented orally, direct and rebuttal testimony of a witness in a hearing must be prepared and submitted in written form, as required by Rule 507. Any witness submitting written testimony must be available for cross-examination, as provided in this subpart.

(b) *Oral testimony during hearing.* Oral examination of a witness in a hearing must be conducted under oath and in the presence of the presiding officer, with opportunity for all participants to question the witness to the extent consistent with Rules 504(b)(17), 505, and 509(a).

§ 385.507 Prepared written testimony (Rule 507).

(a) *Offered as an exhibit.* The prepared written testimony of any witness must be offered as an exhibit. The presiding officer will allow a reasonable period of time for the preparation of such written testimony.

(b) *Time for filing.* Any prepared written testimony must be filed and served

§ 385.704 Rights of participants before initial decision (Rule 704).

After testimony is taken in a proceeding, or phase of a proceeding, the presiding officer will afford every participant an opportunity to:

(a) Submit written initial briefs in accordance with Rule 706, except that the presiding officer may provide an opportunity for oral argument in lieu of, or in addition to, initial briefs; and

(b) Submit written reply briefs in accordance with Rule 706, except that the presiding officer may:

(1) Provide an opportunity for oral reply argument in lieu of, or in addition to, reply briefs; or

(2) For good cause, deny opportunity for reply or limit the issues which may be addressed in any reply.

§ 385.705 Additional powers of presiding officer with respect to briefs (Rule 705).

(a) *Limitations on briefs.* A presiding officer, with due regard to the nature of the proceeding, may limit the length of any brief to be filed under Rule 706.

(b) *Additional briefs and other filings.* If appropriate, the presiding officer may permit or require briefs or other filings in addition to those provided for in Rule 706.

§ 385.706 Initial and reply briefs before initial decision (Rule 706).

(a) *When filed.* The presiding officer will prescribe a time for filing initial or reply briefs and for service of such briefs, giving due regard to the nature of the proceeding, the extent of the record, and the number and complexity of the issues. Unless the presiding officer otherwise orders, the time prescribed in a proceeding for filing briefs will be the same for all initial briefs and the same for all reply briefs.

(b) *Contents.* (1) An initial brief filed with the presiding officer must include:

(i) A concise statement of the case;

(ii) A separate section containing proposed findings and conclusions, unless waived by the presiding officer;

(iii) Arguments in support of the participant's position; and

(iv) Any other matter required by the presiding officer.

(2)(i) A reply brief filed with the presiding officer must be limited to a response to any arguments and issues raised in the initial briefs.

(ii) The presiding officer may impose limits on the reply brief in addition to any prescribed under paragraph (b)(2)(i) of this section.

(c) *Form.* (1) An exhibit admitted in evidence or marked for identification in the record may not be reproduced in the brief, but may be reproduced, within reasonable limits, in an appendix to the brief. Any pertinent analysis of an exhibit may be included in a brief.

(2) If a brief exceeds 20 pages, the brief must be accompanied by a table of contents and of points made, including page references, and an alphabetical list of citations, with page references.

(d) *Record.* All initial and reply briefs will accompany the record and be available to the Commission and the presiding officer for consideration in deciding the case.

§ 385.707 Oral argument before initial decision (Rule 707).

(a) *Procedure.* The presiding officer will designate the order of any oral argument to be held, set a time limit on each argument, and make any other procedural rulings.

(b) *Scope.* (1) If oral argument is held without an initial brief, each participant must be given the opportunity to present orally the information required or permitted to be included in initial briefs under Rule 706(b).

(2) If oral argument is held in addition to an initial or reply brief, oral argument may be limited to issues considered by the presiding officer to be appropriate issues for oral argument.

(c) *Inclusion of transcript of oral argument.* All oral arguments will be transcribed and included in the record and will be available to the Commission and the presiding officer in deciding the case.

§ 385.708 Initial decisions by presiding officer (Rule 708).

(a) *Applicability.* This section applies to any proceeding in which a presiding officer, other than the Commission, presided over the reception of the evidence.

(b) *General rule.* (1) Except as otherwise ordered by the Commission or provided in paragraph (b)(2) of this section, the presiding officer will prepare a written initial decision.

(2)(i) If time and circumstances require, the presiding officer may issue an order stating that an oral initial decision will be issued.

(ii) An oral decision is considered served upon all participants when the decision is issued orally on the record. Promptly after service of the oral decision, the presiding officer will prepare the oral initial decision contained in the transcript in the format of a written initial decision.

(3) Any initial decision prepared under paragraph (b)(1) or (b)(2) of this section will be certified to the Commission by the presiding officer with a copy of the record in the proceeding.

(4) Not later than 35 days after the certification of an initial decision, under paragraph (b)(3) of this section, the presiding officer, after notifying the participants and receiving no objection from them, may make technical corrections to the initial decision.

(c) *Initial decision prepared and certified by presiding officer.* (1) The presiding officer who presides over the reception of evidence will prepare and certify the initial decision, if any, unless the officer is unavailable or the Commission provides otherwise in accordance with 5 U.S.C. 557(b).

(2) If the presiding officer who presided over the reception of evidence becomes unavailable, the Chief Administrative Law Judge may issue an order designating another qualified presiding officer to prepare and certify the initial decision.

(d) *Finality of initial decision.* For purposes of requests for rehearing under Rule 713, an initial decision becomes a final Commission decision 10 days after exceptions are due under Rule 711 unless:

(1) Exceptions are timely filed under Rule 711; or

(2) The Commission issues an order staying the effectiveness of the decision pending review under Rule 712.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21315, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.709 Other types of decisions (Rule 709).

In lieu of an initial decision under Rule 708, the Commission may order any type of decision as provided by 5 U.S.C. 557(b), or permit waiver of the initial decision as provided by Rule 710.

§ 385.710 Waiver of the initial decision (Rule 710).

(a) *General rule.* Any participant may file a motion requesting the Commission to issue a final decision without any initial decision. If all participants join in the motion, the motion is granted, unless the Commission denies the motion within 10 days after the date of filing of the motion or, in the case of an oral motion under paragraph (c)(2) of this section, within 10 days after the motion is transmitted to the Commission. If all participants do not join in the motion, the motion is denied unless the Commission grants the motion within 30 days of filing of the motion or, in the case of an oral motion under paragraph (c)(2) of this section, within 30 days after the motion is transmitted to the Commission.

(b) *Content.* Any motion to waive the initial decision filed with the Commission must specify:

(1) Whether any participant waives any procedural right;

(2) Whether all participants concur in the request to waive the initial decision;

(3) The reasons that waiver of the initial decision is in the interest of parties and the public interest;

(4) Whether any participant desires an opportunity for filing briefs; and

(5) Whether any participant desires an opportunity for oral argument before the presiding officer, the Commission, or an individual Commissioner.

(c) *How and when made.* (1) Any written motion under this section may be filed at any time, but not later than the fifth day following the close of the hearing conducted under subpart E of this part.

(2) An oral motion under this section may be made during a hearing session, in which case the presiding officer will transmit to the Commission the relevant portions of the transcript of the hearing in which the motion was made.

(d) *Waiver by presiding officer.* A motion for waiver of the initial decision, requested for the purpose of certification of a contested settlement pursuant to Rule 602(h)(2)(iii)(A), may be filed with, and decided by, the presiding officer. If all parties join in the motion, the presiding officer will grant the motion. If not all parties join in the motion, the motion is denied unless the presiding officer grants the motion within 30 days of filing the written motion or presenting an oral motion. The contents of any motion filed under paragraph (d) of this section must comply with the requirements in paragraph (b) of this section. A motion may be oral or written, and may be made whenever appropriate for the consideration of the presiding officer.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 578, 60 FR 19508, Apr. 19, 1995]

§ 385.711 Exceptions and briefs on and opposing exceptions after initial decision (Rule 711).

(a) *Exceptions.* (1)(i) Any participant may file with the Commission exceptions to the initial decision in a brief on exceptions not later than 30 days after service of the initial decision.

(ii) Not later than 20 days after the latest date for filing a brief on exceptions, any participant may file a brief opposing exceptions in response to a brief on exceptions.

(iii) A participant may file, within the time set for filing briefs opposing exceptions, a brief on exceptions solely for the purpose of incorporating by reference one or more numbered exceptions contained in the brief of another participant. A brief filed under this clause need not comply with the requirements set forth in paragraph (b) of this section.

(2) A brief on exceptions or a brief opposing exceptions may not exceed 100 pages, unless the Chief Administrative Law Judge, upon motion, changes the page limitation.

(3) The Secretary may extend, on motion or upon direction of the Commission, the time limits for any brief on or opposing exceptions. No additional briefs are permitted, unless specifically ordered by the Commission.

(4) A participant may not attach to, or incorporate by reference in, any brief on exceptions or brief opposing exceptions any portion of an initial or reply brief filed in the proceeding.

(b) *Nature of briefs on exceptions and of briefs opposing exceptions.* (1) Any brief on exceptions and any brief opposing exceptions must include:

(i) If the brief exceeds 10 pages in length, a separate summary of the brief not longer than five pages; and

(ii) A presentation of the participant's position and arguments in support of that position, including references to the pages of the record or exhibits containing evidence and arguments in support of that position.

(2) Any brief on exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A short statement of the case;

(ii) A list of numbered exceptions, including a specification of each error of fact or law asserted; and

(iii) A concise discussion of the policy considerations that may warrant full Commission review and opinion.

(3) A brief opposing exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A list of exceptions opposed, by number; and

(ii) A rebuttal of policy considerations claimed to warrant Commission review.

(c) *Oral argument.* (1) Any participant filing a brief on exceptions or brief opposing exceptions may request, by written motion, oral argument before the Commission or an individual Commissioner.

(2) A motion under paragraph (c)(1) of this section must be filed within the time limit for filing briefs opposing exceptions.

(3) No answer may be made to a motion under paragraph (c)(1) and, to that extent, Rule 213(a)(3) is inapplicable to a motion for oral argument.

(4) A motion under paragraph (c)(1) of this section may be granted at the discretion of the Commission. If the motion is granted, any oral argument will be limited, unless otherwise specified, to matters properly raised by the briefs.

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver*. If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver*. If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver*. Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule.* If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument.* When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review*. After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability*. (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file.* A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request.* Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled ''Statement of Issues,'' listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers.* (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay*. Unless otherwise ordered by the Commission, the filing of a request for rehearing does

not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification under this section does not suspend the proceeding.

§ 385.715 Interlocutory appeals to the Commission from rulings of presiding officers (Rule 715).

(a) *General rule.* A participant may not appeal to the Commission any ruling of a presiding officer during a proceeding, unless the presiding officer under paragraph (b) of this section, or the motions Commissioner, under paragraph (c) of this section, finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person.

(b) *Motion to the presiding officer to permit appeal.* (1) Any participant in a proceeding may, during the proceeding, move that the presiding officer permit appeal to the Commission from a ruling of the presiding officer. The motion must be made within 15 days of the ruling of the presiding officer and must state why prompt Commission review is necessary under the standards of paragraph (a) of this section

(2) Upon receipt of a motion to permit appeal under subparagraph (a)(1) of this section, the presiding officer will determine, according to the standards of paragraph (a) of this section, whether to permit appeal of the ruling to the Commission. The presiding officer need not consider any answer to this motion.

(3) Any motion to permit appeal to the Commission of an order issued under Rule 604, or appeal of a ruling under paragraph (a) or (b) of Rule 905, must be granted by the presiding officer.

(4) A presiding officer must issue an order, orally or in writing, containing the determination made under paragraph (b)(2) of this section, including the date of the action taken.

(5) If the presiding officer permits appeal, the presiding officer will transmit to the Commission:

(i) A memorandum which sets forth the relevant issues and an explanation of the rulings on the issues; and

(ii) the participant's motion under paragraph (b)(1) of this section and any answer permitted to the motion.

(6) If the presiding officer does not issue an order under paragraph (b)(1) of this section within 15 days after the motion is filed under paragraph (b)(1) of this section, the motion is denied.

(c) *Appeal of a presiding officer's denial of motion to permit appeal.* (1) If a motion to permit appeal is denied by the presiding officer, the participant who made the motion may appeal the denial to the Commissioner who is designated Motions Commissioner, in accordance with this paragraph. For purposes of this section, ''Motions Commissioner'' means the Chairman or a member of the Commission designated by the Chairman to rule on motions to permit interlocutory appeal. Any person filing an appeal under this paragraph must serve separate copies of the appeal on the Motions Commissioner and on the General Counsel by Express Mail or by hand delivery.

(2) A participant must submit an appeal under this paragraph not later than 7 days after the motion to permit appeal under paragraph (b) of this section is denied. The appeal must state why prompt Commission review is necessary under the standards set forth in paragraph (c)(5) of this section. The appeal must be labeled in accordance with § 385.2002(b) of this chapter.

(3) A participant who appeals under this paragraph must file with the appeal a copy of the written order denying the motion or, if the denial was issued orally, the relevant portions of the transcript.

(4) The Motions Commissioner may, in considering an appeal under this paragraph, order the presiding officer or any participant in the proceeding to provide additional information.

(5) The Motions Commissioner will permit an appeal to the Commission under this paragraph only if the Motions Commissioner finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or to prevent irreparable harm to a person. If the Motions Commissioner makes no determination within 7 days after filing the appeal under this paragraph or within the time the Motions Commissioner otherwise provides to receive and consider information under this paragraph, the appeal to the Commission under paragraph (b) of this section will not be permitted.

(6) If appeal under paragraph (b) of this section is not permitted, the contested ruling of the presiding officer will be reviewed in the ordinary course of the proceeding as if the appeal had not been made.

(7) If the Motions Commissioner permits an appeal to the Commission, the Secretary will issue an order containing that decision.

(d) *Commission action.* Unless the Commission acts upon an appeal permitted by a presiding officer under paragraph (b) of this section, or by the Motions Commissioner under paragraph (c) of this section, within 15 days after the date on which the presiding officer or Motions Commissioner permits appeal, the ruling of the presiding officer will be reviewed in the ordinary course of the proceeding as if the appeal had not been made.

(e) *Appeal not to suspend proceeding.* Any decision by a presiding officer to permit appeal under paragraph (b) of this section or by the Motions Commissioner to permit an appeal under paragraph (c) of this section will not suspend the proceeding, unless otherwise ordered by the presiding officer or the Motions Commissioner.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 402, 49 FR 39539, Oct. 9, 1984; Order 725, 74 FR 41039, Aug. 14, 2009]

§ 385.716 Reopening (Rule 716).

(a) *General rule.* To the extent permitted by law, the presiding officer or the Commission may, for good cause under paragraph (c) of this section, reopen the evidentiary record in a proceeding for the purpose of taking additional evidence.

(b) *By motion.* (1) Any participant may file a motion to reopen the record.

(2) Any motion to reopen must set forth clearly the facts sought to be proven and the reasons claimed to constitute grounds for reopening.

(3) A participant who does not file an answer to any motion to reopen will be deemed to have waived any objection to the motion provided that no other participant has raised the same objection.

9th Circuit Case Number(s) 13-74361

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CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) September 24, 2014 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/Karin L. Larson, Attorney

****

CERTIFICATE OF SERVICE
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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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

Signature (use "s/" format)

CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 13-74361

I, Karin L. Larson , certify that this brief is identical to the version submitted electronically on [date] 9/24/2014 .

Date 9/30/2014

Signature /s/ Karin L. Larson

(either manual signature or "s/" plus typed name is acceptable)