ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

No. 12-1434

TC RAVENSWOOD, LLC,
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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DECEMBER 6, 2013
FINAL BRIEF: FEBRUARY 3, 2014

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying docket are as stated in the Brief of Petitioner.

B. Rulings Under Review

1. Order Rejecting Proposed Rate Schedules, *TC Ravenswood, LLC*, FERC Docket No. ER10-1359, 133 FERC ¶ 61,087 (Oct. 27, 2010) ("Initial Order"), R. 32, JA 207; and

2. Order Dismissing Rehearing As Moot, *TC Ravenswood, LLC*, FERC Docket No. ER10-1359, 140 FERC ¶ 61,214 (Sept. 20, 2012) ("Dismissal Order"), R. 37, JA 255.

C. Related Cases

This case has not previously been before this Court or any other court. This appeal is one of a number of recent cases before this Court, some still pending, concerning Petitioner TC Ravenswood, LLC's (and its predecessor's) various disputes with the New York Independent System Operator. *See TC Ravenswood, LLC v. FERC*, D.C. Cir. Nos. 12-1008, *et al.*, ___ F.3d ____, 2013 WL 6509470 (D.C. Cir. Dec. 13, 2013) (demand curve rates for installed capacity market); *Pub. Serv. Comm'n of N.Y. v. FERC*, D.C. Cir. Nos. 08-1366, *et al.* (in abeyance pending agency decision) (Ravenswood intervened in appeals of rate mitigation in New York City capacity market); *TC Ravenswood, LLC v. FERC*, 705 F.3d 474 (D.C. Cir. 2013) (rate mitigation in energy markets outside New York City); *TC Ravenswood, LLC v. FERC*, 331 F. App'x 8 (D.C. Cir. 2009) (compensation for Minimum Oil Burn Service); *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804 (D.C. Cir. 2007) (installed capacity requirements); *Keyspan-Ravenswood, LLC v. FERC*, 348 F.3d 1053 (D.C. Cir. 2003) (price cap for New York City capacity market).

/s/ *Carol J. Banta*
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Attorney

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Federal Power Act

Natural Gas Act

GLOSSARY

Commission or FERC	Respondent Federal Energy Regulatory Commission
Court Order	This Court's order dated March 1, 2013, referring the Commission's motion to dismiss to the merits panel and directing the parties to address, in their briefs, issues relating to jurisdiction and finality
Dismissal Order	Order Dismissing Rehearing As Moot, *TC Ravenswood, LLC*, 140 FERC ¶ 61,214 (2012), R. 37, JA 255
FERC Orders	Initial Order and Dismissal Order
FPA or Act	Federal Power Act
Initial Order	Order Rejecting Proposed Rate Schedules, *TC Ravenswood, LLC*, 133 FERC ¶ 61,087 (2010), R. 32, JA 207
Minimum Oil Burn Service	A reliability service provided by dual-fuel generators by burning fuel oil at a designated minimum level under certain system conditions, as required by Local Reliability Rule I-R3
Ravenswood	Petitioner TC Ravenswood, LLC
Reliability Council	New York State Reliability Council (called "NYSRC" in Petitioner's Brief)
Rule I-R3	Local Reliability Rule, established by Reliability Council, requiring dual-fuel generators to provide Minimum Oil Burn Service under designated system conditions
Services Tariff	New York Independent System Operator Market Administration and Control Area Services Tariff

GLOSSARY

Settlement	FERC-approved settlement agreement among Ravenswood, System Operator, and other parties resolving Ravenswood's compensation for Minimum Oil Burn Service from May 2009 through April 2014
System Operator	New York Independent System Operator (called "NYISO" in Petitioner's Brief)

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

COUNTERSTATEMENT OF JURISDICTION

The Court lacks jurisdiction to review the challenged orders of the Federal Energy Regulatory Commission ("Commission" or "FERC"). In addition to satisfying the requirements of Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), for judicial review of FERC rulings, Petitioner TC Ravenswood, LLC ("Ravenswood") must satisfy the requirements of Article III of the United States Constitution. As set forth more fully in Part I.A of the Argument, *infra*, Ravenswood lacks standing because its claimed injuries are speculative, not

immediate and concrete. For similar reasons, as set forth more fully in Part I.B of the Argument, Ravenswood's arguments are not ripe for review. Ravenswood also cannot satisfy the statutory requirements for judicial review, as the Commission did not issue a final order on the merits that aggrieved Ravenswood (Argument Part II.A, *infra*) and Ravenswood did not seek agency rehearing of the order dismissing its request for rehearing as moot (Argument Part II.B, *infra*).

STATEMENT OF THE ISSUES

1. Whether this Court has Article III jurisdiction to review the challenged Commission orders, where Petitioner Ravenswood, having settled the issue of its compensation for a form of reliability service, asserts injuries — a procedural interest in obtaining a declaratory ruling on tariff filing rights, and the burden of potential future litigation — that are not sufficiently concrete or immediate to demonstrate standing or ripeness.

2. Whether this Court has jurisdiction under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), to review the challenged Commission orders, where: (A) the Commission never issued a final, reviewable order on Ravenswood's tariff filing, on account of a settlement that resolved Ravenswood's compensation, and (B) Ravenswood failed to seek rehearing of the Commission's determination that Ravenswood was not aggrieved and that the remaining issues were moot because of that settlement.

3. Assuming jurisdiction, whether the Commission: (A) reasonably found that Ravenswood's proposed tariff was duplicative of the New York Independent System Operator's tariff and (B) reasonably concluded that Ravenswood's request for rehearing of that determination was moot, and appropriately declined to rule on a hypothetical matter.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes are contained in the attached Addendum.

INTRODUCTION

This case concerns the latest in a long series of disputes between Ravenswood, a generator operating in New York City, and the New York Independent System Operator ("System Operator") relating to electricity pricing. The instant appeal involves compensation for a particular form of reliability service in the New York wholesale electricity market.

Following years of disputes over compensation for a reliability service known as Minimum Oil Burn Service, Ravenswood filed a complaint before the Commission seeking payment from the System Operator, through the System Operator's tariff, for certain costs associated with that service. Concurrent with that filing, Ravenswood filed a separate tariff of its own, which would provide for additional compensation for Minimum Oil Burn Service, to be paid by participants in the System Operator's market.

The Commission initially rejected Ravenswood's tariff filing, finding it duplicative of the System Operator's tariff, which exclusively governs pricing for that reliability service in the System Operator's market. Order Rejecting Proposed Rate Schedules, *TC Ravenswood, LLC*, 133 FERC ¶ 61,087 (2010) ("Initial Order"), R. 32, JA 207. After the complaint proceeding culminated in a settlement that resolved all compensation to Ravenswood for Minimum Oil Burn Service from May 2009 through April 2014, the Commission dismissed Ravenswood's request for rehearing on its separate tariff application as moot. Order Dismissing Rehearing As Moot, *TC Ravenswood, LLC*, 140 FERC ¶ 61,214 (2012) ("Dismissal Order"), R. 37, JA 255.[1]

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

Section 201 of the Federal Power Act ("FPA" or "Act") gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of 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). All rates for or in connection with

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA § 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e).

The Commission's efforts to foster wholesale electricity competition over broader geographic areas in recent decades have led to the creation of independent system operators and regional transmission organizations. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-37 (2008). These independent regional entities operate the transmission grid on behalf of transmission-owning member utilities and are required to maintain system reliability. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 169 & n.1 (2010) (explaining responsibilities of regional system operators).

The New York Independent System Operator is responsible for administering New York's wholesale electricity markets, including by "enforc[ing] rules designed to ensure the reliability of the state's electricity grid." *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 806 (D.C. Cir. 2007). The structure and development of the System Operator's network and electricity markets are familiar to this Court — especially so in the context of Ravenswood filings and appeals. *See, e.g.*, *TC Ravenswood, LLC v. FERC*, D.C. Cir. Nos. 12-1008, *et al.*, ___ F.3d ____, 2013 WL 6509470 (D.C. Cir. Dec. 13, 2013) (demand curve rates for installed capacity market); *TC Ravenswood, LLC v. FERC*, 705 F.3d 474 (D.C. Cir.

2013) (rate mitigation in energy markets outside New York City); *TC Ravenswood, LLC v. FERC*, 331 F. App'x 8 (D.C. Cir. 2009) (compensation for Minimum Oil Burn Service); *Consol. Edison Co. of N.Y., Inc. v. FERC*, 510 F.3d 333 (D.C. Cir. 2007) (price spikes in operating reserves markets); *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964 (D.C. Cir. 2003) (same); *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232 (D.C. Cir. 2005) (approval of rate design for installed capacity market); *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964 (D.C. Cir. 2005) (mitigation of prices charged by New York generators and marketers); *PSEG Energy Res. & Trade, LLC v. FERC*, 360 F.3d 200 (D.C. Cir. 2004) (same); *Keyspan-Ravenswood, LLC v. FERC*, 348 F.3d 1053 (D.C. Cir. 2003) (price cap for New York City capacity market).

The New York State Reliability Council ("Reliability Council") is a non-profit corporation established by the System Operator to develop reliability standards for New York's grid. *Keyspan-Ravenswood*, 474 F.3d at 806; *see also Cent. Hudson Gas & Elec. Corp.*, 83 FERC ¶ 61,352 at p. 62,405-13 (1998), *on reh'g*, 87 FERC ¶ 61,135 (1999).

II. THE COMMISSION PROCEEDINGS AND ORDERS

A. Minimum Oil Burn Service

Ravenswood operates an electric generation facility in New York City. Initial Order at P 2, JA 207. The facility includes three units that can operate using

either natural gas or fuel oil. *See Keyspan-Ravenswood, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 119 FERC ¶ 61,089 at P 2 (2007). As the operator of a dual-fuel generator, Ravenswood can be required to burn fuel oil at a designated minimum level under certain system conditions ("Minimum Oil Burn Service"), pursuant to Local Reliability Rule I-R3 established by the Reliability Council. Initial Order at P 2, JA 207. The Reliability Council requires such fuel usage in times of high local demand because oil-burning generators are less likely to trip off-line in the event of a sudden and unexpected loss of natural gas supply. *Id.*

Payment for this reliability service has been in dispute for a number of years. Such compensation is provided under Section 4.1.7a of the System Operator's Market Administration and Control Area Services Tariff ("Services Tariff"), which provides that dual-fuel generators may recover variable operating costs of Minimum Oil Burn Service required under Rule I-R3. Initial Order at P 3, JA 208. In February 2007, Ravenswood filed a complaint against the System Operator, contending that Section 4.1.7 did not provide sufficient compensation for Minimum Oil Burn Service. The Commission determined that the System Operator had properly interpreted its Tariff but agreed with Ravenswood that the Tariff should be amended. *Keyspan-Ravenswood*, 119 FERC ¶ 61,089 at PP 27-28, *reh'g denied*, 119 FERC ¶ 61,319 (2007). The Commission later accepted the System Operator's proposed tariff amendment to allow compensation for variable

(operating) costs associated with Minimum Oil Burn Service, over Ravenswood's protest that the System Operator must also, immediately, provide compensation for fixed costs of oil storage and delivery infrastructure. *N.Y. Indep. Sys. Operator, Inc.*, 119 FERC ¶ 61,130 at PP 16-17, *reh'g denied*, 121 FERC ¶ 61,039 (2007).

In 2009, this Court affirmed both sets of orders, holding that the Commission had reasonably deferred issues of fixed cost recovery to be considered in a future proceeding, after allowing the System Operator's stakeholder process to address those issues. *Ravenswood*, 331 F. App'x at 9-10; *see also id.* at 9 ("An incremental approach to a problem is certainly within the scope of the Commission's discretion, especially in circumstances like these where it's unclear that additional aspects of a problem even remain to be solved.") (internal citations omitted).

B. Complaint Proceeding and Settlement

On May 27, 2010, Ravenswood filed a complaint against the System Operator, seeking compensation for certain costs incurred in the summer of 2009 that it contended were variable costs subject to reimbursement under Section 4.1.7a of the Services Tariff. *See TC Ravenswood, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 133 FERC ¶ 61,205 at PP 1, 5-12 (2010). In December 2010, the Commission set the complaint for hearing and settlement judge procedures. *Id.* at PP 54-55.

On April 19, 2011, the parties filed a settlement agreement ("Settlement") that resolved all issues set for hearing and settlement in the complaint proceeding, resolved all issues related to Ravenswood's compensation for Minimum Oil Burn Service for the two-year period from May 1, 2009 through April 30, 2011, and — relevant here — included a three-year agreement specifying how Ravenswood would be compensated for Minimum Oil Burn Service for the period from May 1, 2011 through April 30, 2014. *See TC Ravenswood, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 135 FERC ¶ 61,125 at PP 2-3 (2011). The Commission approved the uncontested Settlement in May 2011. *Id.* at P 6 ("We conclude that the Settlement appears to be fair and reasonable and in the public interest.").

C. Initial Order

On May 27, 2010, the same day Ravenswood filed the complaint, it also filed an application to establish its own tariff implementing a rate for Minimum Oil Burn Service. R. 1, JA 1. Ravenswood explained that its tariff would provide compensation for variable costs of providing such service. *Id.* at 1, JA 1. Ravenswood further explained that it would pass those costs "through directly, without any mark-up, to purchasers of Minimum Oil Burn Service *via* the NYISO," and that the System Operator would collect the costs from its customers and "provide reimbursement to TC Ravenswood." *Id.*; *see also id.* at 13-14 (proposing to bill purchasers of Minimum Oil Burn Service by sending invoices to

the System Operator, with payment due "in accordance with the NYISO billing process, including . . . the dispute resolution processes"), JA 13-14.

On October 27, 2010, the Commission rejected the proposed tariff, without prejudice to any action to be taken in the pending complaint proceeding. Initial Order at PP 24, 26, JA 216. The Commission found that "[t]he service Ravenswood proposes to provide is the generation of electricity which is a jurisdictional Market Service that already falls under the exclusive purview of the [System Operator's] tariff" — specifically, Section 4.1.2 of the Services Tariff, which states that the System Operator "'shall be the sole point of Application for all Market Services provided in the [New York Control Area]. Each Market Participant that sells or purchases Energy . . . in the [System Operator] Administered Markets utilizes Market Services and must take service as a Customer under the Tariff.'" Initial Order at P 24 (quoting Services Tariff), JA 216. Because the production of wholesale energy by burning fuel oil to comply with Local Reliability Rule I-R3 is a Market Service, for which Section 4.1.7a of the Services Tariff governs rates, that Tariff "bars Ravenswood from proposing its own duplicative rate schedule to provide the same generation service already governed exclusively by the . . . Services Tariff." *Id.* at P 25, JA 216. For the same reason, the Commission concluded that the Services Tariff "exclusively governs the pricing" for Minimum Oil Burn Service. *Id.*

D. Dismissal Order

Ravenswood timely filed a request for rehearing of the Initial Order. On September 20, 2012, the Commission dismissed that request, without prejudice, because the issues raised were moot. Dismissal Order at PP 16-17, JA 261. The Commission explained that the compensation issue had been resolved in the 2011 Settlement in the complaint proceeding: the FERC-approved Settlement "establishes compensation for [Minimum Oil Burn Service] under a new section 4.1.9 of [the System Operator's] Services Tariff through April 30, 2014." *Id.* at P 17, JA 261; *see also id.* at P 7, JA 257. For that reason, Ravenswood was not "aggrieved, as required by section 313 of the FPA for a party seeking rehearing of a Commission order." *Id.* at P 17 (citing 16 U.S.C. § 825*l*). Neither granting nor denying rehearing would change Ravenswood's compensation under the Settlement, which specified compliance "'irrespective of the outcome'" of the application proceeding. *Id.* (quoting Settlement); *see also id.* at P 7. Accordingly, the Commission "decline[d] to issue what, at this juncture, would effectively be a declaratory order on a purely hypothetical matter." *Id.* at P 17.

Ravenswood then filed its petition for review in this Court of the Initial and Dismissal Orders.

III. THE COURT ORDER

Before this Court, the Commission moved to dismiss the petition for review for lack of aggrievement and/or ripeness. By order dated March 1, 2013 ("Court Order"), the Court referred the motion to the merits panel and directed the parties to brief those jurisdictional issues (*see* Argument Part I, *infra*) as well as two additional jurisdictional questions relating to finality: (1) whether the Initial Order was a final, reviewable order, and (2) whether Ravenswood was required to file a request for rehearing of the Dismissal Order prior to seeking judicial review. *See* Argument Part II, *infra*.

SUMMARY OF ARGUMENT

Reliable operation of the power grid is a central responsibility of a transmission system operator such as the New York Independent System Operator. As a dual-fuel generator, Ravenswood is required to provide a form of reliability service to the New York grid. This case began as yet another pricing dispute between those parties. But after the Commission issued an initial determination that Ravenswood's proposed separate tariff was duplicative of the System Operator's tariff, Ravenswood and the System Operator resolved the financial dispute in a Settlement that established Ravenswood's compensation for Minimum Oil Burn Service back to 2009 and forward through April 2014. The Commission concluded that Ravenswood was not aggrieved by the hypothetical issues that

remained, and dismissed rehearing as moot. Similarly, this Court lacks both constitutional and statutory jurisdiction over the appeal.

First, the Court lacks Article III jurisdiction because Ravenswood cannot demonstrate any concrete and immediate injury. Having settled its compensation dispute, Ravenswood is left to assert harms — a procedural injury untethered to a substantive result, and the speculative burden of potential future rate litigation — that do not constitute cognizable injuries in fact. For the same reasons, the issues raised in this appeal are not ripe for judicial review.

This Court also lacks statutory jurisdiction to review either of the challenged orders. The Commission never issued a final, reviewable order on the merits of Ravenswood's arguments — not on the statutory right to file a separate tariff, not on the scope or application of the System Operator's tariff, not on the merits of Ravenswood's proposed tariff, nor on any other merits issue — because it found all issues moot once the Settlement had resolved Ravenswood's compensation. And Ravenswood failed to seek agency rehearing of the Dismissal Order, in which the Commission did not rule on rehearing but instead concluded that the issues were moot, found that Ravenswood was not "aggrieved" under the Federal Power Act, and declined to issue a declaratory order on a hypothetical matter — determinations that Ravenswood now disputes in the first instance on appeal.

Assuming jurisdiction, however, the Commission's Initial Order reasonably determined that Ravenswood's tariff was duplicative, and its Dismissal Order reasonably concluded that the Settlement had rendered the matter moot. It is entirely appropriate for an agency to decide not to decide the abstract merits of issues that no longer have any immediate effect.

ARGUMENT

I. THIS COURT LACKS ARTICLE III JURISDICTION TO CONSIDER RAVENSWOOD'S CHALLENGES TO THE FERC ORDERS

A. Ravenswood Lacks Standing

To obtain judicial review of a FERC order, a party must meet the requirements of Article III standing. *See Nat'l Comm. for the New River, Inc. v. FERC*, 433 F.3d 830, 832 (D.C. Cir. 2005); *see also N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011) (party is not "aggrieved" within the meaning of Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b), unless it can establish constitutional and prudential standing). The "irreducible constitutional minimum" for standing requires the party to have suffered (1) an "injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that likely "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

560-61 (1992) (internal citations and quotation marks omitted); *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997).

Ravenswood has identified no cognizable injury caused by the challenged orders. Conceding that the Settlement resolved its compensation for providing Minimum Oil Burn Service through mid-2014 (Br. 6), Ravenswood does not focus on any purported economic interest in this case. Instead, Ravenswood asserts various alternative bases for its standing (*see, e.g.*, Br. 16-18), none of which is sufficiently concrete or immediate to support jurisdiction.

1. Ravenswood's Interest In A Declaratory Ruling On Its Filing Rights Does Not Support Standing

First, Ravenswood asserts its interest in obtaining a definitive ruling on its claimed right, under Section 205 of the Federal Power Act (16 U.S.C. § 824d) to file its own tariff for Minimum Oil Burn Service — "independent of compensation issues." Standing Addendum at 9; *see also* Br. 14-15, 16, 57-58. But an alleged procedural injury is not, *in itself*, sufficient for standing: the procedure in question must "affect[] a concrete substantive interest." *Del. Dep't of Natural Res. & Envtl. Control v. FERC*, 558 F.3d 575, 579 (D.C. Cir. 2009); *see also Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 269 (D.C. Cir. 2007) ("[A] petitioner asserting a procedural right must nonetheless show [that] it has itself suffered personal and particularized injury because of the challenged substantive result.") (internal quotation marks and citations omitted). For example, in *Delaware*, as here, the

petitioner asserted a loss of a statutory right (in that case, a state's right to consider approval of certain coastal projects under certain environmental statutes before the Commission considered certification under the Natural Gas Act). *See* 558 F.3d at 576-79. The Court, however, found no cognizable injury from the alleged procedural violation because the Commission's order conditioned its approval on the state's decision. *Id.* at 578-79.

Ravenswood cites nothing to support its claim of procedural entitlement, under the Federal Power Act, to a declaratory ruling on its rate schedule filing (for rates that have already been determined by the Settlement). Ravenswood relies on *City of Dania Beach v. FAA*, 485 F.3d 1181 (D.C. Cir. 2007), for the proposition that an asserted violation of statutory procedures is sufficient for standing. Br. 23-24. But there, those procedures were the *point* of the statute. Alleged failure to comply with environmental review procedures went to the very "purpose of [the National Environmental Policy Act] to integrate environmental review into the agency decisionmaking process" — so the potential environmental consequences were "exactly the types of injuries that [the statute's] procedural requirements were intended to mitigate." *Dania* Beach, 485 F.3d at 1185-86. Nothing in *Dania Beach* suggests that a utility suffers a concrete injury when the Commission

chooses not to opine on a filing under Section 205 of the Federal Power Act that, because of the utility's own settlement, would have no rate effect.[2]

Ravenswood is left to argue that the Commission likely would reach the same conclusion "if and when Ravenswood makes another filing" in the future. Br. 22. But whatever precedential value the determination in the Initial Order might hold in a hypothetical future case is not sufficient for Article III jurisdiction. Even precedential effect within the Commission is "a type of 'injury' that is clearly insufficient to satisfy . . . Article III jurisdictional requirements." *Ala. Mun. Distribs. Grp. v. FERC*, 312 F.3d 470, 473 (D.C. Cir. 2002). Indeed, as this Court has previously explained, "it seems inescapable that neither standing nor ripeness could properly grow out of a harm predicated on a potential collateral estoppel effect. . . . To create standing out of the preclusive effect that *would* flow from

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[2] Nor is Ravenswood's pursuit of a declaratory ruling comparable to the interest that this Court recently found sufficient for standing in *Southwest Power Pool v. FERC*, 736 F.3d 994 (D.C. Cir. 2013). There, the Commission *had* issued a declaratory order, in which it interpreted a capacity-sharing provision in a joint operating agreement between two regional system operators. On appeal, the Court held that the petitioner's injury was not speculative because, on the particular facts of that case, the agency's ruling on the parties' respective contractual rights and obligations "cast a very present shadow" over the two system operators' competition to "woo[]" a new member utility. *Id.* at 997. By contrast, the Commission's decision here *not* to rule on a theoretical legal issue that would have no impact on settled compensation, leaving the matter for potential future litigation or negotiation, casts no such shadow.

granting standing is to create it ex nihilo." *Id.* at 474 (emphasis in original); *accord Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009) ("We have previously made clear, however, that a mere interest in FERC's legal reasoning and the possibility of a 'collateral estoppel effect' are insufficient to confer a cognizable injury in fact."). *See also Panhandle E. Pipe Line Co. v. FERC*, 198 F.3d 266, 270 (D.C. Cir. 1999) (finding no injury-in-fact in "continued publication" of mooted orders "as policy statements").

2. The Hypothetical Burden Of Potential Future Litigation Is Not A Cognizable Injury

Second, Ravenswood complains that, "if and when" it files a tariff to govern future rates (Br. 22), it will be forced to "repeat the costly and time-consuming process of litigating" the issues raised in this case. Br. 20; *see also id.* 20-22, Standing Addendum at 11-13. It is long settled, however, that the "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) (internal quotation marks and citation omitted); *accord Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 740 (D.C. Cir. 1987).[3] *See also Truckers United for Safety v. Mead*, 251 F.3d 183, 192 (D.C. Cir. 2001) ("the burden of pursuing future litigation is not enough,

[3] "The hardship inquiry under ripeness review . . . overlaps with the injury in fact facet of standing doctrine." *N.Y. State Elec. & Gas Corp. v. FERC*, 177 F.3d 1037, 1040 n.4 (D.C. Cir. 1999) (internal quotation marks and citation omitted).

by itself, to demonstrate hardship justifying premature judicial decision-making"); *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1205-06 (D.C. Cir. 1998) ("The burden of participating in future proceedings does not constitute sufficient hardship for the purposes of ripeness. To be sure, it is easier and cheaper to mount a single challenge now . . . . But this kind of litigation cost-saving does not justify review in a case that would otherwise be unripe.") (internal quotation marks and citations omitted); *cf. Ravenswood*, 705 F.3d at 479 (acknowledging that "delay may be costly," while nevertheless rejecting Ravenswood's objections to the Commission's "iterative process" for addressing the System Operator's market design).

Moreover, Ravenswood's argument presumes a similar tariff filing in the future, and a similar determination by the Commission (and the absence of another resolution by settlement). But that presumption "stacks speculation upon hypothetical upon speculation, which does not establish an 'actual or imminent' injury." *N.Y. Reg'l Interconnect*, 634 F.3d at 587 (dismissing petition for review of FERC orders that adopted a new planning process for future transmission projects, where petitioner challenged the new criteria but had no active project proposal); *accord Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1026-27 (D.C. Cir. 2012) (dismissing challenge based on speculation about future cost-shifting). And, as explained *supra*, even if future rate litigation were certain, the

precedential effect (if any) of the Initial Order would not constitute a present injury. *See also Wis. Pub. Power*, 493 F.3d at 268 ("'[M]ere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation.'") (citation omitted); *N.Y. State Elec. & Gas*, 177 F.3d at 1041-42 ("[E]ven if it [was] virtually inevitable" that a utility would file a future rate case, and the Commission had, in the challenged orders, "indicated its predisposition" to approve a particular rate treatment at that time, the petitioner had "not demonstrated that it suffered current hardship as a result of the orders under appeal.").[4]

This Court's opinion in *Wisconsin Public Power* is particularly instructive. In that case, in which customers of transmission providers challenged orders that approved certain charges to those providers, the Court ruled that the customers lacked standing because they would not suffer any injury unless and until the providers sought to pass through those charges. *See* 493 F.3d at 267-68. In fact, by the time of the appeal, the transmission providers had already sought and obtained approval to pass through the disputed charges in a subsequent FERC proceeding (which came to a conclusion before the Court decided *Wisconsin Public Power*). *Id.* at 268-69. Nevertheless, the Court held that the petitioners did

[4] The Court noted the petitioner's argument "that rate cases, like 'death and taxes,' are an inevitable fact of life." *Id.* at 1040.

not have standing for purposes of the existing appeal: "The fact that the Commission approved a pass-through of [the] charges . . . in orders not currently before us does not alter our standing analysis." *Id.* at 269. Accordingly, even if Ravenswood intends to file another tariff application — indeed, even if it were to make such a filing during the pendency of this appeal — the hypothetical burden of doing so is not a concrete, actual injury for purposes of standing in *this* case.

B. Challenges To The FERC Orders Are Not Yet Ripe For Review

Ravenswood's issues on appeal are likewise unripe for review. The basic rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies . . . ." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (doctrine also "protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties"). Courts generally determine ripeness by considering "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149.

Therefore, this Court finds an issue unripe for review when "the injury has not yet materialized" and there is no showing that a "delay of adjudication would inflict hardship." *Ala. Mun. Distribs. Group*, 312 F.3d at 473. In a case such as this, standing and ripeness "overlap significantly," as "[t]he contingencies that

stand between the orders here and any injury to petitioners tend both to show the injury's lack of imminence and to render their claim unripe." *Id.* at 472; *see supra* note 3.

Just as the prospect of a future rate filing does not support Ravenswood's standing, neither does it present a ripe issue for judicial review. Ravenswood's arguments for ripeness depend on a series of predictions and contingencies (*see supra* p. 19), and Ravenswood seeks immediate review of the Commission's initial legal determination (in a non-final order, *see* Part II.A, *infra*) on a matter that has no actual effect on rates. *Cf. Flint Hills Res. Alaska, LLC v. FERC*, 627 F.3d 881, 889 (D.C. Cir. 2010) ("a case may not be ripe for review when it would be inappropriate for a court to spend scarce resources on claims that, 'though predominantly legal in character, depend[] on future events that may never come to pass, or that may not occur in the form forecasted.'") (citation omitted).

II. THIS COURT LACKS STATUTORY JURISDICTION TO CONSIDER RAVENSWOOD'S CHALLENGES TO THE FERC ORDERS

In addition to the absence of Article III jurisdiction, this Court also lacks jurisdiction under the Federal Power Act. In accordance with the Court Order directing the parties to address certain issues of reviewability, the Commission contends that neither of the FERC Orders meets the statutory requirements for judicial review: the Initial Order because the Commission never issued a final

judgment on the merits of Ravenswood's application or Ravenswood's arguments, and the Dismissal Order because Ravenswood never requested agency rehearing of the Commission's new (post-Settlement) determination that the issues were moot.

A. Ravenswood Is Not "Aggrieved" By A Final Order, As Required For Judicial Review Under The Federal Power Act

The Court Order directed the parties to address whether the Initial Order "is a final, reviewable order," citing *Panhandle*, 198 F.3d at 268-69. And, indeed, *Panhandle* is dispositive of Ravenswood's appeal. Here, as in that case, the Commission never issued a final judgment.

In *Panhandle*, the pipeline and the Commission disagreed as to the fate of FERC orders that, like the Initial Order in the instant case, had been rendered moot by a FERC-approved settlement that the petitioner and other parties entered while rehearing of the disputed orders was still pending. The pipeline asked the Court to vacate the FERC orders, to nullify their continued existence as statements of agency policy. 198 F.3d at 267, 269-70. The Court, however, concluded that "no federal court has had jurisdiction" over the case, because the Commission "never issued a final, appealable order" — that is, an order on the pending rehearing. *Id.* at 267. Accordingly, the Court found not only an absence of a cognizable injury-in-fact for purposes of Article III standing (*id.* at 270; *see supra* Part I.A) but also a lack of "aggrievement" for purposes of the statute. "[O]nly a party that is 'aggrieved' by an order issued under the Act may obtain judicial review thereof"

(*El Paso Natural Gas Co. v. FERC*, 50 F.3d 23, 26 (D.C. Cir. 1995)), but there was "no aggrievement" because the Commission "never issued final judgments disposing of Panhandle's rate filings." *Panhandle*, 198 F.3d at 268.[5]

Likewise, here the Commission dismissed Ravenswood's request for rehearing as moot, given the intervening Settlement, and never issued a final judgment on Ravenswood's application for a separate tariff. Thus, as in *Panhandle*, no federal court can have jurisdiction under section 313(b) of the Federal Power Act to consider Ravenswood's petition for review.

Ravenswood contends that *Panhandle* is not controlling here because the Settlement arose from the complaint proceeding, rather than the application proceeding (Br. 18), and because the Commission did issue what Ravenswood characterizes as a "Rehearing Order" (Br. 19). The first distinction is immaterial; the second, erroneous. Though the Settlement was reached in the complaint proceeding, it indisputably resolved the issue of Ravenswood's compensation for Minimum Oil Burn Service through April 2014, leaving only the "purely hypothetical matter" of Ravenswood's 2010 tariff filing for that very

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[5] Though *El Paso* and *Panhandle* involved judicial review under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), that provision is substantially identical to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), and courts cite decisions construing the two statutes interchangeably. *See*, *e.g.*, *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981); *Granholm ex rel. Mich. Dep't of Natural Res. v. FERC*, 180 F.3d 278, 280 n.2 (D.C. Cir. 1999).

compensation. Dismissal Order at P 17, JA 261; *see also id.* at P 7 (noting that Settlement had resolved issue of compensation raised in both dockets), JA 257.

Moreover, the Commission did not issue an order on rehearing of the Initial Order — rather, it dismissed Ravenswood's request for rehearing as moot, a difference that is anything but "academic" (Br. 19). The Commission neither granted nor denied rehearing, did not address any of the arguments raised in the rehearing request, and did not revisit (to revise or to reaffirm) its determination on any issue in the Initial Order. Indeed, the Commission emphasized that the dismissal was "without prejudice" (Dismissal Order at PP 16-17, JA 261), leaving Ravenswood free to seek a future, non-hypothetical ruling on its asserted right to file a separate rate schedule. As such, the Commission did not "impose[] an obligation, den[y] a right, or fix[] some legal relationship as a consummation of the administrative process." *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 239 (D.C. Cir. 1980) (citation omitted).

B. Ravenswood Failed To Seek Rehearing Of The Dismissal Order, As Required For Judicial Review Under The Federal Power Act

The Court Order also directed the parties to address whether Ravenswood was required to seek agency rehearing of the Dismissal Order before seeking judicial review of that order. Because the Dismissal Order pronounced a different result than in the Initial Order, Ravenswood was indeed required to seek agency

rehearing of the Dismissal Order as a prerequisite to judicial review. Ravenswood's failure to apply for rehearing is thus fatal to its appeal.

As noted *supra* at p. 25, the Commission, in the Dismissal Order, did not act on Ravenswood's request for rehearing of the Initial Order, or on the merits of Ravenswood's rehearing arguments. Rather, the Commission found that, because Ravenswood's compensation for Minimum Oil Burn Service had been established by the Settlement, Ravenswood's separate tariff application seeking such compensation was now moot. Dismissal Order at P 17 (Ravenswood was no longer "aggrieved," for purposes of FPA § 313, by the issues it had raised on rehearing, and "[n]either granting nor denying rehearing would change Ravenswood's compensation under the settlement"), JA 261. The Commission further found that what remained before it was the legal status of a hypothetical filing with no rate effect — an advisory opinion that the Commission exercised its discretion to leave for another day. *Id.* ("We decline to issue what, at this juncture, would effectively be a declaratory order on a purely hypothetical matter."). The rehearing request was not "denied without significant modification" to the initial ruling, and requiring rehearing of the distinct ruling on dismissal would not "lead to infinite regress and serve no useful end." *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289 (D.C. Cir. 2001).

Therefore, to the extent that Ravenswood disagrees (*see* Br. 14-15, 57-58) with the Commission's rationale for dismissal — whether the resolution of compensation, or the resulting lack of aggrievement, or the hypothetical nature of the remaining issue — Ravenswood was required to raise those arguments before the Commission on rehearing. The Federal Power Act requires another filing: "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 to do so." 16 U.S.C. § 825*l*(b); *see also, e.g.*, *Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002) (strictly construing jurisdictional requirement); *Town of Norwood v. FERC*, 906 F.2d 772, 774 (D.C. Cir. 1990) (same).

In addition to being an express statutory prerequisite for jurisdiction, rehearing serves the important purpose of "enabl[ing] the Commission to correct its own errors, which might obviate judicial review, or to explain in its expert judgment why the party's objection is not well taken, which facilitates judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005); *see also Ameren Servs. Co. v. FERC*, 330 F.3d 494, 499 n.8 (D.C. Cir. 2003) ("The very purpose of rehearing is to give the Commission the opportunity to review its decision before facing judicial scrutiny."). Ravenswood did not give the Commission an opportunity to reconsider or to explain more fully its

determinations, following the parties' Settlement, as to aggrievement and mootness. Having failed to do so, Ravenswood is now barred by the Federal Power Act from challenging the Commission's Dismissal Order in this Court.

III. IF THE COURT HAS JURISDICTION, THE ORDERS SHOULD BE UPHELD ON THE MERITS

To the extent (albeit limited) that the Commission addressed the merits of Ravenswood's tariff filing in its (non-final) Orders, the Commission properly concluded: (1) that Ravenswood's proposed tariff was duplicative of the System Operator's Services Tariff, and (2) that the resolution of the compensation issue in the Settlement left only hypothetical questions about Ravenswood's tariff application that the Commission chose to defer to a future proceeding. Though the Commission never issued a final judgment as to the first issue and Ravenswood failed to seek agency rehearing as to the second, both determinations were reasonable.

A. Standard of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1286 (D.C. Cir. 2011); *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs.*

Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Under the *Chevron* standard, this Court gives "substantial deference to [the Commission's] interpretation of filed tariffs, 'even where the issue simply involves the proper construction of language.'" *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998) (citation omitted); *see also Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 701 (D.C. Cir. 2010).

B. The Commission Reasonably Determined That Ravenswood's Tariff Was Duplicative Of The System Operator's Tariff

In its Initial Order, the Commission reasonably concluded that the reliability service that Ravenswood proposed to provide — production of wholesale energy using fuel oil in compliance with Local Reliability Rule I-R3 (which ensures diversity of fuel sources to maintain system reliability in the event of a disruption in natural gas supply) — is "already governed exclusively" by the Services Tariff of the System Operator. Initial Order at PP 24-25, JA 216. Because it dismissed Ravenswood's rehearing request as moot, the Commission never addressed the extensive arguments that Ravenswood raises on appeal. Nevertheless, the Commission's initial ruling on the merits was reasonable, while many of Ravenswood's arguments are irrelevant to its actual tariff filing before the Commission.

For all its arguments about statutory filing rights (Br. 28-32), competing electricity exchange markets (Br. 43-46), and exclusive territories (Br. 51-57), Ravenswood's tariff application proposed only to attach charges to reliability service provided to the System Operator's market. *See, e.g.*, Application at 1 (explaining that, under its proposal, TC Ravenswood would pass certain costs "through directly . . . to purchasers of Minimum Oil Burn Service *via* the NYISO"), JA 1. Indeed, although Ravenswood characterizes its proposed service as "outside of" (Br. 41), "in parallel to" (Br. 46), and "independent of" (Br. 48) the System Operator's administration of its market, Minimum Oil Burn Service is, by definition, a service to participants in that market, to maintain the reliability of the integrated system managed by the System Operator, in compliance with the Reliability Council's requirement for operation of the network.[6] *See* Initial Order at PP 3, 25, JA 208, 216; *see also* Application at 4 ("By providing this service, TC Ravenswood enhances the reliability of the electric system in NYISO Zone J."), JA 4; Br. 4 (Minimum Oil Burn Service "enhances the reliability of the electric

[6] "The [New York State] Bulk Power System shall be operated so that the loss of a single gas facility does not result in the loss of electric load within the New York City zone." NYSRC Reliability Rules For Planning and Operating the New York State Power System, Version 26, Rule I-R3, "Loss of Generator Gas Supply (New York City)" at 65 (Dec. 4, 2000) (italics omitted), *quoted in* Initial Order at P 2 n.1, JA 207. The Reliability Council itself is a creation of the System Operator. *See supra* p. 6.

system"). Accordingly, the Commission appropriately concluded that compensation for Minimum Oil Burn Service is provided exclusively through the System Operator's Services Tariff — a tariff interpretation for which the Commission is entitled to deference (*see supra* p. 29) — and rejected Ravenswood's filing as a "duplicative" tariff to provide "the same" service. Initial Order at P 25, JA 216.

C. The Commission Reasonably Determined That The Rehearing Request Was Moot After The Settlement Resolved Ravenswood's Compensation Through April 2014

In its Dismissal Order, the Commission properly concluded that, once the compensation was established by the Settlement, all that remained before the Commission in the application proceeding was a theoretical question of law without any actual rate effects. Dismissal Order at P 17, JA 261; *see supra* p. 26. The Commission reasonably found — as shown *supra* in Part I.A — that "the issues Ravenswood raises on rehearing . . . do not demonstrate that Ravenswood is aggrieved, as required by Section 313" of the Federal Power Act, 16 U.S.C. § 825*l*. Dismissal Order at P 17, JA 261. Thus, "the issues raised here are moot." *Id.*

Therefore, the Commission opted not to issue "what, at this juncture, would effectively be a declaratory order on a purely hypothetical matter." *Id.* That choice was well within the Commission's discretion. *See, e.g.*, *Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230

(1991) (question of "how best to handle related, yet discrete, issues in terms of procedures" is a matter committed to agency discretion); *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.") (citing cases).

That decision also was consistent with this Court's holding in an earlier *Ravenswood* case. When the Commission approved Section 4.1.7a of the Services Tariff, which was amended to provide compensation for variable costs incurred by dual-fuel generators, the Commission deferred consideration of additional costs related to infrastructure so that the parties could address such costs through the System Operator's stakeholder process. *See Ravenswood*, 331 F. App'x at 9. The Court upheld that decision, finding that the Commission had "reasonably deferred consideration" of the disputed compensation. *Id.* at 10; *see id.* at 9 ("An incremental approach to a problem is certainly within the scope of the Commission's discretion"); *cf. Ravenswood*, 705 F.3d at 479 (finding no justification for "disrupting the pattern created by the Commission's choices over how to sequence its consideration of issues").[7]

[7] Though the Court noted that an agency can be found to have abused even such broad discretion (705 F.3d at 478), the threshold for such a finding is high (as Ravenswood appears to recognize, having omitted any reference to either *Ravenswood* case in its Opening Brief). *See* 705 F.3d at 479 ("it would take a far

This Court has appropriately afforded deference to the Commission's management of the many issues and disputes that arise as it "struggl[es] to address the complexities posed by regional integration and independent systems operators." *Ravenswood*, 705 F.3d at 479 (citing the 2009 *Ravenswood* case (331 F. App'x 8) for the Court's "explicit approval" of the Commission's "iterative process" for addressing regional issues in general, and its "'incremental approach to [the] problem'" of New York's Minimum Oil Burn Service rates in particular). For that reason, the Court should likewise uphold the Commission's decision not to issue an advisory opinion on Ravenswood's hypothetical tariff in the instant case.

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clearer case than this" to justify judicial intervention). Nor can the Commission be accused of "slic[ing] and dic[ing] issues to the prejudice of a party" (*id.* at 478) where the petitioner itself agreed to resolve its economic interest while purporting to preserve litigation of hypothetical issues of law.

CONCLUSION

For the reasons stated, the petition should be dismissed for lack of jurisdiction (constitutional, prudential, or statutory). Alternatively, the petition should be denied on the merits and the challenged FERC Orders should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent contains 7,586 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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February 3, 2014

ADDENDUM
Statutes

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previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) Compliance with order of Commission

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classi-

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

the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

(June 10, 1920, ch. 285, pt. III, § 314, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 109–58, title XII, § 1288, Aug. 8, 2005, 119 Stat. 982.)

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of Title 28 which states that ''the District of Columbia constitutes one judicial district''.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

§ 825n. Forfeiture for violations; recovery; applicability

(a) Forfeiture

Any licensee or public utility which willfully fails, within the time prescribed by the Commission, to comply with any order of the Commission, to file any report required under this chapter or any rule or regulation of the Commission thereunder, to submit any information or document required by the Commission in the course of an investigation conducted under this chapter, or to appear by an officer or agent at any hearing or investigation in response to a subpena issued under this chapter, shall forfeit to the United States an amount not exceeding $1,000 to be fixed by the Commission after notice and opportunity for hearing. The imposition or payment of any such forfeiture shall not bar or affect any penalty prescribed in this chapter but such forfeiture shall be in addition to any such penalty.

(b) Recovery

The forfeitures provided for in this chapter shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States, brought in the district where the person is an inhabitant or has his principal place of business, or if a licensee or public utility, in any district in which such licensee or public utility transacts business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this chapter. The costs and expenses of such prosecution shall be paid from the appropriations for the expenses of the courts of the United States.

(c) Applicability

This section shall not apply in the case of any provision of section 824j, 824k, 824*l*, or 824m of this title or any rule or order issued under any such provision.

(June 10, 1920, ch. 285, pt. III, § 315, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amend-

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 3d day of February 2014, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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