ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

Nos. 14-1103, 14-1104, 14-1105 (Consolidated)

TRANSCANADA POWER MARKETING LTD.*, et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Final Brief: April 15, 2015

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 Petitioners.

B. Rulings Under Review

D.C. Cir. No. 14-1103:

1. Order Conditionally Accepting Bid Results, *ISO New England, Inc.*, FERC Docket No. ER13-2266, 145 FERC ¶ 61,023 (Oct. 7, 2013), JA 598; and

2. Order Denying Rehearing, , *ISO New England, Inc.*, FERC Docket No. ER13-2266, 147 FERC ¶ 61,027 (Apr. 8, 2014), JA 642.

D.C. Cir. Nos. 14-1104 and 14-1105:

3. Order Conditionally Accepting Tariff Revisions, *ISO New England, Inc.*, FERC Docket No. ER13-1851, 144 FERC ¶ 61,204 (Sept. 16, 2013), JA 462; and

4. Order Denying Rehearing, *ISO New England, Inc.*, FERC Docket No. ER13-1851, 147 FERC ¶ 61,026 (Apr. 8, 2014) , JA 553.

C. Related Cases

This case has not previously been before this Court or any other court.

/s/ *Carol J. Banta*
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2005 Winter Order	*ISO New England, Inc.*, 113 FERC ¶ 61,220 (2005), JA 648
2006 Rehearing Order	*ISO New England, Inc.*, 115 FERC ¶ 61,145 (2006), JA 665
Act or FPA	Federal Power Act
B.R.	Record Index for the bid results proceeding, FERC Docket No. ER13-2266
Bid Results Order	*ISO New England, Inc.*, 145 FERC ¶ 61,023 (2013), JA 598
Bid Results Rehearing Order	*ISO New England, Inc.*, 147 FERC ¶ 61,027 (2014), JA 642
Commission or FERC	Respondent Federal Energy Regulatory Commission
JA	Joint Appendix
P	Paragraph in a FERC order
Program	Winter Reliability Program (below)
Real-Time Load Obligation	A calculation defined in Section III.3.2.1(b) of the System Operator's tariff that, as to each participant in the energy markets administered by the Operator, is based on the number of megawatts of that participant's load in each hour and is used to determine each participant's share of various market-related charges

GLOSSARY

Regional Network Load	A calculation defined in Section II.21.2 of the System Operator's tariff that reflects the proportional share of each network transmission customer relative to the aggregate load in its local network area in the monthly peak hour, and is used to allocate various transmission-related charges
Retail Suppliers	Petitioner Retail Energy Supply Association
System Operator or Operator	ISO New England Inc. (commonly called ISO-NE)
T.R.	Record Index for the proceeding to consider the Operator's tariff filing, FERC Docket No. ER13-1851
Tariff Order	*ISO New England, Inc.*, 144 FERC ¶ 61,204 (2013), JA 462
Tariff Rehearing Order	*ISO New England, Inc.*, 147 FERC ¶ 61,026 (2014), JA 553
TransCanada	Petitioner TransCanada Power Marketing Ltd.
Winter Reliability Program	Temporary measures proposed by the System Operator to address risks to system reliability in New England during the winter of 2013-2014

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FEDERAL ENERGY REGULATORY COMMISSION,
***Respondent*.**

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

In mid-2013, ISO New England Inc., the independent system operator that operates the electrical grid in six northeastern states ("System Operator" or "Operator"), proposed a package of temporary measures to address risks to system reliability during the winter of 2013-2014 ("Winter Reliability Program" or "Program"). Among those measures was a mechanism for incentive compensation to oil-fired generators who would commit to maintain fuel reserves to meet demand when natural gas-fired generation was constrained ("Oil Inventory

Service"). The orders on review arise from separate proceedings in which the Commission first approved the terms of the Winter Reliability Program and then accepted the results of the bidding process for the Oil Inventory Service. The questions presented on appeal are:

(1) [In Case Nos. 14-1104 and 14-1105] Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably approved the Winter Reliability Program, and whether the Commission properly determined that the associated costs should be allocated to real-time load;

(2) [In Case No. 14-1103] Whether the Commission reasonably accepted the results of the bid selection process for Oil Inventory Service under the Winter Reliability Program; and

(3) [In Case Nos. 14-1103 and 14-1104] Whether the Commission reasonably exercised its procedural discretion in declining to consolidate the separate proceedings to consider the proposed Winter Reliability Program and the bid results.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum.

INTRODUCTION

This case concerns the System Operator's efforts to maintain reliability of generation supplies in New England during periods of peak winter usage. After

reviewing its operations during the winter of 2012-2013, the System Operator developed a package of temporary measures to address identified risks to reliability for the next winter. Of particular concern to the Operator was the region's growing reliance on natural gas-fired generators, which can be vulnerable to supply shortages and price volatility. In addition, the Operator had found that many dual-fuel or oil-fired generators did not keep sufficient fuel supplies on hand to meet increased demand in extended or repeated periods of cold weather. Accordingly, the Operator's proposed Winter Reliability Program included an Oil Inventory Service component, which would compensate oil-fired and dual-fuel generators, selected through a bidding process, to maintain specified supplies of oil and to provide energy when system conditions were stressed.

The Commission conditionally approved the Winter Reliability Program, finding the Operator's proposed measures to be just and reasonable given the particular reliability risks and the interim nature of the Program, but rejecting the Operator's proposed allocation of Program costs to transmission charges and directing the Operator instead to allocate costs to load. *ISO New England, Inc.*, 144 FERC ¶ 61,204 (2013), T.R. 67, JA 462 ("Tariff Order"), *reh'g denied*, 147 FERC ¶ 61,026 (2014), T.R. 78, JA 553 ("Tariff Rehearing Order"), *on appeal in*

D.C. Cir. Nos. 14-1104 and 14-1105.[1] Petitioner TransCanada Power Marketing Ltd. ("TransCanada") seeks judicial review of the Commission's approval of the Program (in Case No. 14-1104), and its decision to allocate costs to real-time load; Petitioner Retail Energy Supply Association ("Retail Suppliers") joins the challenge to the cost allocation (in Case No. 14-1105).

In a separate proceeding, the Operator submitted the results of the bid selection process for Oil Inventory Service under the Program. The Commission conditionally accepted the bid results, but required the Operator to provide a more detailed explanation of how it had applied the Program criteria in selecting the bids. *ISO New England, Inc.*, 145 FERC ¶ 61,023 (2013), B.R. 24, JA 598 ("Bid Results Order"), *reh'g denied*, 147 FERC ¶ 61,027 (2014), B.R. 34, JA 642 ("Bid Results Rehearing Order"), *on appeal in* D.C. Cir. No. 14-1103. TransCanada seeks judicial review of the Bid Results Orders.

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

[1] "T.R." (Tariff Record) refers to a record item in FERC Docket No. ER13-1851. "B.R." (Bid Results Record) refers to a record item in FERC Docket No. ER13-2266. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

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 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). Section 206 of the FPA, 16 U.S.C. § 824e, authorizes the Commission to investigate whether existing rates are lawful. If the Commission, on its own initiative or on a third-party complaint, finds that an existing rate or charge is "unjust, unreasonable, unduly discriminatory or preferential," it must determine and set the just and reasonable rate. FPA § 206(a), 16 U.S.C. § 824e(a).

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). ISO

New England is the regional entity that operates the regional transmission system and administers bid-based energy markets across six northeastern states (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont). *See generally NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 796 (D.C. Cir. 2007).

II. RELIABILITY CONCERNS IN NEW ENGLAND

Having ruled on numerous appeals concerning new energy market rate designs over the last decade, this Court is well-acquainted with the problems of maintaining reliability, especially in areas of high demand along the eastern seaboard, and with the various mechanisms that the Commission has approved in regional markets (including New England) for the purpose of promoting reliability. *See, e.g.*, *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009) (capacity market in New England); *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) (same), *rev'd in part sub nom. NRG*, 558 U.S. 165; *Blumenthal v. FERC*, 552 F.3d 875 (D.C. Cir. 2009) (transition to capacity market in New England); *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283 (D.C. Cir. 2011) (transitional capacity auctions in mid-Atlantic region); *Pub. Serv. Elec. & Gas Co. v. FERC*, 324 F. App'x 1 (D.C. Cir. 2009) (capacity market in mid-Atlantic); *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232 (D.C. Cir. 2005) (capacity market in New York). The Court also is familiar with the continued

reliance on oil-fired generation resources for reliability services in the Northeast. *See, e.g.*, *Braintree Elec. Light Dep't v. FERC*, 667 F.3d 1284 (D.C. Cir. 2012) (involving oil-fired units in New England); *TC Ravenswood, LLC v. FERC*, 565 F. App'x 1 (D.C. Cir. 2014) (involving dual-fuel generator in New York); *TC Ravenswood, LLC v. FERC*, 331 F. App'x 8 (D.C. Cir. 2009) (same).

The instant case arises from particular concerns about reliability of electricity supplies in peak winter periods in New England — concerns stemming, in large part, from an increased dependence on natural-gas fired generation in the region, along with a decrease in oil-fueled generation as older units are retired. Natural gas supplies can be limited at peak usage times in the winter, due to constraints in available pipeline infrastructure and increased consumption by gas customers for heating. *See generally Centralized Capacity Markets in Regional Transmission Organizations and Independent System Operators*, 149 FERC ¶ 61,145 at P 12 (2014) (noting efforts to address winter reliability concerns in New England arising from generators' reliance on natural gas supplies); *Bangor Hydro-Elec. Co.*, 122 FERC ¶ 61,265 at P 73 n.63 (2008) (noting that, in New England, "heavy reliance on natural gas-fired generators that are subject to interruption of fuel supply poses potential reliability issues for the winter peak load periods").

The Commission approved special measures proposed by the System Operator to address winter reliability concerns in New England once before. In late October 2005, anticipating shortages in supplies of natural gas and other generating fuels due to hurricane damage in the Gulf of Mexico region, the Operator filed interim revisions to its tariff to implement a contingency plan for the impending winter. *See ISO New England, Inc.*, 113 FERC ¶ 61,220 (2005) ("2005 Winter Order"), JA 648 (conditionally approving tariff filing), *reh'g denied*, 115 FERC ¶ 61,145 (2006) ("2006 Rehearing Order"), JA 665. To maintain system reliability, the Operator developed a package of temporary measures to increase generators' flexibility in adjusting supply offers, to facilitate energy imports, to provide incentives for demand response,[2] and to increase posturing of generating resources. *See* 2005 Winter Order at PP 4-9, JA 649-51. ("Posturing" refers to the Operator's practice of constraining or holding back scheduled resources to maintain operating reserves during or in anticipation of shortages, and providing credits to those resources. *See id.* at P 7, JA 650.) The Commission largely approved the Operator's proposals, including the allocation of posturing costs to

[2] "Demand response" refers to a customer's reduction in electricity usage in response to short-term fluctuations in demand and price, effectively returning energy to the market to alleviate price volatility and shortages. *See Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 736 (D.C. Cir. 2012).

market participants in proportion to their Real-Time Load Obligations,[3] finding that real-time load was the "primary beneficiary" of posturing to maintain reliability. *Id.* at P 34, JA 659. *See infra* Argument, Part II.B (discussing cost allocation).

III. THE COMMISSION PROCEEDINGS AND ORDERS

A. Tariff Proceeding

1. Winter Reliability Program Proposal

On June 28, 2013, the System Operator filed proposed revisions to Market Rule 1 of its Transmission, Markets and Services Tariff to implement a Winter Reliability Program for the winter of 2013-2014.[4] Transmittal Letter , T.R. 1, JA 1. The Operator explained that it had identified strategic risks to winter reliability, the most pressing of which were New England's increasing reliance on natural gas-fueled generation and resource performance during periods of stressed

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[3] Real-Time Load Obligation, as defined in Section III.3.2.1(b) of the System Operator's tariff, is a calculation that, as to each participant in the energy markets administered by the Operator, is based on the number of megawatts of that participant's load in each hour and is used to determine each participant's share of various market-related charges.

[4] The Operator submitted the Program filing jointly with the New England Power Pool Participants Committee, but subsequently filed amendments that the Committee did not sponsor because the circumstances did not allow time for the amendments to be considered in the stakeholder process. Accordingly, the Commission considered the Operator the only filing party, but noted that the Committee had jointly proposed most aspects of the Program. Tariff Order at P 1 n.4, JA 462-63.

system conditions. *Id.* at 4, JA 4. Though the Operator had been working with stakeholders to address those issues in future revisions to the capacity market, its operational experience in the (relatively mild) winter of 2012-2013 led it to propose temporary measures to maintain reliability during the next winter. *Id.* at 5, JA 5. In particular, natural gas-fueled generators had experienced supply shortages and volatile prices, while many oil-fired and dual-fuel facilities had not kept enough oil in storage tanks to provide reliability service in the event of extended or repeated periods of cold weather. *Id.*

Based on that experience, the Operator developed a proposal that comprised four components: (1) demand response; (2) Oil Inventory Service; (3) dual-fuel testing; and (4) market monitoring changes. *See id.* at 1, JA 1. Of relevance to these appeals, the Oil Inventory Service would compensate oil-fired generators and dual-fuel units that committed to establish specified amounts of oil inventory in exchange for "as bid" monthly payments in December, January, and February. *Id.* at 15-16, JA 15-16.

To implement the Program, the Operator would solicit bids for Oil Inventory Service and for demand response; it would then assess the bids in accordance with several tariff-defined criteria: "cost, the asset's historical availability and performance, the asset's ability to respond to contingencies and other changed conditions, diversity of location and sensitivity to locational constraints, dual fuel

capability and replenishment capability." *Id.* at 23, JA 23. Using a forecast based on a past (more severe) winter, the Operator estimated a potential reliability gap that would require approximately 2.4 million megawatt-hours from oil-fired generation, which it set as a cap on the total bids to be selected. *Id.* at 6, 23 JA 6, 23. The Operator estimated that the costs of providing the services would range from $16 to $43 million, and that it expected participants also to include risk premiums and profit margins in their price bids. Joint Testimony of Robert Ethier and Peter Brandien ("Ethier/Brandien Testimony") at 29-30, JA 213, 241-42; Answer of ISO New England at 8, T.R. 45, JA 348, 355.

The Operator proposed to allocate the costs of the Winter Reliability Program to Regional Network Load — i.e., to transmission owners.[5] The Operator reasoned that the Program was an out-of-market, discrete set of measures that, given the timing of the proposal, might not be priced into suppliers' contracts,[6]

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[5] Regional Network Load, as defined in Section II.21.2 of the tariff, reflects the proportional share of each network transmission customer relative to the aggregate load in its local network area in the monthly peak hour, and is used to allocate various transmission-related charges. "Generally, Regional Network Load is allocated the costs of the transmission system, while market costs are allocated to Real-Time Load Obligation." Transmittal Letter at 25, JA 25; *see supra* note 3 (defining Real-Time Load Obligation).

[6] The Operator noted that, in New England, the load-serving entities who paid for Real-Time Load Obligation (*see supra* note 3) "are generally suppliers that enter into contracts with local distribution companies and end users to serve load." Transmittal Letter at 25, JA 25. As explained in their brief (at 20), members of

whereas transmission owners could pass through the costs on a one-time basis. Transmittal Letter at 25, JA 25.

2. Tariff Order

On September 16, 2013, the Commission issued the Tariff Order, which conditionally accepted the proposed Program. As set forth in more detail in Part II.A of the Argument, *infra*, the Commission found the Program to be "an appropriate solution" as a temporary measure to address "the particular challenges to reliability" in the impending winter. Tariff Order at P 21, JA 468. The Commission determined that the bid-based compensation for Oil Inventory Service, with selection to be "based on both price and non-price factors," was just and reasonable, "given the urgency of the need to protect reliability, and the interim nature" of the Program. *Id.* at P 54, JA 478. The Commission, however, rejected the proposed allocation of costs to Regional Network Load as inconsistent with cost-causation principles and directed the Operator to submit a compliance filing that would allocate the costs of the Program to Real-Time Load Obligation. *See id.* at P 70, JA 483-84; Argument, Part II.B, *infra*.

Petitioner Retail Suppliers, including Petitioner TransCanada, are such load-serving entities.

3. Tariff Rehearing Order

TransCanada and Retail Suppliers filed timely requests for rehearing of the Tariff Order on October 16, 2013. T.R. 72, JA 490 (TransCanada); T.R. 73, JA 538 (Retail Suppliers). On April 8, 2014, the Commission denied rehearing in the Tariff Rehearing Order.

TransCanada and Retail Suppliers filed petitions for review of the Tariff Orders in Case Nos. 14-1104 and 14-1105, respectively.

B. Bid Results Orders

1. Bid Results Order

Because of the need to prepare for the impending winter, the System Operator solicited bids for Oil Inventory Service by the end of July 2013. On August 26, 2013, the Operator filed the results of its bid selection process. Winter Reliability Bid Results, B.R. 1, JA 564. The Operator explained that it had selected bids to provide up to 1.995 million megawatt-hours of energy, with all bids at or below $31 per megawatt-hour per month and a total cost of $78.8 million. *See id.* at 3, JA 566. (The Operator had received bids totaling 2.29 million megawatt-hours, at a total cost of $114.3 million, but chose not to select bids on the steeper section of the supply curve. *See id.* at 2-3, JA 565-66.)

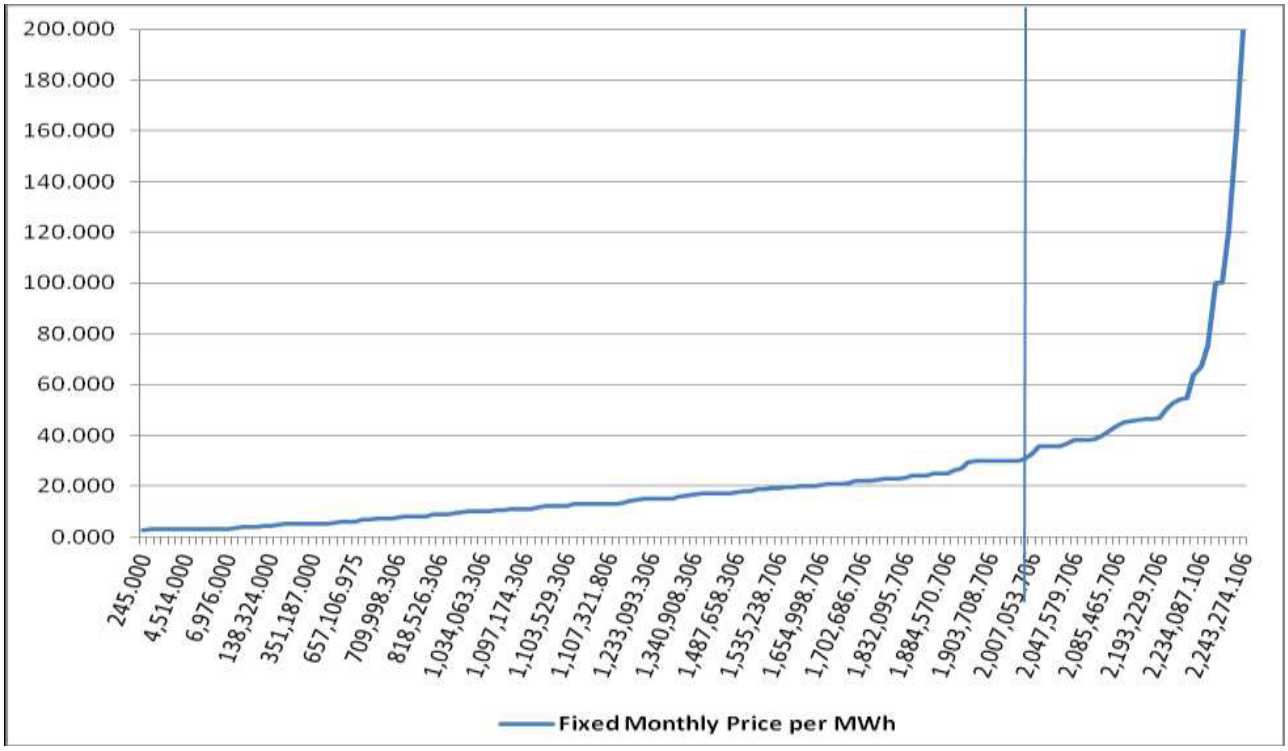
Several parties, including TransCanada, disputed the results on various grounds. On October 7, 2013, the Commission issued its Bid Results Order, which conditionally accepted the results but directed the Operator to submit a compliance

filing to provide further details of its evaluation process, including its selection of bids and its choice of $31 per megawatt-hour as a bid cutoff point. Bid Results Order at PP 23, 26-30, JA 603, 604-06. The Commission found that the Operator had complied with the tariff requirement to submit a list of the participants selected for the Winter Reliability program and the prices they would be paid (*id.* at P 24, JA 603), but the Commission also explained that it had "envisioned a more detailed filing" that would describe the Operator's process of evaluating bids, including its application of the criteria specified in the tariff. *Id.* at PP 26-27, 30, JA 604-05,606.

2. Compliance Filing

On October 15, 2013, the System Operator submitted a compliance filing that explained how it had considered and selected the bids. Winter Reliability Bid Results Compliance Filing (public version), B.R. 25, JA 609.[7] In particular, the Operator explained that it had arranged all eligible bids by price, ranking bids from lowest to highest cost of providing oil storage and demand response services, and had then evaluated the supply offer curve. *See* Compliance Filing at 3-4, JA 611-12. The Operator provided the following graph of that offer curve:

[7] The Operator also submitted a privileged version of the filing, which included a confidential attachment showing the bid stack, with names and prices of the bidding generators. B.R. 26.



Id. at 4, JA 612.[8]

The Operator had identified the potential cut-off point of $31 per megawatt-hour per month because the supply curve became steeper, such that taking the next tranche would increase costs by 5.6% ($4.4 million)) but result in only a 2% gain in the target procurement amount. Lowering the cutoff point to $30 per megawatt-hour would decrease Program costs by 10% ($7.3 million) but result in a 13% loss in the procurement amount. The Operator then applied the replenishment cap specified in the tariff. *See id.* at 4, 7, JA 612, 615.

[8] In the graph, the horizontal axis represents tranches of megawatt-hours, while the vertical axis shows bids in dollars per megawatt-hour.

Taking the remaining resources, the Operator considered reliability issues, including historical availability and performance and resource flexibility (based on data regarding forced outages and start times), and geographical distribution (focusing on proximity to concentrated load areas relative to constraints), and determined that no adjustments to the group of selected bids were necessary. The Operator further determined that the group met the proposed minimum output target of 4,000 MW per hour with a diverse selection of 56 generating resources and three demand response assets. *See id.* at 5-6, JA 613-14.

No party protested the compliance filing, which the Commission accepted by letter order on November 13, 2013. B.R. 31, JA 640.

3. Bid Results Rehearing Order

TransCanada filed a timely request for rehearing of the Bid Results Order on November 6, 2013. B.R. 29, JA 621. On April 8, 2014, the Commission denied rehearing in the Bid Results Rehearing Order, issued together with the Tariff Rehearing Order.

TransCanada filed a petition for review of the Bid Results Orders in Case No. 14-1103.

C. Subsequent Proceedings

In the 2013-2014 proceeding, the Operator stated its commitment to commence a stakeholder process to address reliability for future winter periods,

and the Commission "encourage[d] [the Operator] to consider market-based solutions as part of that process and to start that process as soon as possible . . . ." Tariff Order at P 42, JA 474.

In July 2014, however, the Operator filed a proposal for a second interim program, which was largely modeled on the 2013-2014 Winter Reliability Program, to address reliability concerns in the winter of 2014-2015. *See ISO New England Inc.*, 148 FERC ¶ 61,179 (2014). The Operator explained that the 2013-2014 program had succeeded in maintaining reliability during the colder-than-average winter, in which natural gas prices exceeded oil prices on more than half the days and oil-fired units provided nearly a quarter of the region's power at times. *Id.* at P 4. The Oil Inventory Service measures had supported procurement of more than three million barrels of oil, 88 percent of which was used for generation. *Id.* The Operator explained that it was proposing a second interim program because a substantial amount of non-natural gas generation had retired since the previous year, and its operational experience in the winter of 2013-2014 included more gas pipeline constraints than had been expected and difficulty replenishing oil inventories mid-season. *Id.*

The Commission accepted the proposal, but required (not just encouraged) the Operator to begin a stakeholder process to develop a long-term, market-based

proposal for the winter of 2015-2016 and future winters, and to submit progress reports to the Commission every 60 days. *Id.* at PP 1, 41.[9]

SUMMARY OF ARGUMENT

Reliable operation of the power system is one of ISO New England's central responsibilities. Based on its operational experience during the winter of 2012-2013, the System Operator proposed a package of temporary, out-of-market measures to help it maintain reliability during the following winter. The only measure at issue in these appeals is an incentive program to compensate oil-fired and dual-fuel generators for preparing to meet demand when natural gas-fired generation might be unable to do so. The Commission reasonably approved both the terms of the Winter Reliability Program and the results of the bid selection process for Oil Inventory Service.

The Program was a novel approach. Under ordinary circumstances, the Commission would prefer market-based mechanisms, and it has urged the Operator to develop such an approach for a long-term solution to winter reliability concerns.

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[9] Petitioner Retail Suppliers intervened in that proceeding, but did not protest the filing. Petitioner TransCanada filed no intervention or protest. *See id.*, Appendix A. No party sought rehearing of the order; an intervenor in the instant case, New England Power Generators Association, Inc., filed a motion for clarification regarding the Commission's expectations for any future proposal, which the Commission granted. *See ISO New England Inc.*, 150 FERC ¶ 61,029 (2015).

But the Program was developed in 2013 to address specific concerns about maintaining reliability in the impending winter of 2013-2014, based on known vulnerabilities observed during the previous winter. For that reason, the Commission considered the urgent need for reliability measures, the tailoring of the criteria to the identified risks, and the temporary nature of the Program and reasonably determined that those factors, weighed together with the prospective costs, supported a determination that the Program was just and reasonable.

The Commission, however, rejected the proposed allocation of Program costs to transmission. Because the Program was driven by the need to ensure sufficient supplies of generation resources and thus would primarily benefit real-time load, the Commission reasonably concluded that longstanding principles of cost causation and benefits required allocating costs to load. The Commission properly rejected arguments that load-serving entities (such as Petitioners TransCanada and Retail Suppliers) should not bear the costs, reaffirming its policy judgment that such entities voluntarily assume real-time load obligations, and the associated supply cost risks, under bilateral contracts.

In approving the bid results, the Commission reasonably found that the Operator had applied the Program criteria in accordance with the tariff and that the total costs were within the zone of reasonableness. Though the actual costs were higher than the initial estimate, the Commission noted that the Program — an

innovative design that valued the reliability benefits provided by resources' performance, flexibility, and location — was not conducive to precise projections. The Commission found, consistent with other cases involving reliability-driven rate designs, that the disparity did not show the Program rates to be unreasonable.

Finally, the Commission appropriately exercised its procedural discretion to consider the terms of the Winter Reliability Program and the results of the bid selection process in separate proceedings. The issues in the two proceedings were related, but distinct, and the Commission properly considered all matters before it.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners 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)).

The Commission's policy assessments are afforded "great deference." *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000), *aff'd sub nom. New York*, 535 U.S. 1; *see Black Oak Energy, LLC v. FERC*,

725 F.3d 230, 240 (D.C. Cir. 2013) (courts "defer to FERC's policy priorities"). "[T]he breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968). *See also S. Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014) ("the Commission must have considerable latitude in developing a methodology responsive to its regulatory challenge") (internal quotation marks and citations omitted).

In particular, the Commission's ratemaking decisions are subject to a "'zone of reasonableness.'" *Permian Basin*, 390 U.S. at 767 (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)); *see also Morgan Stanley*, 554 U.S. at 532 ("The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984) (reasonableness is a "zone," not a precise point, and FERC has discretion to consider legitimate non-cost factors to allow variation within that zone). Indeed, "issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission"; thus, "review of whether a particular rate design is just and reasonable is highly deferential." *Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d

250, 254 (D.C. Cir. 2001) (internal quotation marks and citations omitted); *accord Maryland*, 632 F.3d at 1286; *Elec. Consumers*, 407 F.3d at 1236.

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

II. THE COMMISSION REASONABLY APPROVED THE WINTER RELIABILITY PROGRAM

A. The Commission Properly Determined That The Program Was Just And Reasonable

The Commission reasonably approved the Winter Reliability Program as a short-term solution tailored to specific and pressing concerns about reliability of the New England system. In finding the Program just and reasonable, the Commission considered not only the associated costs, but also the exigent need for measures to address resource unavailability during the impending winter, the temporary nature of the proposed measures, and the specific criteria that the Operator had developed to implement the Program. *See* Tariff Order at PP 50, 54, JA 476, 478; Tariff Rehearing Order at PP 15, 18, 20, 23, JA 558-61.

Accordingly, the Commission found that, "[c]onsidering the particular challenges to reliability this coming winter and the interim nature of the Program . . . the Program is an appropriate solution for the fixed period requested . . . ." Tariff Order at P 21, JA 468. The Commission went on to find that the System Operator had adequately justified its approach, having "reasonably considered resource performance during prolonged cold weather events, given the region's increased reliance on natural gas-fired generation and recent problems with resource performance during periods of stressed system conditions" and proposed an approach "specifically tailored to consider resource unavailability caused by fuel shortages." *Id.* at P 30, JA 471. *See* Transmittal Letter at 4-26, JA 4-26 (explaining need for Program and describing proposed measures); Ethier/Brandien Testimony at 6-13, JA 218-25 (describing supply problems based on Operator's experience), 17-18, 27-28, JA 229-30, 239-40 (explaining proposed criteria and process for selecting bids). While the bid selection criteria would give the Operator "substantial discretion in setting prices," the Commission found that "appropriate discretion is necessary under these circumstances," including discretion "to consider factors of location, performance history, and flexibility, as well as cost." Tariff Order at P 31, JA 471. More specifically, the criteria derived from the very reliability concerns that drove the development of the Program, "such as the ability to respond to contingencies and other changed conditions,

diversity of location and sensitivity to locational constraints, dual-fuel capability, and oil replenishment ability." Tariff Rehearing Order at P 18, JA 559.

That assessment of "a range of factors" (*id.* at P 21, JA 560) was consistent with the Federal Power Act. The core purpose of the statute is not only "preventing excessive rates," but also "protecting against inadequate service" and "promoting the orderly development of plentiful supplies of electricity." *Consol. Edison Co. of N.Y., Inc. v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) (internal quotation marks and citations omitted); *Blumenthal*, 552 F.3d at 879 (system reliability is "a primary goal"). To those ends, the Commission has approved, and this Court has affirmed, a variety of innovative approaches to the problem of capacity shortages that threaten system reliability. *See*, *e.g.*, *Maryland*, 632 F.3d 1284 (mid-Atlantic transitional capacity auctions); *Connecticut*, 569 F.3d 477 (New England's forward capacity market); *Maine*, 520 F.3d 464 (New England's transition capacity payments and descending clock auction); *Elec. Consumers*, 407 F.3d 1232 (New York's capacity auctions); *California*, 254 F.3d 250 (bid-based reliability contracts). The Operator's approach to securing adequate generation resources to prepare for known reliability risks fits within this line of precedents.

Moreover, the Commission did consider the costs of the Program. The Commission did not suggest that individual bids for Oil Inventory Service would, or should, be scrutinized using traditional cost-of-service standards — the "as-bid"

pricing under the proposal was designed to attract useful resources. *See* Tariff Order at P 54, JA 478 ("Because the selected resources will provide resource-specific levels of reliability benefits, they are not similar situated and it is reasonable that they be paid different (non-uniform) prices as well."). Rather, the Commission weighed the estimated aggregate cost of the Program against the pressing need to secure commitments for oil-fired generation in advance of winter. *See id.*; *see also* Tariff Rehearing Order at P 15, JA 558 ("the Commission weighted prospective costs, as well as the need to ensure reliability during the then-imminent winter 2013-2014"); *id.* at P 20, JA 560 ("the Commission properly considered reliability concerns, not just final Program costs").

Though the actual total cost was higher than the initial estimate, the Commission understood from the outset that prospective costs were difficult to estimate and that the selection of resources would properly (indeed, necessarily) be based in part on non-cost criteria. *See* Tariff Order at P 54, JA 478 ("resources . . . will be chosen based on both price and non-price factors, including historical availability and performance, ability to respond to contingencies, diversity of location, and sensitivity to transmission constraints"); Tariff Rehearing Order at P 16, JA 558-59 ("the proposal appropriately allowed [the Operator] to consider criteria other than cost in selecting resources, criteria that likely would affect the Program's final cost"); *see also id.* at P 17, JA 559 (Program addressed "reliability

risks that were pressing but somewhat difficult to definitively quantify"). Thus, "the fact that the Program resulted in an actual cost higher than the estimate does not alone demonstrate that the Program design is unjust and unreasonable." *Id.* at P 21, JA 560. *Cf. Blumenthal*, 552 F.3d at 879 (upholding Commission's approval of interim reliability measures that offered "a *temporary and imperfect* solution to particular problems in the New England electricity market") (emphasis added).

Neither the Federal Power Act nor precedent confines the Commission's analysis to a precise, binding estimate of prospective costs or to a parsing of individual bids. The Commission's assessment of the Winter Reliability Program was consistent with its "latitude to balance the competing considerations and decide on the best resolution" for "'intensely practical difficulties'" — such as threats to system reliability — that call for novel solutions. *Blumenthal*, 552 F.3d at 885 (quoting *Permian Basin*, 390 U.S. at 790). Though TransCanada may disagree with the Commission's determination that the reliability needs and urgent timing warranted mechanisms that would value non-cost factors, and its decision to allow the Operator discretion in evaluating and selecting bids, those policy judgments were the Commission's to make. *See Elec. Consumers*, 407 F.3d at 1239 (deferring to Commission's "predictive judgments and policy choices" in approving an experimental rate design).

B. The Commission Appropriately Required Allocation Of Program Costs To Real-Time Load

1. Allocation To Real-Time Load Is Consistent With Cost Causation Principles

Though the Commission found the Winter Reliability Program just and reasonable, it conditioned its approval on the allocation of costs to real-time load, rather than to transmission charges as the Operator had proposed. The Commission explained that, because the Winter Reliability Program was intended "to address generation-related reliability concerns" by ensuring "sufficient energy supply to meet real-time load," such load "is the primary beneficiary, and the primary cost-driver, of the Winter Reliability Program . . . ." Tariff Order at P 70, JA 484; *see also* Tariff Rehearing Order at P 26, JA 562 (Program was "designed to ensure adequate electric energy supply to meet real-time load during the winter"; "the Program is a time-sensitive out-of-market reliability measure with real-time load as the primary beneficiary").

The Commission's "[l]ong-standing cost-causation and benefits/burdens principles provide that costs should be allocated to those who benefit from the incurrence of the costs." Tariff Order at P 70, JA 483-84 (citing 2005 Winter Order at P 34, JA 659). *See, e.g.*, *S. Carolina*, 762 F.3d at 85 ("'costs are to be allocated to those who cause the costs to be incurred and reap the resulting benefits'") (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d

1277, 1285 (D.C. Cir. 2007)). For that reason, costs of the Operator's earlier winter reliability measures in 2005-2006 had similarly been allocated to load charges. *See* 2006 Rehearing Order at P 12, JA 668 ("Real-Time Load directly benefits from the availability of generating capacity in real time."). Moreover, contrary to Petitioners' claim that load-serving entities such as themselves (*see* Br. 20), in contrast to the load customers that they serve, "do not benefit" from reliability measures (Br. 51), the Commission has concluded that they do:

> [Load-serving entities] purchase power in the real time energy market to serve load and are, therefore, the entities that directly cause [the System Operator] to posture generation resources to ensure that the [load-serving entities] have adequate generation to meet their real time load obligations. Thus it is reasonable and consistent with cost causation principles to allocate these costs to [load-serving entities].

2006 Rehearing Order at P 13, JA 668.

Petitioners' efforts (*see* Br. 54-55) to distinguish the 2005-2006 proceeding from the 2013-2014 Program are without merit. In both cases, the Commission determined that allocation to real-time load was just and reasonable, while allocation to transmission would be unjust and unreasonable.[10] In neither case did the Commission's ruling turn on what the Operator had proposed, nor did any of

[10] In the 2005-2006 proceeding, the Commission could have ended its analysis when it accepted the Operator's proposed allocation to load (as just and reasonable under Federal Power Act section 205), but it nevertheless went on to discuss the merits of protestors' arguments that costs should instead be allocated to transmission.

the 2005, 2006, 2013, or 2014 orders support Petitioners' claim that the Commission's policy view was grounded in the particular "facts and circumstances" of a proposal. Indeed, the Commission found the circumstances "similar" in that the 2005-2006 winter program and the 2013-2014 Program were "both time-limited, out-of-market mechanisms that are appropriately considered reliability measures directly benefitting real-time load. . . . While the mechanisms differ, the goal of both programs is the same: to improve reliability by ensuring that adequate electric energy supply is available to meet real-time load during the winter." Tariff Order at P 72, JA 484-85. *See generally NSTAR*, 481 F.3d at 799 (Court "defer[s] to the Commission's interpretations of its own precedents."); *accord*, *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 743 (D.C. Cir. 2007).

Accordingly, in the context of contingency measures to ensure the availability of generation resources to serve load in periods of peak usage, supply shortages, and other threats to reliability during the winter of 2013-2014, allocation of the costs to real-time load, which benefits most from the measures, was consistent with cost-causation principles. Petitioners do not dispute the Commission's application of those principles; instead, they claim that the Commission improperly rejected the Operator's proposed allocation to transmission (Br. 47-48) and failed to respond to the objections of load-serving

entities regarding potential consequences to consumers (Br. 51-53). As explained in the following sections, both arguments lack merit.

2. The Commission Reasonably Rejected The Proposed Allocation To Transmission Customers

The Commission did, in fact, expressly reject the Operator's proposed allocation through transmission charges as unreasonable. Of course, the Commission need not "use the 'magic words'" of the statute to reject the Operator's proposed allocation. *Interstate Natural Gas Ass'n v. FERC*, 285 F.3d 18, 47 (D.C. Cir. 2002) (affirming Commission's determination under a substantially identical provision of the Natural Gas Act). The Commission unmistakably found — as it had in 2005 — that allocating costs to transmission customers would be unjust and unreasonable.

Oil Inventory Service under the 2013-2014 Program "does not address . . . a transmission-related concern." Tariff Order at P 74, JA 485. TransCanada and Retail Suppliers do not contend otherwise; rather, they argue (as did the Operator, in attempting to justify its proposed allocation) that transmission owners would be able to pass the costs through to end-users, effectively, by way of charging transmission customers, whereas load-serving entities would not be able to pass through real-time load charges to end-users under their supply contracts. But the Commission, in the 2013-2014 proceeding as in the 2005-2006 proceeding, rejected such outcome-driven deviation from cost-causation principles. "It would

not be appropriate" to allocate reliability costs through network load charges, because "there is no direct benefit to network transmission customers . . . ." 2005 Winter Order at P 34, JA 659; *accord*, Tariff Rehearing Order at P 24, JA 561 ("there is no *direct* benefit to Regional Network Load") (citing 2005 Winter Order, *supra*); *see also* 2006 Rehearing Order at P 13, JA 668 (transmission customers "do not cause [the System Operator] to posture generation resources in order to maintain the stability and reliability of the transmission system"). Accordingly, the Commission rejected that aspect of the Operator's 2013 proposal: "[W]e *cannot* find that the costs should be allocated to transmission customers . . . ." Tariff Rehearing Order at P 24, JA 561 (emphasis added).

3. The Commission Explained Its Policy View That Bilateral Supply Contracts Should Reflect Risks Associated With Real-Time Load Obligations

TransCanada and Retail Suppliers further contend that the Commission disregarded the impact on consumers of allocation to real-time load, which they argue would increase risks to suppliers and result in higher contract costs to account for those risks. *See* Br. 51-53. But the Commission did not ignore the consequences for contracts — it reaffirmed its policy judgment that contracts *should* reflect supply cost risks.

The Commission has repeatedly explained its judgment. The Commission addressed similar arguments — i.e., that the short notice of the Program was unfair

to load-serving entities because they would not be able to avoid or pass on the costs — in the 2005-2006 orders, concluding that load-serving entities "voluntarily assume supply cost risks in entering into contracts" with local distribution companies, and that parties had provided "no credible argument that would persuade the Commission to relieve [load-serving entities] of that voluntary, contractual obligation." 2006 Winter Rehearing Order at P 17, JA 669; *see also id.* at P 15, JA 668 ("[Load-serving entities] voluntarily assume Real-Time Load Obligation when entering into bilateral contracts with end-use customers.").

Indeed, the Commission explained that "an important purpose of the . . . supply contracts is to shift supply cost risks" from local distribution companies to load-serving entities:

> Such risks include those from unanticipated as well as anticipated events. [Allocating costs to transmission customers] would unfairly burden [local distribution companies] and retail load with the risks that the [load-serving entities] contracted to bear. . . . [T]he risks associated with load-serving obligations should have been anticipated and reflected in the rates incorporated in the contracts . . . .

2005 Winter Order at P 35, JA 659-60, *cited in* Tariff Order at P 76, JA 486; *see also* 2006 Rehearing Order at P 15, JA 668 ("we would expect that risk to be captured in bilateral contracts between [load-serving entities] and end-use customers"), *quoted in* Tariff Order at P 75, JA 486, *and* Tariff Rehearing Order at P 27, JA 562. Therefore, in the 2013-2014 proceeding, the Commission was similarly "unpersuaded" by the same argument. Tariff Order at P 75, JA 485.

The Commission also specifically rejected suppliers' argument that allocation to real-time load would harm consumers. In the 2005 Winter proceeding, a load-serving entity argued that allocation of posturing costs to real-time load would adversely affect future contracts, as load-serving entities would anticipate similar allocations of further reliability measures, increasing costs to retail load.[11] *See* 2006 Winter Rehearing Order at P 8, JA 667. The Commission, however, disagreed that its ruling would have adverse consequences: "Rather, by acting consistently and according to cost causation principles the Commission is providing certainty to [all parties] that the contracts into which they have entered will not be upset arbitrarily." *Id.* at P 16, JA 669.

Presented with another temporary winter reliability program, a similar cost allocation dispute, and the same objections, the Commission provided just such consistency and certainty by relying on its previous orders and standing by its policy judgment. Though TransCanada and Retail Suppliers may disagree with the Commission's policy assessment regarding the allocation of risks and obligations under bilateral supply contracts, that assessment — which the Commission fully considered in the 2005-2006 proceeding and reaffirmed in the 2013-2014

[11] That supplier's prediction — notwithstanding the Commission's rejection of the argument and its clear explanation of contract risks — apparently failed to materialize, given these parties' claimed lack of notice and revival of the same warning nearly a decade later.

proceeding — is entitled to "great deference." *Transmission Access*, 225 F.3d at 702.

III. THE COMMISSION REASONABLY APPROVED THE BID RESULTS

The Commission also reasonably approved the results of the bid selection process, finding that the System Operator had properly followed its tariff and that there was no evidence that the costs of the Program fell outside the zone of reasonableness. TransCanada argues that the Commission could not find the results of the selection process just and reasonable without analyzing the cost components of each individual bid. *See* Br. 33-37. The Commission, however, had already approved "as-bid" pricing, based on both cost and non-cost factors, reasonably considering the potential costs of the Program as weighed against the pressing need to secure incremental oil service to maintain reliability, the design of the selection criteria, and the limited (i.e., one-winter) scope of the Program. *See supra* Part II.A.

On review of the bid results, the Commission found that the Program costs, though higher than the original estimate, did not result in unreasonable rates. *See* Bid Results Rehearing Order at P 15, JA 646. The Winter Reliability Program was "a novel approach" to addressing concerns about reliability that arose from operational experience in the previous winter. Bid Results Order at P 25, JA 604; Bid Results Rehearing Order at P 15, JA 646. Given that novelty, "the Program

[did] not easily lend itself to precise cost predictions." Bid Results Order at P 25, JA 604; *see also* Bid Results Rehearing Order at P 15, JA 646 (costs of the new measures "could not be easily identified with certainty"). Therefore, the fact that the actual costs exceeded the estimate did not make the results unjust and unreasonable, and the Commission was not persuaded by speculation — based only on that disparity — that participants had included excessive profit margins in their bids. Bid Results Rehearing Order at P 15, JA 646. *Cf. Blumenthal*, 552 F.3d at 883 (upholding Commission's determination that disparity between costs and rates was not prima facie evidence of unjust rates); *Maryland*, 632 F.3d at 1285 (upholding rates that had increased during transition to capacity market).

Nevertheless, the Commission did review the Operator's decision to accept bids up to a price of $31 per megawatt-hour per month. In the Bid Results Order, the Commission only conditionally accepted the results, directing the Operator to submit a more detailed explanation of the selection process, to show whether and how the Operator had applied all of the tariff criteria. Bid Results Order at PP 23, 30, JA 603, 606. In particular, the initial results filing "lack[ed] sufficient detail to determine why $31 . . . was the proper cutoff point" for the selected bids. *Id.* at P 29, JA 606. Accordingly, the Operator submitted its Compliance Filing detailing its process of sorting and evaluating the bids, and explaining that the steeper supply curve above $31 meant that selecting additional bids would have raised

program costs disproportionately to the incremental service gained. *See* Compliance Filing at 4, 7, JA 612, 615; *supra* p. 15 (graph and explanation of cut-off point). Neither TransCanada nor any other party protested that compliance filing.

The Commission also noted that the overall cost of providing Oil Inventory Service included not only the costs of procuring fuel, but also operational or risk-related costs, and found that tariff criteria did not require the Operator to assess each bid based on the underlying fuel costs. Bid Results Rehearing Order at P 14, JA 646. Moreover, as noted *supra* at p. 25, it was reasonable that resources providing greater reliability benefits would receive higher prices. Bid Results Rehearing Order at P 15, JA 646; *see also* Compliance Filing at 5-6, JA 613-14 (describing evaluation of bids based on resource performance, flexibility, geographical distribution, and diversity, as required by Program criteria). *Cf. Blumenthal*, 552 F.3d at 883 (upholding above-cost rates that reflected scarcity and encouraged development of new supplies).

IV. THE COMMISSION REASONABLY DECLINED TO CONSOLIDATE THE TARIFF FILING AND BID RESULTS DOCKETS

TransCanada also argues that the Commission improperly declined to consolidate the separate dockets. *See* Br. 55-57. The Commission, however, has broad discretion to order its own proceedings: "Absent constitutional constraints

or extremely compelling circumstances . . . administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978)) (internal quotation marks and citations omitted); *see also Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities"); *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).

In the underlying proceedings, the Commission agreed that the matters were linked, but disagreed with TransCanada's contention that the questions of fact and law were "the same" (Br. 56): "Although the proceedings are closely related, they present separate factual and legal issues as to the just and reasonableness of two distinct [FPA] section 205 filings." Tariff Rehearing Order at P 28, JA 562; *accord*, Bid Results Rehearing Order at P 17, JA 647. The Commission reasonably chose to consider the terms and criteria of the proposed Winter Reliability Program, and to address the objections thereto, in one proceeding, and to review the Operator's selection of Oil Inventory Service bids separately. *See*

Bid Results Rehearing Order at P 17, JA 647 (noting that TransCanada's challenges to acceptance of the Program would be addressed in the tariff proceeding).

TransCanada does not argue that the Commission's procedural rulings warrant remand, but asks the Court to direct the Commission to require consolidation if it remands both sets of FERC Orders for further proceedings. Br. 57. *But see Mobil*, 498 U.S. at 230 (appeals court had "clearly overshot the mark" if it required the Commission to resolve a particular issue at a particular time in a particular proceeding) (internal citations omitted). The Commission, however, not only exercised its broad procedural discretion to maintain separate dockets but appropriately considered and resolved all issues. Nothing more is required.

CONCLUSION

For the reasons stated, the petitions should be denied 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 Final Brief for Respondent contains 8,413 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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April 15, 2015

ADDENDUM

STATUTES

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

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with re-

spect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

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

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 de-

livering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

(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).

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

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

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

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

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

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

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

[1] See References in Text note below.

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

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 15th day of April 2015, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

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