ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

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Nos. 15-1071 and 16-1042 (consolidated)

NEW ENGLAND POWER GENERATORS ASSOCIATION, INC., *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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Washington, D.C. 20426

FINAL BRIEF: October 25, 2016

CIRCUIT RULE 28(a)(1) CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties:

To counsel's knowledge, all parties before this Court and the Federal Energy Regulatory Commission are listed in Petitioners' opening brief.

B. Rulings Under Review:

1. *New Eng. Power Generators Ass'n, Inc.*, Docket No. EL14-7-000, Order Denying Complaint, 146 FERC ¶ 61,039 (2014) (New Eng. Gen. Initial Order), JA 103;

2. *New Eng. Power Generators Ass'n, Inc.*, Docket No. EL 14-7-001, Order Denying Rehearing, 150 FERC ¶ 61,064 (2015) (New Eng. Gen. Rehearing Order), JA 212;

3. *Exelon Corp.*, Docket No. EL15-23-000, Order Denying Complaint, 150 FERC ¶ 61,067 (2015) (Exelon Initial Order), JA 221; and

4. *Exelon Corp.*, Docket No. EL15-23-001, Order Denying Rehearing, 154 FERC ¶ 61,005 (2016) (Exelon Rehearing Order), JA 253.

C. Related Cases:

The issue under review in this proceeding has not previously been before this Court or any other court. This Court previously considered petitions for review of earlier Commission orders that established rules for auctions in the ISO New England regional electricity capacity market, in *Me. Pub. Utils. Comm'n v.*

FERC, 520 F.3d 464 (D.C. Cir. 2008), *rev'd in part sub nom. NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010), and that made changes to the capacity market rules, in *New Eng. Power Gen. Ass'n v. FERC*, 757 F.3d 283 (D.C. Cir. 2014).

Another petition sought review of Commission orders approving further changes to the New England capacity market, in *NextEra, et al. v. FERC*, No. 15-1070 (D.C. Cir., filed on Mar. 30, 2015). That petition was voluntarily remanded back to the Commission on December 1, 2015.

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October 25, 2016

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GLOSSARY

2009 PJM Order	*PJM Interconnection, LLC*, 128 FERC ¶ 61,157 (2009)
Amended New Entrant Rule or Amended Rule	Market rule approved in *ISO New Eng. Inc.*, 147 FERC ¶ 61,173 (2014), allowing new generators entering the capacity auction in New England to lock in the clearing price they receive in the first auction for the next six auctions, during which time they must bid zero to ensure their capacity clears
Commission or FERC	Federal Energy Regulatory Commission
Exelon	Exelon Corporation
Exelon Initial Order	*Exelon Corp.*, 150 FERC ¶ 61,067 (2015), JA 221
Exelon Rehearing Order	*Exelon Corp.*, 154 FERC ¶ 61,005 (2016), JA 253
Generators Association	New England Power Generators Association
JA	Joint Appendix
Minimum Offer Rule	Rule requiring new capacity auction entrants in New England to bid at an administratively-determined price, unless the new entrant can prove its actual costs are lower
New Eng. Gen. Initial Order	*New Eng. Power Generators Ass'n*, 146 FERC ¶ 61,039 (2014), JA 103
New Eng. Gen. Rehearing Order	*New Eng. Power Generators Ass'n*, 150 FERC ¶ 61,064 (2015), JA 212
New Entrant Rule or Rule	Market rule allowing new generators entering the capacity auction in New England to lock in their clearing price for a certain period, during which time they must bid zero to ensure their capacity clears
PJM	PJM Interconnection, LLC
P	Paragraph in a Commission order
Pet. Br.	Petitioners' Opening Brief
R.	Record on appeal
Sloped Demand Initial Order	*ISO New Eng. Inc.*, 147 FERC ¶ 61,173 (2014)
Sloped Demand Rehearing Order	*ISO New Eng. Inc.*, 150 FERC ¶ 61,065 (2015)
System Operator	ISO New England Inc.
Tariff	System Operator's Tariff

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

This is the latest in a series of cases concerning the ongoing efforts of the Federal Energy Regulatory Commission (Commission or FERC), regional transmission operators, and wholesale electricity market participants to create and implement rate designs that promote the development of sufficient electric capacity resources to ensure system reliability. ISO New England Inc. operates the high-voltage electric transmission network in the New England region. ("ISO" stands

for Independent System Operator; this brief will refer to ISO New England as the System Operator.) The System Operator administers a tariff, approved by the Commission, which details the rates, terms, and conditions of regional transmission service and wholesale market operations.

The System Operator's tariff contains a new-entrant pricing rule (New Entrant Rule or Rule) for its regional capacity auction market. (Capacity is not electricity itself; it is the ability to produce electricity when needed.) Under the decade-old New Entrant Rule, new generators can choose to "lock in" the clearing price they receive in their first auction for a specified number of subsequent auctions. A new generator must effectively bid zero during that lock-in period to ensure that its capacity is selected. In 2014, the Commission approved the System Operator's proposed amendment to the New Entrant Rule that extended the lock-in period from five to seven years (Amended New Entrant Rule or Amended Rule). The Commission determined that the Amended Rule reasonably balanced incentivizing new entry and maintaining low consumer prices – given the threat of a lack of new investment, and thus the threat to system reliability, in New England.

Petitioners New England Power Generators Association (Generators Association) and Exelon Corporation (Exelon) (collectively, Power Generators) filed separate complaints with the Commission, challenging the special treatment for new generators in New England and claiming the suppression of capacity

prices for existing generators. The Commission, in the orders now on review, denied the complaints. *New Eng. Power Generators Ass'n*, 146 FERC ¶ 61,039 (2014), R. 59 (New Eng. Gen. Initial Order), JA 103, *on reh'g*, 150 FERC ¶ 61,064 (2015), R. 87 (New Eng. Gen. Rehearing Order), JA 212; *Exelon Corp.*, 150 FERC ¶ 61,067 (2015), R. 88 (Exelon Initial Order), JA 221; *on reh'g*, 154 FERC ¶ 61,005 (2016), R. 96 (Exelon Rehearing Order), JA 253.

The issue presented for review is: Whether the Commission reasonably determined that the Power Generators had not demonstrated that the System Operator's New Entrant Rule must, again, be changed.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE FACTS

I. BACKGROUND

A. Statutory And Regulatory Background

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over the transmission and wholesale sale of electricity in interstate commerce. 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). It includes the power to set rates for electricity capacity, either directly or indirectly through a market mechanism, and to review

capacity requirements that affect those rates. *See Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 482-84 (D.C. Cir. 2009).

All rates for or in connection with jurisdictional sales and transmission service are subject to Commission review to assure that they are just and reasonable, and not unduly discriminatory or preferential. *See* Federal Power Act sections 205 and 206, 16 U.S.C. §§ 824d(e), 824e(a). "[T]he [Federal Power Act] has multiple purposes in addition to preventing excessive rates, including protecting against inadequate service and promoting the orderly development of plentiful supplies of electricity." *Consol. Edison Co. of N.Y. v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) (citations and internal quotation marks omitted). The Commission must balance these competing interests. *See, e.g., New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283, 298 (D.C. Cir. 2014).

A public utility first proposes rates with the Commission pursuant to section 205 of the Federal Power Act. 16 U.S.C. § 824d(c); *see also Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 531 (2008). Section 205 places the burden on the filing utility to show that its proposal is lawful. 16 U.S.C. § 824d(e); *see Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010) (describing section 205 burden of proof).

Once a rate is established, section 206(a) of the Federal Power Act authorizes a complainant to challenge that existing rate. 16 U.S.C. § 824e(a). The

complainant bears the burden to demonstrate that the existing just and reasonable rate has become unjust and unreasonable based on changed circumstances. *Id.* § 824e(b); *see FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353, 356 (D.C. Cir. 2014); *see also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 59 (D.C. Cir. 2014) (FERC may alter a previously set just and reasonable rate when changed circumstances warrant); *Iberdola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1301 (D.C. Cir. 2010) (complainant can bring a section 206 challenge when it believes a rate has "become unjust over time"). If the Commission finds the rate unjust and unreasonable, it must establish a new rate. *See FirstEnergy Serv. Co.*, 758 F.3d at 356.

B. Regional Capacity Markets

In recent decades, the Commission has sought to transition from incumbent utilities operating much of the nation's electricity grid and exercising monopoly power, toward facilitating competition in wholesale power markets. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 49-54 (providing a history of the Commission's electric industry reforms); *ExxonMobil Corp. v. FERC*, 571 F.3d 1208, 1212 (D.C. Cir. 2009) (same). The Commission's efforts to enhance competition resulted in the landmark Order No. 888 rulemaking, requiring utilities to provide open, non-

discriminatory access to their transmission facilities to competing suppliers.[1] *See New York*, 535 U.S. at 11-13 (affirming Order No. 888); *cf. Morgan Stanley Capital Grp.*, 554 U.S. at 536 ("the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity").

To broaden the geographic reach of wholesale competition and to promote efficiencies, the Commission has also encouraged the creation of large regional transmission system operators. *See FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016). These regional entities manage the electricity grid on behalf of transmission-owning member utilities, "providing generators with access to transmission lines and ensuring that the network conducts electricity reliably." *Id.* The system operator provides this open access at rates established by a single tariff. *See NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165, 169 n.1 (2010) (quoting *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004)).

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[1] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part, Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

Some regional system operators employ capacity auctions to determine the amount of electricity available for production and transmission when needed. *See New Eng. Gen.*, 757 F.3d at 285; *see generally Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1293 (2016) (describing operation of capacity auctions). "Capacity" is not electricity itself but the ability to produce it when necessary. *See Conn. Dep't of Pub. Util. Control*, 569 F.3d at 478 (describing capacity as a "call option" that allows purchasers to have the option of buying electricity from generators); *see also NRG Power Mktg.*, 558 U.S. at 168 ("In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases an option to buy a quantity of energy, rather than purchasing the energy itself."). In overseeing capacity markets, the Commission ensures regional system operators adopt transmission and pricing policies that "promote the efficient use of, and investment in, generation, transmission, and consumption" of wholesale electricity in capacity systems. *New Eng. Gen.*, 757 F.3d at 286 (quotation omitted).

C. The System Operator's Capacity Market

The New England System Operator is a private, non-profit entity that administers the energy market across six states (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont), operates the region's high-voltage transmission system, and maintains system reliability. *See Blumenthal v. FERC*, 552 F.3d 875, 878 (D.C. Cir. 2009). Numerous appeals in

this Court have considered the difficult practicalities in maintaining system reliability and mitigating market power in areas of high demand along the eastern seaboard such as New England – including efforts to assure an adequate level of electric capacity to meet future demand. *See, e.g.*, *Conn. Dep't of Pub. Util.*, 569 F.3d 477 (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 Power Marketing*, 558 U.S. 165; *see also New Eng. Gen.*, 757 F.3d 283 (imposition of additional mitigation measures for New England capacity market); *New Eng. Power Generators Ass'n v. FERC*, 707 F.3d 364 (D.C. Cir. 2013) (standard for Commission review of auction rates); *Blumenthal*, 552 F.3d 875 (transition to capacity auction).

Like other regional entities, the New England System Operator utilizes a capacity auction to set prices by attracting sufficient capacity to meet wholesale demand. *New Eng. Gen.*, 757 F.3d at 286; *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 796 (D.C. Cir. 2007). The System Operator has administered its capacity auction since 2008 pursuant to its Commission-approved jurisdictional tariff (Tariff). *See* Tariff § III.13 *et seq.* (Forward Capacity Market rules), JA 261-64; *see also New Eng. Gen.*, 757 F.3d at 287-88 (tracing history of the System Operator's capacity auction). The System Operator fashioned its capacity market "via a settlement including stakeholders of all stripes." *New Eng. Gen.*, 757 F.3d

at 287. This capacity market has been – and continues to be – repeatedly revised based on the stakeholder process. *See id.* at 288.

In the auction, electricity providers in New England purchase from generators (and other suppliers) options to buy capacity three years in advance. *See Blumenthal*, 552 F.3d at 879. Before each auction, the System Operator determines how much capacity will be needed in three years' time. *See New Eng. Gen.*, 757 F.3d at 298 (explaining bidding process). The capacity auction is a "descending clock" auction, in which the price gradually drops until the total amount of capacity offered by suppliers equals the required capacity amount. *Id.*; *see generally* Tariff § III.13.2 *et seq.*, JA 265-75.

Any bid that "clears" the auction receives the auction-clearing price – regardless of bid price. *New Eng. Gen.*, 757 F.3d at 298; *see Hughes*, 136 S. Ct. at 1293. The capacity auction should result in the System Operator selecting capacity from generators who can produce the needed capacity most efficiently for the least cost. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 775 (purpose of capacity auction is to select bids that lower wholesale rate by displacing higher-priced generation). The auction also identifies the need for new generation. *New Eng. Gen.*, 757 F.3d at 287; *see generally Hughes*, 136 S. Ct. at 1293. A high clearing price encourages new generators to enter the market. *Hughes*, 136 S. Ct. at 1293.

A low clearing price discourages new entry and encourages retirement of existing high-cost generators. *Id.*

D. The System Operator's Special Capacity Auction Rules For New Generators

Relevant to this appeal are two rules that apply to new generators seeking to enter the New England System Operator capacity auction – the Minimum-Offer Price Rule (Minimum Offer Rule) and the New Entrant Rule. The first rule requires new entrants to bid capacity into the auction at or above a predetermined price to ensure that the price of capacity is "truly reflective of the cost of new entry into the market" – unless the new entrant demonstrates that its actual costs are lower. *New Eng. Gen.*, 757 F.3d at 292; *see also Hughes*, 136 S. Ct. at 1294 (a minimum offer price rule "requires new generators to bid capacity into the auction at or above an [administratively-determined] price"); *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 85-86 (3rd Cir. 2014) (describing preliminary screens used to identify such resources). The purpose of the Minimum Offer Rule is to prevent new entrants from bidding low to ensure they clear and, in so doing, suppressing capacity prices. *See New Eng. Gen.*, 757 F.3d at 287, 290. Once a new generator clears its first auction, it can bid its capacity in subsequent auctions at any price, including zero. *See New Eng. Gen.*, 757 F.3d at 292; *see also Hughes*, 136 S. Ct. at 1294.

In *New England Generators*, this Court affirmed the FERC-approved Minimum Offer Rule in New England, finding that it "reasonably mitigated" new entrant price-suppression. 757 F.3d at 291. The Court held that the Commission balanced competing interests and "reasonably determined that it was more important to prevent price distortion and excess capacity purchases than it was to allow out-of-market resources to clear." *Id.* at 293.

This appeal concerns the second of the New England rules for new generators, the New Entrant Rule. This Rule has been part of the System Operator's capacity auction since the auction's inception. *See Devon Power LLC*, 115 FERC ¶ 61,340 P 16 (2006) (describing lock-in provision as part of settlement agreement creating auction), *rev'd in part on other grounds, Me. Pub. Utils. Comm'n*, 520 F.3d 464, *rev'd in part sub nom. NRG Power Mktg.*, 558 U.S. 165; *see also New Eng. Gen.*, 757 F.3d at 287 (describing settlement process).

Under the Rule's original version, a generator could choose to lock in its first-year capacity price for five years. *See* Exelon Initial Order P 4 n.5, JA 222. In other words, a new generator would receive that initial clearing price for the four subsequent annual auctions during the lock-in period – even if the actual clearing price for those subsequent auctions were higher or lower. *Id.* P 4, JA 222. Although the new generator foregoes the potential upside that subsequent capacity auctions could result in higher clearing prices, *see id.*; Exelon Rehearing

Order P 2, JA 254, the lock-in mitigates price risk by providing insurance to any new generator that it will receive its first auction-clearing price throughout the lock-in period. *See* New Eng. Gen. Initial Order P 6, JA 106; New Eng. Gen. Rehearing Order P 19, JA 219.

During the lock-in period, a new generator must offer its capacity into those subsequent auctions as a "price taker." Exelon Initial Order P 4, JA 222; Exelon Rehearing Order P 2, JA 254. This means the generator effectively offers its capacity at zero dollars, guaranteeing it clears the auction. Exelon Initial Order P 6, JA 223; Exelon Rehearing Order P 2, JA 254. The Commission has found the Rule just and reasonable, providing "predictable revenues and facilitate[ing] financing for new capacity." *Devon Power*, 115 FERC ¶ 61,340 P 16.

E. The Commission Approves The Amended New Entrant Rule

In May 2014, the Commission approved an amendment to the New Entrant Rule. *See ISO New Eng.*, 147 FERC ¶ 61,173 P 56 (2014) (Sloped Demand Initial Order), *on reh'g*, 150 FERC ¶ 61,065 PP 31-34 (2015) (Sloped Demand Rehearing Order). The System Operator historically used a vertical demand curve to procure the same fixed quantity of power to clear the auction – regardless of price. *See* Sloped Demand Initial Order P 4. Because the System Operator used a vertical demand curve, under certain conditions the prices paid to cleared resources would

have to be administratively determined by the Tariff. *See id.* P 3; *see also* New Eng. Gen. Initial Order P 3, JA 213.

The System Operator's first seven auctions involved a capacity surplus. Sloped Demand Initial Order P 4; New Eng. Gen. Initial Order P 10, JA 107. But prior to the eighth auction – to be held in February 2014 – the System Operator forecast that New England might have a capacity shortage. Sloped Demand Initial Order P 4. In response, the System Operator filed to change to a sloped demand curve for the New England capacity auction. *Id.* A sloped demand curve allows the amount of power procured to vary depending on the price set in the auction, removing the need for certain administrative pricing rules. *See id.* P 29. In conjunction with proposing a sloped demand curve, the System Operator sought to amend the New Entrant Rule to extend the lock-in period from five to seven years (the Amended New Entrant Rule). *Id.* P 1. The Rule otherwise remained unchanged.

On May 30, 2014, the Commission accepted the System Operator's sloped demand curve tariff revisions – including the Amended New Entrant Rule. The Commission subsequently denied multiple requests – including those from Exelon and the Generators Association – for rehearing. *See* Sloped Demand Rehearing Order P 6.

The Commission found the Amended Rule achieved a "reasonable balance between incenting new entry and protecting consumers from very high prices" in the New England market. *Id.* P 56. The Amended Rule was a "reasonable response" to the "specific issues unique to the New England region," *id.*, namely "the real risk of lack of investment when new capacity is needed." *Id.* P 58; *see also id.* P 56 (extending the lock-in by two years was "an appropriate way to provide investor assurance"); R. 83, System Operator Answer to Exelon Compl. at 16 n.57 (new entrants may be offering artificially high bids into the auction due to the risks new generators face in New England) (citing April 1, 2014 Testimony of Robert G. Ethier in Sloped Demand Proceeding at 13), JA 202.

The Amended Rule was also "closely linked to the design of the [System Operator's] demand curve and the parameters chosen." Sloped Demand Initial Order P 58. Although the Commission acknowledged that the lock-in extension may result in lower market clearing prices, it found that, if the lock-in period were kept at five years, the System Operator would have to raise rates to achieve the same level of reliability, "exposing consumers to very high prices in the event the auction is not competitive." Sloped Demand Rehearing Order P 31; *accord* Sloped Demand Initial Order P 55.

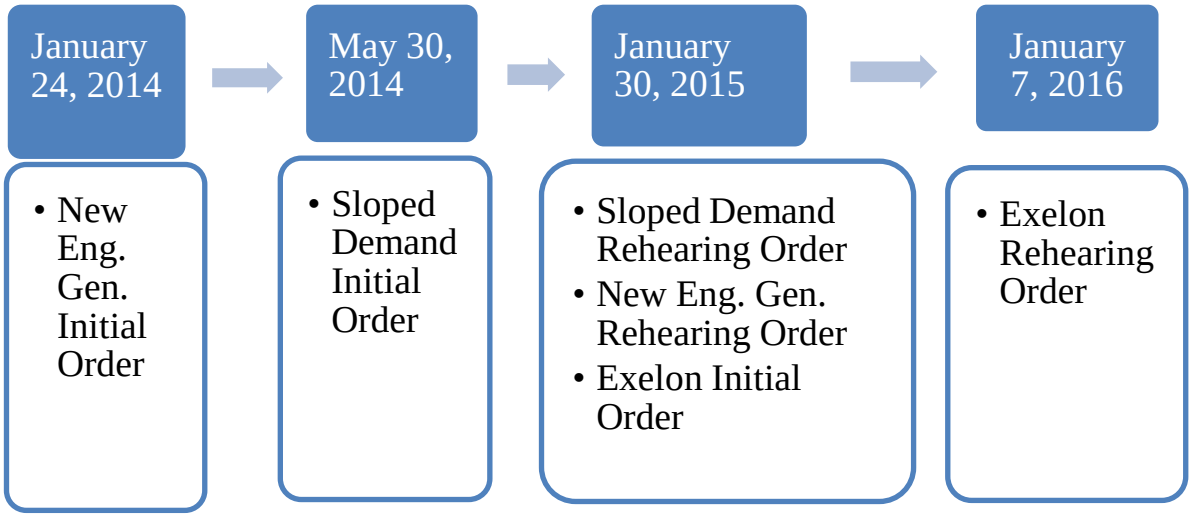
The Commission rejected the claim that the Amended Rule results in undue discrimination. "[R]esources that are entering the [capacity auction] now are not

similarly situated to resources that entered the market previously." Sloped Demand Rehearing Order P 32. The Commission also found the fact that it had rejected an extended lock-in period for the new entrant rule in the PJM Interconnection (PJM) Mid-Atlantic region distinguishable. With each region, the Commission has to balance different regional considerations, leading to different conclusions. *Id.* P 34. In New England, the extension not only addressed "specific issues unique to the New England region, such as the real risk of lack of investment when capacity is needed," but also was "closely linked to the design of the [System Operator's] sloped demand curve and the parameters chosen." *Id.* Neither Exelon nor the Generators Association petitioned for judicial review of those now-final orders. *See NextEra, et al. v. FERC*, No. 15-1070 (D.C. Cir. filed Mar. 30, 2015), *voluntarily remanded on other grounds* (challenging only the renewable resources exemption portion of the Sloped Demand Orders).[2]

F. The Commission Denies The Power Generators' Challenges To The System Operator's New Entrant Rule

Exelon and the Generators Association filed separate complaints against the System Operator's New Entrant Rule. The Power Generators' challenges largely overlapped with the Sloped Demand proceeding. The timeline of the three proceedings is as follows:

[2] On June 28, 2016, the Commission accepted further revisions to the sloped demand curve. *See ISO New England*, 155 FERC ¶ 61,319 (2016). Those revisions did not include any further changes to the New Entrant Rule.



The Commission's approval of the Amended New Entrant Rule altered the Commission's review of the Power Generators' complaints.

1. The Generators Association's Complaint

On October 31, 2013, the Generators Association filed their complaint. New Eng. Gen. Initial Order P 1, JA 103. The Generators Association challenged rules related to the System Operator's vertical demand curve. *See id.* P 57, JA 126. Because the Commission accepted the change to a sloped demand curve (and Amended New Entrant Rule) in the May 2014 Sloped Demand Initial Order, the Generators Association's challenge to the vertical demand curve rules were rendered either moot or not relevant to this appeal.[3] The Commission considered

[3] Specifically, the Commission denied the Power Generators' challenge to the "Capacity Carry Forward Rule." *See* New Eng. Gen. Initial Order P 1, JA 103; New Eng. Gen. Rehearing Order P 1, JA 212. The Power Generators do not challenge the Capacity Carry Forward Rule in their brief. *See Power Co. of Am. v.*

the Generators Association's rehearing request after accepting the Amended Rule. *See* New Eng. Gen. Rehearing Order P 4 & n.9, JA 214.

2. Exelon's Complaint

On November 26, 2014 – after the Sloped Demand Initial Order – Exelon filed its complaint. *See* Exelon Initial Order P 6 & n.11 (explaining that the Commission had accepted the extension of the lock-in period), JA 223-24; *id.* P 16 (stating that Exelon's complaint raises the exact same issues as in the Sloped Demand and Generators Association proceedings already before FERC) (citing System Operator Answer to Exelon Compl. at 2, JA 188), JA 226.

Exelon did not seek for the Commission to remove the Amended New Entrant Rule from the System Operator's Tariff. Exelon Rehearing Order P 3, JA 254. It requested that the Commission mitigate the rule's impact with an approach consistent with that taken in the PJM (Mid-Atlantic) region. *See* Exelon Initial Order P 7, JA 224. Rather than allow zero-dollar bids, a new entrant would have to bid near its initial clearing price. *Id.* If the price in subsequent auctions dropped so that new generators' locked-in capacity did not clear, the System Operator would have to purchase that capacity outside the auction. *See* Exelon Rehearing Order P 19, JA 260.

FERC, 245 F.3d 839, 845 (D.C. Cir. 2001) (argument waived if not presented in opening brief).

3. The Commission's Orders On Review

On January 30, 2015, the Commission denied the Generators Association's request for rehearing and Exelon's complaint on the same day the Commission issued the Sloped Demand Rehearing Order. *See* New Eng. Gen. Rehearing Order P 17, JA 219; Exelon Initial Order P 7, JA 224. The Commission later denied Exelon's request for rehearing. *See* Exelon Rehearing Order P 3, JA 254. The Commission found that the Power Generators failed to meet their burden to demonstrate that the Amended New Entrant Rule had become unjust and unreasonable or unduly discriminatory. *See* Exelon Rehearing Order P 16, JA 258; Exelon Initial Order P 31, JA 229; New Eng. Gen. Rehearing Order P 19, JA 219.

The Commission determined that the Power Generators could not demonstrate that requiring new generators to submit zero-price offers during the lock-in period suppressed prices. *See* New Eng. Gen. Rehearing Order P 18, JA 218; Exelon Initial Order P 30, JA 229; Exelon Rehearing Order P 15, JA 258. Such zero-dollar offers only reflect or "approximate" how a competitive new generator would bid in a competitive market. New Eng. Gen. Rehearing Order P 18, JA 218; *see* Exelon Initial Order P 30, JA 229; Exelon Rehearing Order P 15, JA 258.

A new generator's cost of entry largely comes from initial construction. *See* New Eng. Gen. Rehearing Order P 18, JA 218; Exelon Initial Order P 30, JA 229.

After incurring this up-front cost, a new generator's "going-forward costs" in years two through seven are low – approaching zero – because "new resources need relatively little maintenance." Exelon Rehearing Order P 15, JA 258.

So, even if a new generator "did not have a price lock-in, it would typically submit a zero-price offer . . . consistent with its low going-forward costs and in order to ensure it is taken in the auction." Exelon Initial Order P 35, JA 230; *accord* New Eng. Gen. Rehearing Order P 18 (finding it efficient for a new generator to bid zero and act as a price taker to "ensure that it is taken in the auction"), JA 219; Exelon Rehearing Order P 18 (finding a new resource has an "incentive" to ensure it clears), JA 259. It is likewise "efficient for such a resource to be selected in the auction" over older, less efficient generators that are more expensive to run. Exelon Initial Order P 30, JA 229; *see* New Eng. Gen. Rehearing Order P 18, JA 219; Exelon Rehearing Order P 15, JA 258.

The Commission thus found that the Amended New Entrant Rule remained just and reasonable and not unduly discriminatory, and not in need of further modification (at least for now). *See* Exelon Rehearing Order P 16, JA 258. Although the Commission acknowledged that the lock-in's existence may result in lower entry capacity prices, any such lowering is an "acceptable byproduct" of an Amended New Entrant Rule that "achieves particular and distinct" objectives in New England – namely a "reasonable balance between incenting new entry

through greater investor assurance and protecting consumers from high prices." *Id.* (citing Sloped Demand Initial Order P 56); *see also* System Operator Answer to Exelon Compl. at 16 & n.57 (New Entrant Rule ensures that capacity auction results in competitive, and not artificially high, prices) (citing Ethier Testimony in Sloped Demand Proceeding at 13), JA 202. And the Minimum Offer Rule limits any incentive for a new generator to submit an artificially low entry offer. Exelon Rehearing Order P 16 & n.11 (citing *ISO New Eng. Inc.*, 142 FERC ¶ 61,107 (2013)), JA 258.

The Commission also rejected the argument that the Amended New Entrant Rule was inconsistent with the Commission's 2009 finding that, for the PJM Mid-Atlantic region, a zero-price offer requirement was not appropriate. *See* Exelon Rehearing Order P 4 (citing *PJM Interconnection, LLC*, 128 FERC ¶ 61,157 P 112 (2009) (2009 PJM Order)), JA 254. Market design and rules need not be identical. Exelon Initial Order P 35, JA 230. There "can be more than one just and reasonable rate." *Id.* P 35 & n.20 (citations omitted), JA 230; *see* New Eng. Gen. Rehearing Order P 19 & n.36 (citations omitted), JA 219. As both New England and PJM new entrant rules resulted in the efficient selection of capacity, "both can be just and reasonable." Exelon Rehearing Order P 17, JA 259; *see also* Exelon Initial Order P 31 (Power Generators did not demonstrate that the System Operator's rule was unjust and unreasonable), JA 229.

Yet if the Commission's position regarding the Amended New Entrant Rule could be deemed a departure from its seven-year old 2009 PJM Order, the Commission explained this departure. *See* Exelon Rehearing Order PP 18-20, JA 259-60. "As the [regional system operator] markets have evolved, so too has the Commission's opinion regarding whether zero-price offers from locked-in resources may be just and reasonable." *Id.* P 18, JA 259. The Commission has subsequently determined that zero-price offers reflect competitive market conditions – not an attempt to suppress prices. *Id.* Because of this, the Commission found that a PJM-like rule that requires new generators to artificially bid near their entry-auction clearing price (instead of an economically rational zero-dollar bid) during the lock-in period could significantly raise prices for New England consumers. *Id.* P 19, JA 260.

SUMMARY OF ARGUMENT

It is not uncommon for existing customers to complain when a business gives a special, introductory deal to new customers. They might perceive that the business is being unfair to loyal customers – when in fact the business may be acting in the best interest of all customers, old and new.

So too here, Power Generators complain that the System Operator, in charge of maintaining the reliability of grid operations in New England, is unfairly discriminating against existing capacity suppliers by offering new generators a

special "lock-in" plan. Specifically, the Power Generators object to the particular mix of incentives offered to attract new entrants in New England.

But those complaints do not merit relief when both the System Operator and the Commission can conclude, as they did here based upon substantial record evidence, that this plan – approved in earlier orders not now on review – benefits all New England market participants. The Commission has repeatedly found that the New Entrant Rule ensures reliability by reasonably balancing New England's need to incentivize new entry with the desire to maintain reasonable consumer prices.

Indeed – prior to considering three of the four orders on review – the Commission approved the Amended New Entrant Rule. The Amended Rule extended the lock-in period from five to seven years. The Commission found the change:

- Not unduly discriminatory, because new and existing generators are not similarly situated;
- A reasonable balance, based on New England's need for new capacity, of incentivizing new generation and protecting against higher consumer prices;
- And not inconsistent with the Commission's treatment of PJM's new entrant rule in the Mid-Atlantic region, because PJM and the System Operator present different regional circumstances.

The Power Generators did not appeal the Commission's orders (the Sloped Demand Orders) approving the Amended New Entrant Rule. Yet on appeal here,

the Power Generators object to the same Amended Rule. But the Commission reasonably determined, in denying their complaints, that the Power Generators could not show any change that rendered the previously just and reasonable New Entrant Rule now unjust and unreasonable. Instead, the Commission relied upon the Orders approving the Amended New Entrant Rule to reaffirm its findings here.

The Commission rejected the claim that the New Entrant Rule is unduly discriminatory. The Rule addresses the dissimilar situations facing new and existing generators. It helps new generators overcome the high up-front costs they face to construct a new generating plant. And it mirrors a new generator's incentive to bid low in subsequent auctions. This creates an efficient outcome for the capacity auction, ensuring that the System Operator accepts capacity from new generators who can produce capacity more cheaply. In accepting the validity of a new entrant rule as a general matter, the Power Generators acknowledge that new and existing generators can be treated differently.

The Commission likewise reaffirmed that the Amended New Entrant Rule achieves a reasonable balance. By contrast, the Power Generators' proposed alternative could significantly raise consumer prices. The Commission is entrusted to balance competing interests under the Federal Power Act. The Commission can reasonably determine that lower consumer prices are not unreasonably suppressive – they are the goal. As the System Operator stated, in New England, the New

Entrant Rule simply ensures that capacity rates are set at competitive levels and not artificially high. And the Minimum Offer Rule mitigates any concern about the price-lowering effect of new generator entry bids.

Finally, the Commission reiterated that PJM's new entrant rule for the Mid-Atlantic region is distinguishable. Although the Power Generators only now raise their argument that the 2009 PJM Order is controlling precedent – despite the New Entrant Rule existing since 2006 – the Commission here noted the relevant issue is not whether regional market designs are identical. It is whether the capacity auction in each region results in an efficient outcome. And the new entrant rules in both the PJM Mid-Atlantic region and the New England region do just that. As the System Operator states – and the Commission repeatedly found – the New Entrant Rule is needed in New England, given the lack of new investment.

If the Commission's orders here do conflict with its seven-year old PJM decision, the Commission adequately explained that its position has evolved based on its intervening experience with capacity markets. The Commission now recognizes that zero-dollar bids by new entrants in subsequent auctions to ensure the new generation capacity is selected can make economic sense because new plants have low operating costs, as they require little maintenance. Because of that, applying the 2009 PJM Order in New England to require new generators to bid artificially high could result in higher consumer costs and preclude the System

Operator from efficiently selecting capacity. The Commission agreed with the System Operator that, for New England, the New Entrant Rule – as Amended – remains needed to ensure the capacity auction results in competitive prices.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews Commission actions under the Administrative Procedure Act's arbitrary and capricious standard. *See* 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow," and the Court "may not substitute [its] own judgment for that of the Commission." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (citation omitted); *see, e.g.*, *New Eng. Gen.*, 757 F.3d at 289 (upholding FERC's actions "to ensure that [capacity auction] rates are just and reasonable" under arbitrary and capricious standard). The relevant question is whether the Commission "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted).

Commission ratemaking decisions receive "great deference," *Morgan Stanley*, 554 U.S. at 532, as do Commission policy determinations. *See Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010) (quotation omitted) (court "'properly defers to policy determinations invoking the

Commission's expertise in evaluating complex marketing conditions'") (quoting *Tenn. Gas. Pipeline Co. v. FERC*, 400 F.3d 23, 27 (D.C. Cir. 2005)); *accord New Eng. Gen.*, 757 F.3d at 55 (same). The Commission likewise receives latitude in exercising its responsibility to "balance competing interests" under the Federal Power Act. *New Eng. Gen.*, 757 F.3d at 293, 298 ("[s]uch a balancing function is precisely the role of expert agencies"); *see NRG Power Mktg. v. FERC*, 718 F.3d 947, 955 (D.C. Cir. 2013) ("[W]hen entities before FERC present 'intensely practical difficulties' that demand a solution, FERC 'must be given the latitude to balance the competing considerations and decide on the best resolution.'") (quoting *Blumenthal*, 552 F.3d at 885).

The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 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) (citation omitted); *accord South Carolina*, 762 F.3d at 54. If the evidence is susceptible to more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *accord Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("[W]e do not ask whether record

evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision.").

II. THE COMMISSION REASONABLY FOUND THAT THE POWER GENERATORS FAILED TO DEMONSTRATE THAT THE SYSTEM OPERATOR NEEDED TO CHANGE, AGAIN, THE NEW ENTRANT RULE

The terms "just and reasonable" and "unduly discriminatory" are "incapable of precise" definition. *Blumenthal*, 552 F.3d at 883 (quotations omitted); *see Transmission Agency of N. Cal.*, 628 F.3d at 549; *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."). The Commission is not "bound to the use of any single formula or combination of formulae." *Grand Council of Crees (of Quebec) v. FERC*, 198 F.3d 950, 956 (D.C. Cir. 2000) (quoting *Fed. Power Comm'n v. Hope Nat'l Gas Co.*, 320 U.S. 591, 602 (1944)). Instead, the Commission may balance competing considerations, *Blumenthal*, 552 F.3d at 883, such as preventing excessive rates, protecting against inadequate service, and promoting the orderly development of electricity. *Consol. Edison*, 510 F.3d at 342; *see New Jersey*, 744 F.3d at 108 (rejecting undue discrimination claim based on FERC balancing competing considerations).

The Power Generators complain that the Amended New Entrant Rule's seven-year lock-in "entices new resources to enter the market, where their (otherwise) economically rational zero-price bids drag down prices for existing

suppliers." Pet. Br. at 37. They want that inducement mitigated by not allowing zero-dollar bids, requiring new entrants to instead bid at or near the price they bid in their first auction. *Id.*; *see id.* at 21 (The "problem with the zero-price offer rule is that it fails to address price suppression in the entry auction through adjustments to clearing prices in the post-entry auction.").

But although the Power Generators contend that the Rule is discriminatory, unreasonable, and otherwise inconsistent with the PJM (Mid-Atlantic) region's new entrant rule, the Commission has consistently found otherwise since 2006. *See Devon Power*, 119 FERC ¶ 61,150 P 2 (2007) (citing *Devon Power*, 115 FERC ¶ 61,340 P 16). This includes the Commission's approval in May 2014 of the Amended New Entrant Rule that extended the lock-in period by two years, finding the Amended Rule a reasonable balance in light of New England's specific circumstances and not unduly discriminatory between new and existing generators.

The Sloped Demand Orders, approving that 2014 Amendment, are final.[4] *See supra* pp. 12-14 (explaining the orders and underlying agency proceedings). All but one of the orders on review was issued after the Commission approved the Amended New Entrant Rule. So, against this backdrop of the Commission

[4] Indeed, Intervenor PSEG Companies' brief primarily seems focused upon objecting to the Sloped Demand Orders. *See* PSEG Br. at 6-7. Such arguments constitute impermissible collateral attacks on now final orders. *See Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 825 (D.C. Cir. 2008) (challenge to a FERC order outside the Federal Power Act's 60-day period for seeking review is a collateral attack over which court lacks jurisdiction).

approving five-year and seven-year lock-in periods, the Power Generators had the challenge of demonstrating that the New Entrant Rule had become unjust and unreasonable or unduly discriminatory. *See Iberdola Renewables*, 597 F.3d at 1301 (petitioner must demonstrate a previously just and reasonable rate has become unjust and unreasonable). The Commission reasonably determined that the Power Generators failed to meet that challenge. *See* Exelon Rehearing Order P 16 (Rule remains just and reasonable), JA 258; Exelon Initial Order P 31 (complainant did not show the Rule had become unjust and unreasonable), JA 229; New Eng. Gen. Rehearing Order P 19 (same), JA 219.

A. The Power Generators Cannot Demonstrate That The New Entrant Rule Unduly Discriminates Against Existing Generators

The Power Generators first allege that the New Entrant Rule is unduly discriminatory between new and existing providers. To prove a difference in rates is unduly discriminatory, the Power Generators must demonstrate that existing generators are "similarly situated" to new generators. *See, e.g.*, *Transmission Agency of N. Cal.*, 628 F.3d at 549 ("The court will not find a Commission determination to be unduly discriminatory if the entity claiming discrimination is not similarly situated to others."); *Sacramento Mun. Util. Dist. v. FERC*, 474 F.3d 797, 802 (D.C. Cir. 2007) (same).

No undue discrimination exists where there is a "rational basis for treating [two entities] differently" and where such differing treatment is based on "relevant,

significant facts which are explained." *"Complex" Consol. Edison Co. of N.Y., Inc. v. FERC*, 165 F.3d 992, 1013 (D.C. Cir. 1999); *see also Cities of Newark, New Castle and Seaford, Del. v. FERC*, 763 F.2d 533, 546 (3rd Cir. 1985) ("differences in rates are justified when they are predicated upon factual differences") (collecting cases). Once the Commission determines that a rate is not unduly discriminatory, petitioners must demonstrate that the Commission's "policy judgements are arbitrary and capricious, a heavy burden indeed." *Transmission Agency of N. Cal.*, 628 F.3d at 549 (quotation omitted); *see also Sw. Elec. Coop., Inc. v. FERC*, 347 F.3d 975, 981 (D.C. Cir. 2003) (even where a rate has differing effects on similarly situated customers, such disparities can be justified by factual differences).

1. The System Operator's New Entrant Rule Is Based On New And Existing Resources Not Being Similarly Situated

In the Sloped Demand Orders, the Commission found that the Amended New Entrant Rule was not unduly discriminatory between new and existing resources because "resources entering [the capacity market] now are not similarly situated to resources that entered the market previously." Sloped Demand Rehearing Order P 32. The Commission reiterated this holding in the orders on review. *See* Exelon Rehearing Order P 16, JA 258; New Eng. Gen. Rehearing Order P 19, JA 219. The Power Generators cannot now show that the Commission's reasoning is arbitrary and capricious, *see Transmission Agency of N.*

Cal., 628 F.3d at 549, because the New Entrant Rule is predicated upon two salient factual differences between new and existing generators.

First, a new generator faces high up-front costs to entry because it must construct a power plant – something an existing generator need not do. *See* New Eng. Gen. Rehearing Order P 18 (new generator must incur construction costs by the end of its first year), JA 219; Exelon Initial Order P 30 (new resource recently completed construction), JA 229; Exelon Rehearing Order P 15 (same), JA 258. Second, a new generator generally faces lower "going-forward costs" than existing plants. Exelon Rehearing Order P 15, JA 258; *see* Exelon Initial Order P 30, JA 229; New Eng. Gen. Rehearing Order P 18, JA 219. This is because once a new generator pays its construction costs – generally by the end of its first year in the capacity auction, New Eng. Gen. Rehearing Order P 18, JA 219 – it costs less to operate a new generator than an existing one because new plants require less maintenance. *See* Exelon Rehearing Order P 15, JA 258.

The New Entrant Rule reflects this high up-front cost/low going-forward cost dichotomy. By allowing a new generator to lock in its capacity price, the Rule helps overcome the significant costs a generator must incur, "engender[ing] additional confidence in the New England market for potential investors." Sloped Demand Initial Order P 59; *see also Devon Power*, 115 FERC ¶ 61,340 P 16 (noting the lock-in "is intended to provide predictable revenues and facilitate

financing for new capacity"). And it mitigates risk. *See* Exelon Initial Order P 4, JA 222; *see also Hughes*, 136 S. Ct. at 1294 ("The [new entrant rule in the PJM region] eliminates, for three years, the risk that the new generator's entry into the auction might so decrease the clearing price as to prevent that generator from recovering its costs."). The Commission found such incentives warranted in New England, where there is a "real risk of lack of investment when new capacity is needed." Sloped Demand Initial Order P 58; *see* Sloped Demand Rehearing Order P 34 (lock-in rule addresses "specific issues unique to the New England region, such as the real risk of lack of investment").

But once a new generator clears its first auction, allowing zero-price offers in the subsequent, locked-in auctions simply reflects how a new generator would likely bid absent the New Entrant Rule. *See* Exelon Initial Order P 35 ("even if a [new] resource does not have a price lock-in, it would typically submit a zero-price offer"), JA 230. A new generator often wants to ensure it clears the auction because the capacity price will generally be greater than its operating costs. *See* Exelon Rehearing Order P 15 (new plant requires "relatively little maintenance") JA 258; *see also id.* P 18 (new resource has an "incentive" to clear), JA 259.

2. The Power Generators Concede That The Differing Treatment Of New And Existing Generators With The New Entrant Rule Is Rational

The Power Generators' only support for their claim that new and existing generators are similarly positioned is a single statement from the 2009 PJM Order that new and existing generators should receive the same price. Pet. Br. at 26 (citing 2009 PJM Order P 102). But in approving the Amended New Entrant Rule, the Commission already rejected this argument as a basis for finding that the Amended Rule causes undue discrimination. *See* Sloped Demand Rehearing Order P 45 (rejecting contention that a price difference between new and existing resources "violates a fundamental economic premise of a capacity market, that resources that provide the same service should receive the same price"). As the System Operator observed, based on its supporting testimony in the Sloped Demand proceedings that led to the Commission accepting the Amended New Entrant Rule, potential new entrants – unlike existing customers – face significant risks in New England and are unlikely to enter the market without the (Amended) Rule. *See* System Operator Answer to Exelon Compl. at 19 & n.70 (citing Ethier Testimony in Sloped Demand Proceeding at 31), JA 205.

Plus, the Commission – and the courts – have long approved both the System Operator's **and** PJM's differing treatment of new and existing generators. *See, e.g.*, *New Eng. Gen.*, 757 F.3d at 292 (approving System Operator's Minimum

Offer Rule); *New Jersey*, 744 F.3d at 109 (approving PJM's minimum-offer price rule); *see also Hughes*, 136 S. Ct. at 1294 (describing PJM's new-entrant and minimum offer rule). The Power Generators acknowledge this. *See* Pet. Br. at 31 ("To be sure, the Commission did find PJM's bid floor for price-locked resources to be just and reasonable.").

Indeed, the Power Generators accept the premise of the New Entrant Rule. See *id.* at 15 (Complainant "was not challenging the availability of the price-lock option for new entrants in general but was only asking the Commission to mitigate the harm . . . ."). They only want New England's New Entrant Rule to mimic PJM's. *See id.* at 37. But if the Power Generators accept that the System Operator can use a New Entrant Rule, they accept that new and existing generators can be treated differently because they are not similarly situated.

For example, in *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006), the court rejected petitioners' request to reduce the "netting" period, during which generators can net the station power they consume against the station power they supply. *Id.* at 822. The petitioners there conceded that some netting "is perfectly consistent with the statute." *Id.* The Court saw "no principled reason" why a different length of netting violated the Federal Power Act. *Id.* So too here, since the Power Generators agree that a new entrant rule in principle is acceptable, there is no reason why the Amended New Entrant Rule becomes

unduly discriminatory simply because it contains a mix of incentives the Power Generators do not like.

B. The Power Generators Cannot Demonstrate That The Commission Was Unreasonable In Continuing The New Entrant Rule

Nor can the Power Generators demonstrate that the Commission was arbitrary in finding that the Power Generators failed to prove the New Entrant Rule had become unjust and unreasonable. Instead, the Commission reaffirmed that the Rule reaches a reasonable balance for New England.

1. The Commission Reasonably Balanced The System Operator's Unique Circumstances

The Commission is entrusted to balance competing interests. *See NRG Power Mktg. v. FERC*, 718 F.3d 947, 961 (D.C. Cir. 2013); *see also U.S. Dept. of Interior v. FERC*, 952 F.2d 538, 545 (D.C. Cir. 1992) (FERC must "determin[e] the public interest, *i.e.*, balancing power and non-power values"). Such balancing is particularly necessary in addressing "complex [regional] market conditions." *Sacramento Mun. Util. Dist.*, 616 F.3d at 542; *see Blumenthal*, 552 F.3d at 885 (regional electricity markets present "intensely practical difficulties").

The Commission satisfied this responsibility in approving and maintaining the New Entrant Rule. The Commission has found that the Rule strikes a "reasonable balance between incenting new entry through greater investor assurance and protecting consumers from very high prices." Exelon Rehearing

Order P 16 (citing Sloped Demand Initial Order P 56), JA 258. The Commission found this balance necessary, given that:

- The New England region faces a lack of investment in new capacity; and
- The Amended New Entrant Rule is linked with the sloped demand curve to help "assure that the demand curve construct overall" will achieve system reliability.

See Sloped Demand Initial Order P 56; *accord* System Operator Answer to Exelon Compl. at 19 & n.70 (citing Ethier Testimony in Sloped Demand Proceeding at 31), JA 205. In contrast, the Power Generators' desired alternative could significantly raise consumer prices. Exelon Rehearing Order P 19, JA 260; *accord* Sloped Demand Rehearing Order P 31 (removing the lock-in extension would expose "consumers to very high prices in the event the auction is not competitive").

The Commission acknowledged that its balance in favor of the Amended New Entrant Rule could lead to lower market clearing prices. Sloped Demand Initial Order P 56; Sloped Demand Rehearing Order P 31; Exelon Rehearing Order P 16, JA 258. But lower consumer prices do not automatically equal price suppression. Instead, lower consumer prices can be the desired outcome. *See Wisc. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 262 (D.C. Cir. 2007) (FERC entrusted to balance investor and consumer interests); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 775 (affirming demand response program to reduce wholesale

prices); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 968 (D.C. Cir. 2000) (FERC can take into account policies that will benefit consumers).

And here, the Commission found that lower clearing prices – in tandem with the other sloped demand curve reforms – would achieve the desired reliability for New England. *See* Sloped Demand Initial Order P 56; *see also* System Operator Answer to Exelon Compl. at 16 & n.57 (Amended Rule lowers prices from artificially high to economically competitive rates) (citing Ethier Testimony in Sloped Demand Proceeding at 13). The Commission determined that the Power Generators could not demonstrate that the Amended New Entrant Rule had become unjust and unreasonable in light of prior orders affirming the Rule. *See* Exelon Rehearing Order P 16 (Rule remains just and reasonable based on reasonable balance), JA 258; *see also* New Eng. Gen. Rehearing Order P 19 (Generators Association failed to show that the "existing Tariff's [Amended New Entrant Rule] is unjust and unreasonable"), JA 219.

2. The Power Generators Ignore The Bases For The Balance Reached By The Commission

Although the Power Generators argue that the New Entrant Rule does not result in a reasonable balance, *see* Pet. Br. at 41, they did not appeal the Sloped Demand Orders in which the Commission approved the Amended Rule. The Power Generators instead largely attempt to ignore those earlier orders. *See id*.

For instance, the Power Generators proffer a single Commission sentence – that lowering the auction's clearing price "'is an acceptable byproduct of a just and reasonable market rule . . . that achieves particular and distinct objectives in the region'" – to argue that the Commission's reasoning is "circular and conclusory." Pet. Br. at 45 (quoting Exelon Rehearing Order P 16, JA 258). But the next sentence explains what potentially lower clearing prices are an "acceptable byproduct" of – a lock-in provision that strikes a "reasonable balance between incenting new entry through greater investor assurance and protecting consumers from very high prices." Exelon Rehearing Order P 16 (citing Sloped Demand Initial Order P 56), JA 258. And in the Sloped Demand Initial Order, the Commission detailed the "particular and distinct" regional objectives that justify the balance it reached – namely combating the risk of an insufficient supply of new generation in New England and ensuring that the System Operator's demand curve functions as intended to ensure system reliability. Sloped Demand Initial Order P 56; Sloped Demand Rehearing Order P 31.

The Power Generators also argue the Commission has reached an improper balance. They assert that the Commission can only balance consumer and investor interests, and that incentivizing new entry is "a consumer interest." Pet. Br. at 47.

This is an incomplete understanding of the Commission's findings. Read in context, the Commission's holding is that incentivizing new entry and seeking to

maintain consumer prices outweigh potentially higher returns for existing generators. *See* Sloped Demand Rehearing Order P 31 (affirming reasonable balance because alternative of raising prices for existing generators could expose consumers to higher prices); Exelon Rehearing Order P 19 (rejecting Power Generators' proposed remedy to increase prices for existing generators because it could lead to higher consumer costs), JA 260; *see also* System Operator Answer to Exelon Compl. at 17-18 (New Entrant Rule results in competitive bids by new generators, while altering Rule would result in consumers unnecessarily paying more to existing generators), JA 203-04.

Nor is new generation solely a "consumer interest." The Commission repeatedly found that the Amended New Entrant Rule provides "investor assurance." Sloped Demand Initial Order P 56; *see id.* P 59 (rule "engenders additional confidence in the New England market for potential investors"); *see also Fla. Mun. Power Agency v. FERC*, 602 F.3d 454, 461 (D.C. Cir. 2010) (The relevant question "is not whether record evidence supports [petitioner's] version of events, but whether it supports FERC's.") (quotation omitted).

In any event, the consumer and investor interests the Commission must consider are not so precisely delineated. *See Consol. Edison,* 510 F.3d at 342 (FERC can balance preventing excessive rates, protecting against inadequate service, and promoting new generation). As noted, the Commission has been

entrusted to balance numerous "practical difficulties with regional markets," *Blumenthal*, 552 F.3d at 885, such as:

- Higher consumer prices with ensuring reliability and accurate long-term price signals, *Cent. Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 111 (2d Cir. 2015);
- Flexibility for producers in future procurement decisions with reasonable certainty, *Sacramento Mun. Util. Dist.*, 616 F.3d at 541; and
- System reliability with incentives to develop new generation and increase efficiency; *Blumenthal*, 552 F.3d at 884.

This latitude includes balancing between the need for new generation and the effect of new entry on capacity auction prices. *See New Eng. Gen.*, 757 F.3d at 293 (affirming FERC determination "that it was more important to prevent price distortion and excess capacity purchase than it was to allow out-of-market resources to clear"); *New Jersey*, 744 F.3d at 109 (upholding FERC's balance between the "danger of price suppression against the counter-danger of over-mitigation").

The Power Generators also overstate the potential harm from the New Entrant Rule – because they ignore the Minimum Offer Rule. As discussed, *see supra* pp. 10-11, the Minimum Offer Rule generally requires new entrants to bid at a predetermined level to ensure that the price of capacity reflects the actual cost of new entry. *See New Eng. Gen.*, 757 F.3d at 292. This helps prevent new generators from suppressing capacity prices when they enter the auction. *Id.*

So a new generator cannot bid whatever it chooses – to take the Power Generators' example, bidding $10 to spread its $70 cost over seven years – by using the lock-in provision as an "installment plan." Pet. Br. at 34-35. It must, in the first auction year, bid at the pre-determined minimum offer bid, *see New Eng. Gen.*, 757 F.3d at 962, mitigating the potential for a new generator to lower the entry-clearing price. *See* Exelon Rehearing Order P 16 n.11 (although the lock-in could in theory reduce capacity clearing prices in a new generator's first auction, "new capacity sell offers are limited" by the Minimum Offer Rule), JA 258.

Nor, as the System Operator explained in both the Sloped Demand proceeding and here, does the lock-in unreasonably suppress entry prices in New England. *See* System Operator Answer to Exelon Compl. at 16 nn.57-59 (citing Ethier Testimony in Sloped Demand Proceeding at 13; May 1, 2014 System Operator Sloped Demand Answer at 20), JA 202. The lock-in ensures that new entrants can bid at their actual cost of entry – and not artificially high – because of the current risks associated with the New England market. *See id*; Exelon Initial Order P 18, JA 227; *see also Sacramento*, 616 F.3d at 530 ("We must 'defer[] to the Commission's resolution of factual disputes between expert witnesses.'"); *see generally Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("All of that together is enough. . . . It is not our job to render judgment" on whether FERC or petitioners' position is better, when "reasonable minds can differ.").

C. The Commission Properly Considered And Addressed Its Treatment Of The Regional PJM Capacity Market

Finally, Power Generators contend that the Commission's orders are inconsistent with the Commission's 2009 PJM Order. *See* Pet. Br. at 27-33. In the 2009 PJM Order, the Commission did not allow new entrant zero-price bids in the PJM Mid-Atlantic region during a new generator's lock-in period. *See* 2009 PJM Order P 102. The Commission instead required new generators to bid at or near what those generators bid in their first auction. *See id.*

The Power Generators have had seven years to challenge the distinction between the New England System Operator's New Entrant Rule (which has been in effect since 2006) and the 2009 PJM Order. Nevertheless, the Commission has found PJM's new entrant rule for the Mid-Atlantic region distinguishable. In the alternative, to the extent it is not, the Commission adequately explained its change and why following the PJM new entrant rule would be harmful here.

1. The Commission's Reasoning Was Consistent With Its 2009 PJM Order

An agency generally must follow its precedent or acknowledge and explain the reasons for its changed interpretation. *See U.S. Telecom. Ass'n v. FCC*, 825 F.3d 674, 706 (D.C. Cir. 2016); *accord FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Commission's findings here did not represent a departure from its 2009 PJM Order. As the Commission oft observes, regional

market rules need not be identical. There can be more than one just and reasonable rate. *See, e.g.*, New Eng. Gen. Rehearing Order P 19 & n.36 (collecting cases), JA 219; Exelon Initial Order P 35 & n.20 (same), JA 230. That is because each region has different characteristics and stakeholder input. *See* New Eng. Gen. Rehearing Order P 19 n.36 (quoting *PJM Interconnection*, 119 FERC ¶ 61,063 P 39 (2007)), JA 219.

For instance, in the Sloped Demand Rehearing Order, the Commission explained why it reached a different "balance of considerations" when it approved the Amended New Entrant Rule than it did when it rejected an extension of the lock-in period for the PJM region. *See* Sloped Demand Rehearing Order P 34. As discussed, the Commission's distinction was partly based on "specific issues unique to the New England region," namely, a lack of regional investment in capacity and the rule's link to the System Operator's sloped demand curve. Sloped Demand Rehearing Order P 34. The Power Generators cannot show why these regional differences no longer form a reasonable basis for differing treatment of the new entrant provisions in the New England and Mid-Atlantic regions. *See* New Eng. Gen. Initial Order P 52 (System Operator's rules had to be considered in light of the "rapidly shifting supply-demand realities in New England"), JA 124; *see also* System Operator Answer to Exelon Compl. at 3 (noting that complainants ignore the fact that the Commission just found in the Sloped Demand Orders that

the New England and Mid-Atlantic regions present different circumstances and do not "explain what might have changed in the past six months to render the provisions no longer just and reasonable"), JA 189.

As the System Operator stated, the New Entrant Rule is needed in New England because of the risks in New England. *See* System Operator Answer to Exelon Compl. at 19 & n.70 (citing Ethier Testimony in Sloped Demand Proceeding at 31), JA 205. Without the Rule, new entrants may bid above their competitive costs of entry. *Id*.

Further, as the Commission explained, the ultimate reasonableness of a particular capacity rate design is not determined by the particular design of a regional capacity market's rules or whether rules are identical across regions. Instead, all that is required is that a capacity auction results in the efficient selection of capacity. *See* Exelon Rehearing Order P 17, JA 259; *see generally Elec. Power Supply Ass'n*, 136 S. Ct. at 775 (capacity auction's purpose is to promote the efficient selection of capacity); *New Eng. Gen.*, 757 F.3d at 286 (same).

Although PJM and the System Operator have differing clearing mechanics, both capacity auctions result in the efficient selection of capacity – and so both are just and reasonable. *See* Exelon Rehearing Order P 17, JA 259; *see also* System Operator Answer to Exelon Compl. at 16 & n.57 (New Entrant Rule ensures

competitive pricing, given the characteristics of the New England region) (citing Ethier Testimony in Sloped Demand Proceeding at 13), JA 202. The Power Generators could not demonstrate that the differing treatment of the PJM Mid-Atlantic region and the New England region – by allowing new generators to bid zero in the latter, but not in the former – had become unjust and unreasonable. *See* Exelon Initial Order P 31, JA 229.

2. The Commission Adequately Explained Any Departure From Prior Precedent

But even if the Commission orders on review represent a departure from its 2009 PJM Order, the Commission adequately acknowledged and explained its evolved reasoning. *See* Exelon Rehearing Order P 18, JA 259.[5] Although an agency must provide a reasoned explanation for changing its position on facts and circumstances that underlie its prior policy, it need not demonstrate that the reasons for the new policy are better. *See U.S. Telecomm.*, 825 F.3d at 707 (citing *Fox*, 556 U.S. at 515-16); *see also S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 184 (D.C. Cir. 2013) ("The record shows that the Commission has not 'glosse[d] over or swerve[d] from prior precedents without discussion [so as to] cross the line from

[5] The Power Generators' focus on the Commission not explaining its departure from precedent until issuance of the Exelon Rehearing Order is irrelevant. *See* Pet. Br. at 32-33. "The very purpose of rehearing is to give the Commission the opportunity to review its decision before facing judicial scrutiny." *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 499 n.8 (D.C. Cir. 2003).

tolerably terse to intolerably mute.'") (quoting *W & M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1347 (D.C. Cir. 2008)).

The Commission may change its position based on changed factual circumstances, *U.S. Telecomm.*, 825 F.3d at 707-09 – namely industry or market changes. *See S. Cal. Edison Co.*, 717 F.3d at 184 (finding FERC provided "principled reasons" for changing precedent based on the "evolution of the gas and electric industries"). But circumstances need not change for an agency to alter its approach. *See U.S. Telecomm.*, 825 F.3d at 709 (FCC reasonably reclassified broadband internet service, based either on changed factual circumstances for how broadband is offered, or on adequate explanation of its changed position).

The Commission here explained that its opinion has evolved on allowing new generators to make locked-in, zero-price offers – based on changes in how capacity markets have functioned since its 2009 PJM Order. Exelon Rehearing Order P 18, JA 259. The Commission now recognizes that zero-dollar offers in subsequent auctions by new generators – who have already cleared one auction and have incurred construction costs – can reflect an economically rational decision. *Id.* It is not solely an attempt to artificially lower clearing prices. *Id*. As the System Operator observed, for New England, the New Entrant rule ensures that capacity pricing is at competitive levels – and not artificially high. *See* System

Operator Answer to Exelon Compl. at 16 & n. 57 (citing Ethier Testimony in Sloped Demand Proceeding at 13), JA 202.

The Commission found that following its 2009 PJM Order here and forcing new generators to bid artificially high in subsequent auctions – near their entry bid instead of zero – could result in significantly higher prices for New England consumers. *See* Exelon Rehearing Order P 19, JA 260. If new generators must bid near their entry-clearing price during the lock-in period and the clearing price drops, those generators will not clear that subsequent auction. The System Operator could be forced to select less efficient, more expensive existing capacity. *Id.* And New England consumers would be left purchasing that locked-in – and now unneeded – capacity from new generators that did not clear outside the auction. *See id.*; *see also* System Operator Answer to Exelon Compl. at 22 (Power Generators' proposal would result in consumers paying higher prices for selected capacity, and purchasing unneeded, surplus capacity), JA 208.

In other words, under the Power Generators' desired remedy, New England consumers could have their prices raised in two ways – by having to purchase less efficient capacity through the auction, and by having to buy locked-in surplus capacity outside the auction. *See* Exelon Rehearing Order P 19, JA 260; *see also* Exelon Initial Order P 21 (proposed remedy would "exacerbate the harms Complainants allege and would create additional problems, including introducing

significant market power concerns"), JA 227; *cf. South Carolina*, 762 F.3d at 76 (FERC can act based upon reasonable predictions rooted in economic principles).

In response, the Power Generators contend that the Commission's change in position, based on the efficacy of zero-price offers by new generators, misses their contention that it is the lock-in provision that creates low going-forward costs – making zero-dollar bids possible. *See* Pet. Br. at 34. But the Power Generators themselves later concede that it is "economically rational" for a new generator to submit zero-dollar bids – even absent a lock-in rule. *Id.* at 37; *see* System Operator Answer to Exelon Compl. at 17 (the operating costs of new resources "are certainly below" the capacity auction clearing prices because new generators operate more efficiently than older resources), JA 203; *see also* New England States Cmte. on Elec. Motion to Intervene and Protest, R. 33, Testimony of James F. Wilson, Attachment A at 11-12 (new generators determine whether to invest in a new facility based on long-term price signals, and once they decide to invest, they want to make sure they clear the auction to recoup their investment), JA 93-94. This is because, as the Commission explained, a new generator's low maintenance costs incentivize it to bid zero. *See* Exelon Rehearing Order P 15, JA 258; *see generally Fla. Mun. Power Agency*, 602 F.3d at 461 (record evidence need only support FERC's, not petitioner's, explanation).

The Power Generators also state that the Commission's focus on the efficiency of zero-price offers by new generators misses their broader contention. *See* Pet. Br. at 34. They state that it is the lock-in provision that induces unnecessary entry, after which otherwise rational zero-price bids by new generators suppress prices. *Id.* at 37. They argue that – in rejecting PJM's request to allow zero-dollar bids in subsequent auctions – the Commission forced PJM to ameliorate this potential for suppression by requiring new generators to bid near their entry-auction bid. *Id.*; *accord id.* at 21. And so the System Operator permitting zero-dollar bids is inconsistent with this mitigation precedent. *Id.* at 37.

But the Commission considered this precise contention. And it rejected it. Since the Commission has since found that zero-dollar bids may be efficient, it has determined that requiring new generators to bid artificially high in subsequent auctions could result in an inefficient selection of capacity and higher consumer costs. *See* Exelon Rehearing Order P 19, JA 260; *see also* System Operator Answer to Exelon Compl. at 19 & n.70 (the Amended New Entrant Rule combats the "unnaturally high" risks in New England that result in artificially high prices) (citing Ethier Testimony in Sloped Demand Proceeding at 31), JA 205. The Commission concluded that preventing this outcome outweighed mitigating any price drop caused by new generator entry. *See* Exelon Rehearing Order P 17, JA 259. This is because, as the System Operator explained in both the

Sloped Demand proceeding and here, any price drop caused by zero-dollar bids in New England only ensures that the auction results in competitive pricing – "preventing a large, unnecessary wealth transfer from ratepayers to existing resources." System Operator Answer to Exelon Compl. at 18 & n.64 (citing System Operator Sloped Demand Answer at 26), JA 204. The Commission adequately explained this change and why following its 2009 PJM precedent would have harmful results in New England. *See S. Cal. Edison Co.*, 717 F.3d at 184 (concise explanation of agency policy change sufficient).

The Power Generators complain, Pet. Br. at 34, that the Commission has not found that its 2009 PJM Order was wrongly decided. But like a court, the Commission need not resolve every issue at one time but can rely upon case-by-case adjudication. *See, e.g.*, *New York*, 535 U.S. at 8 (Commission can proceed step-by-step on a case-by-case basis). If a party believes that PJM's tariff is inconsistent with the Commission's position in the New England orders, or is otherwise no longer appropriate for the PJM region, it can file a complaint arguing that PJM's new entrant rule is now unjust and unreasonable. But the Commission's rationale for its 2009 PJM Order, as to what is reasonable for the PJM region, is not on review here. *See, e.g.*, *Mobil Oil Expl. & Producing S.E. Inc. v. United Dist. Cos.*, 498 U.S. 211, 231 (1990) ("[A]n agency need not solve every problem before it in the same proceeding. This applies even where the initial

solution to one problem has adverse consequences for another area that the agency was addressing.").

CONCLUSION

For the foregoing reasons, the petitions for review should be denied and the Commission's orders should be upheld.

Respectfully submitted,

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FINAL BRIEF: October 25, 2016

New England Power Generators, et al. v. FERC **Docket Nos. EL14-7;**
Nos. 15-1071 & 16-1042 (consolidated) **EL15-23**

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(5), Fed. R. App. P. 32(a)(6), and Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Final Brief of Respondent Federal Energy Regulatory Commission contains 11,555 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum, and has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point, Times New Roman font.

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October 25, 2016

ADDENDUM

STATUTES

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STATUTES: **PAGE**

Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.

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; amend-ed 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).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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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

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 25th day of October 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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