**ORAL ARGUMENT NOT YET SCHEDULED**

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

**Nos. 16-1023 and 16-1024 (Consolidated)**

NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.,
*Petitioner*,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent*.

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

## BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Final Brief: November 28, 2016

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

### A. Parties and Amici

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

### B. Rulings Under Review

1. Order on Tariff Filing and Instituting Section 206 Proceeding, *ISO New England Inc. and New England Power Pool*, FERC Docket Nos. ER14-1050 and EL14-52, 147 FERC ¶ 61,172 (May 30, 2014), T.R. 108, JA 211;

2. Order Denying Rehearing, *ISO New England Inc. and New England Power Pool*, FERC Docket Nos. ER14-1050 and EL14-52, 153 FERC ¶ 61,223 (Nov. 19, 2015), T.R. 146, JA 314;

3. Order Denying Complaint, *New England Power Generators Association, Inc. v. ISO New England Inc.*, FERC Docket No. EL15-25, 150 FERC ¶ 61,053 (Jan. 30, 2015), C.R. 30, JA 545; and

4. Order Denying Rehearing, *New England Power Generators Association, Inc. v. ISO New England Inc.*, FERC Docket No. EL15-25, 153 FERC ¶ 61,222 (Nov. 19, 2015), C.R. 36, JA 599.

### C. Related Cases

This case 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 competitive auctions in the ISO New England regional electricity capacity market, in *Maine Public Utilities Commission v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), *rev'd in part sub nom. NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 558 U.S. 165 (2010), *on remand, New England Power Generators Association v. FERC*, 707 F.3d 364 (D.C. Cir. 2013), and that made changes to the capacity market rules, in *New England Power*

*Generators Association v. FERC*, 757 F.3d 283 (D.C. Cir. 2014). Another case concerning those auction rules is currently pending before this Court in *New England Power Generators Association v. FERC*, Case Nos. 15-1071 and 16-1042 (consolidated) (briefing completed). In addition, after the Commission filed its page-proof brief in this case, the Court dismissed, for lack of jurisdiction, an appeal concerning the results of the eighth capacity auction (referenced in this brief at note 4). *Public Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016).

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## GLOSSARY

| | |
|---|---|
| Br. | Opening brief of Petitioner New England Power Generators Association, Inc. |
| C.R. | Record Index in Case No. 16-1024, for the Complaint proceeding, FERC Docket No. EL15-25 |
| Capacity Performance Proceeding | FERC proceeding that considered alternative proposals by the System Operator and the Power Pool to address problems with resource performance, culminating in the Tariff Orders |
| Capacity Year | The year-long period, from June 1 through May 31, for which suppliers commit (in each capacity auction, three years in advance) to provide capacity |
| Commission or FERC | Respondent Federal Energy Regulatory Commission |
| Complaint Order | Order Denying Complaint, *New Eng. Power Generators Ass'n, Inc. v. ISO New Eng. Inc.*, 150 FERC ¶ 61,053 (2015), C.R. 30, JA 545 |
| Complaint Orders | Collectively, the Complaint Order and Complaint Rehearing Order |
| Complaint Rehearing Order | Order Denying Rehearing, *New Eng. Power Generators Ass'n, Inc. v. ISO New Eng. Inc.*, 153 FERC ¶ 61,222 (2015), C.R. 36, JA 599 |
| FPA | Federal Power Act |
| Generators Association (or Association) | Petitioner New England Power Generators Association, Inc. |
| JA | Joint Appendix |

## GLOSSARY

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|---|---|
| P | Paragraph in a FERC order |
| Peak Energy Rent [Adjustment/mechanism] | Market rule in the System Operator's tariff that provides for deductions from capacity payments triggered by high prices in the real-time energy market |
| Power Pool | New England Power Pool Participants Committee |
| Reserve Constraint Penalty Factors | Limits on the maximum price that the System Operator can pay to resources in the real-time market during certain shortages |
| System Operator | ISO New England Inc. (commonly called ISO-NE), the independent system operator that operates the electrical grid and energy markets in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont |
| T.R. | Record Index in Case No. 16-1023, for the Capacity Performance proceeding, FERC Docket Nos. ER14-1050 and ER14-52 |
| Tariff Order | Order on Tariff Filing and Instituting Section 206 Proceeding, *ISO New Eng. Inc. and New Eng. Power Pool*, 147 FERC ¶ 61,172 (2014), T.R. 108, JA 211 |
| Tariff Orders | Collectively, the Tariff Order and Tariff Rehearing Order, issued in the Capacity Performance Proceeding |
| Tariff Rehearing Order | Order Denying Rehearing, *ISO New Eng. Inc. and New Eng. Power Pool*, 153 FERC ¶ 61,223 (2015), T.R. 146, JA 314 |

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## BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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## COUNTER-STATEMENT OF JURISDICTION

Petitioner New England Power Generators Association, Inc. ("Generators Association" or "Association") seeks review of two sets of orders issued by the Federal Energy Regulatory Commission ("Commission" or "FERC"). *ISO New Eng. Inc. and New Eng. Power Pool*, FERC Docket Nos. ER14-1050 and EL14-52, 147 FERC ¶ 61,172 (2014) ("Tariff Order"), T.R. 108, JA 211, *reh'g denied*, 153 FERC ¶ 61,223 (2015) ("Tariff Rehearing Order"), T.R. 146, JA 314 (together, "Tariff Orders," on review in Case No. 16-1023); *New Eng. Power Generators*

*Ass'n, Inc. v. ISO New Eng. Inc.*, FERC Docket No. EL15-25, 150 FERC ¶ 61,053 ("Complaint Order"), C.R. 30, JA 545, *reh'g denied*, 153 FERC ¶ 61,222 (2015) ("Complaint Rehearing Order"), C.R. 36, JA 599 (together, "Complaint Orders," on review in Case No. 16-1024).

To obtain judicial review of Commission orders, petitioners must satisfy the requirements of both Article III of the United States Constitution and Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). *See, e.g.*, *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011). This Court lacks statutory jurisdiction to consider the particular challenges that the Association raises to the Tariff Orders because the Association did not raise those arguments before the Commission. Section 313(b) of the Federal Power Act provides that: "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so." 16 U.S.C. § 825*l*(b). Courts adhere strictly to that requirement. *See, e.g., Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002).

The Association itself participated in the underlying agency proceeding and filed a request for clarification of an unrelated issue, which the Commission addressed in the Tariff Rehearing Order (at PP 69, 70, 80, JA 347-48, 352-53). *See* Motion of New England Power Generators Association for Clarification, T.R. 116,

JA 261. But the Association does not challenge the Commission's ruling on that issue on judicial review. Rather, the Association now adopts arguments raised on rehearing only by a group of generators, some or all of whom may be members of the Association. *See* Br. 1, 18; Tariff Rehearing Order PP 104-06, JA 364-65; Request for Rehearing of Indicated Generators, T.R. 118, JA 266. While that member relationship might suffice to provide Article III standing (*see, e.g., Sierra Club v. FERC*, 827 F.3d 59, 65 (D.C. Cir. 2016)), Article III precedents do not answer the distinct question whether an association can adopt the arguments of another party under the strictly-construed review provision of the Federal Power Act.

This Court has long declined to consider arguments that a petitioner *itself* did not raise on rehearing, even where other parties before the agency did so. *See ASARCO, Inc. v. FERC*, 777 F.2d 764, 773 (D.C. Cir. 1985) (holding, under substantially identical language in the Natural Gas Act, 15 U.S.C. § 717r(b), that the party seeking judicial review must have raised the argument in its own ("*the*") rehearing request); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989) (applying same interpretation to the Federal Power Act, 16 U.S.C. § 825*l*(b): "Parties seeking review of FERC orders must petition for rehearing of those orders and must *themselves* raise in that petition *all* of the objections urged on appeal."). At a minimum, the Association

must explain why it should be permitted to raise arguments on appeal regarding the Tariff Orders that it failed to raise before the agency — even as it participated in that proceeding and raised different arguments in its own filing. *Cf., e.g., PNGTS Shippers' Grp. v. FERC*, 592 F.3d 132, 137 (D.C. Cir. 2010) ("The burden is on the petitioner to show 'the specifics of the aggrievement alleged.'") (citation omitted).

Beyond that failure, even the group of generators that did seek rehearing did not make some of the arguments that the Association now raises on appeal. *See infra* note 3. Those arguments are, therefore, jurisdictionally barred on multiple grounds.

## STATEMENT OF THE ISSUES

This is the latest in a series of cases concerning the ongoing efforts of the Commission, regional transmission operators, and wholesale electricity market participants to create and implement rate designs that promote the development of sufficient resources and that reasonably allocate costs among market participants. The orders on review involve market rules concerning revenues that generation resources receive for both committed capacity and wholesale sales of electricity in day-ahead and real-time markets. In one set of orders, the Tariff Orders, the Commission approved a proposal to increase price caps, called Reserve Constraint Penalty Factors, that limit what the System Operator can pay to resources in the

real-time market during certain shortages. In that proceeding, the Commission declined to consider whether to modify another market rule under which a price spike in the real-time market would trigger a deduction from capacity payments, called the Peak Energy Rent Adjustment. In the second set of orders, the Complaint Orders, the Commission denied the Generators Association's complaint seeking to modify that deduction rule.

The questions presented on appeal are:

(1) [In Case No. 16-1023] Assuming jurisdiction, whether the Commission reasonably exercised its broad discretion to order its proceedings by declining to consider changes to the Peak Energy Rent Adjustment in the Tariff Orders; and

(2) [In Case No. 16-1024] Whether the Commission reasonably denied the Association's complaint seeking to modify the Peak Energy Rent Adjustment, finding that the Association had failed to meet its burden under section 206 of the Federal Power Act, 16 U.S.C. § 824e, to show that the existing mechanism was unjust and unreasonable.

## STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes are contained in the attached Addendum.

## STATEMENT OF FACTS

## I. STATUTORY AND REGULATORY BACKGROUND

### A. The Federal Power Act

Section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy 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).[1]

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

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[1] "'Capacity' is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties — generally, generators — who can either produce more or consume less when required." *Id.* at 479*; see also NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 168 (2010) ("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.").

Section 206 of the Federal Power Act, 16 U.S.C. § 824e, authorizes the Commission, on its own initiative or on a third-party complaint, to investigate whether existing rates are lawful. In a complaint proceeding, the complainant bears "the burden of proof to show that any rate . . . is unjust, unreasonable, unduly discriminatory, or preferential . . . ." FPA § 206(b), 16 U.S.C. § 824e(b); *see also Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (stating complainant's burden of proof). If the Commission finds that the burden has been met, it must determine and set the new just and reasonable rate. FPA § 206(a), 16 U.S.C. § 824e(a).

### B. Developing Supplier Competition And Regional Markets

Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition among power suppliers. The expansion of vast regional grids and the possibility of long-distance transmission has enabled electric utilities to make large transfers of electricity in response to market conditions, thereby creating opportunities for competition among suppliers. *See New York*, 535 U.S. at 7-8 (explaining evolution of competitive markets).

In the 1990s, the Commission furthered the development of such competition by ordering functional unbundling of wholesale generation and transmission services, requiring utilities to provide open, non-discriminatory access to their transmission facilities to competing suppliers. *See generally id.* at

11-13; *cf. Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536 (2008) ("the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity").

The Commission's efforts to foster wholesale electricity competition over broader geographic areas in recent decades have led to the creation of independent system operators and regional transmission organizations. *See Morgan Stanley*, 554 U.S. at 536-37. These independent regional entities operate the transmission grid on behalf of transmission-owning member utilities and are required to maintain system reliability. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 169 & n.1 (2010) (explaining responsibilities of regional system operators).

These regional entities also run auction markets for wholesale electricity sales. *See Morgan Stanley*, 554 U.S. at 537. Such organized regional markets are subject to FERC market rules that help mitigate the exercise of market power, to price caps in some instances, and to oversight of market behavior and conditions by the Commission and by regional entities' own market monitors. *See, e.g.*, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904, FERC Stats. & Regs. ¶ 31,252, 119 FERC ¶ 61,295 at P 955 (2007), *on reh'g and clarification*, Order No. 697-A, 73 Fed. Reg. 25,382, FERC Stats. & Regs.

¶ 31,268, 123 FERC ¶ 61,055 at P 395 (2008), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

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

## II. THE NEW ENGLAND CAPACITY AND ENERGY MARKETS

These consolidated cases arise from Commission orders addressing the interaction between tariff rules for several wholesale electricity markets that the System Operator administers in New England.

### A. The Forward Capacity Market

Having ruled on numerous appeals concerning new energy market rate designs over the last decade, this Court is well-acquainted with the problems of maintaining system reliability, especially in areas of high demand along the eastern seaboard, and with the various mechanisms that the Commission has approved in regional markets (including New England) for the purpose of promoting reliability. *See Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009) (capacity market in New England); *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) (same) (reversed in one unrelated respect in *NRG Power*

*Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010)); *New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283 (D.C. Cir. 2014) (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 review of auction rates); *Blumenthal v. FERC*, 552 F.3d 875 (D.C. Cir. 2009) (transition to capacity market in New England); *see also*, *e.g.*, *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283 (D.C. Cir. 2011) (transitional capacity auctions in mid-Atlantic region); *Pub. Serv. Elec. & Gas Co. v. FERC*, 324 F. App'x 1 (D.C. Cir. 2009) (capacity market in mid-Atlantic); *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232 (D.C. Cir. 2005) (capacity market in New York).

Since 2008, the System Operator has administered a forward capacity market pursuant to the rules set forth in its FERC-jurisdictional tariff ("Tariff"). Load-serving entities in New England purchase from generators (and other suppliers) options to buy quantities of energy (i.e., capacity) three years in advance. *See Blumenthal*, 552 F.3d at 879; *see generally NRG*, 558 U.S. at 168-72 (describing New England's capacity market). A forward capacity market encourages the entry of new suppliers into the market with auctions that set rates three years in advance of delivery. This lag time allows competition from new suppliers that lack the installed capacity to deliver electricity now but could develop that capacity within three years of winning a bid. *See Md. Pub. Serv.*

*Comm'n*, 632 F.3d at 1285 (dismissing challenge to a pricing model designed to encourage increased investment in capacity); *see also Del. Dep't of Nat. Res. and Envtl. Control v. EPA*, 785 F.3d 1, 12 (D.C. Cir. 2015) (explaining that capacity payments provide revenues to maintain operations of existing generation resources and to encourage development of new resources).

Capacity prices are set through the annual forward capacity auction. The capacity auction is a descending price auction under which generators and other suppliers willing to provide capacity submit bids reflecting the price at which they are willing to supply capacity. Each bid reflects the lowest price the bidding resource will accept before it leaves the capacity market for that year (called a "de-list" bid). *See New Eng. Power Generators*, 757 F.3d at 298 (explaining bidding process); *ISO New England Inc.*, 148 FERC ¶ 61,201, at P 2 (2014) (describing capacity auction process). Any bid that "clears" the auction receives the auction-clearing price. *See New Eng. Power Generators*, 757 F.3d at 298. New England's capacity market also includes a locational component, conducting auctions in different zones based on transmission constraints between subregions. *See Me. Pub. Utils. Comm'n*, 520 F.3d at 469.

The System Operator conducts the annual capacity auction to procure capacity commitments for a 12-month period ("Capacity Year") from June 1

through May 31. *See Devon Power LLC*, 115 FERC ¶ 61,340 at P 16 (2006). The capacity auctions relevant to this case are as follows:

| **Capacity Auction** | **Auction Held** | **Capacity Year (June 1-May 31)** | **Relevance to This Case** |
|---|---|---|---|
| 4 | August 2010 | 2013-2014 | Subject of "back-cast" (*see* p. 44) |
| 5 | June 2011 | 2014-2015 | At issue in this appeal |
| 6 | April 2012 | 2015-2016 | At issue in this appeal |
| 7 | February 2013 | 2016-2017 | At issue in this appeal |
| 8 | February 2014 | 2017-2018 | At issue in this appeal |
| 9 | February 2015 | 2018-2019 | Capacity bids took Peak Energy Rent Adjustment into account (*see* p. 23) |
| 10 | February 2016 | 2019-2020 | Peak Energy Rent Adjustment removed through stakeholder process and System Operator's tariff filing (*see* pp. 24-25) |

### B. The Day-Ahead and Real-Time Markets

The System Operator also administers auction-based markets for energy and ancillary services. *See Blumenthal*, 552 F.3d at 878. Individual generators offer energy into the markets at particular prices; the System Operator determines the amount to meet demand. *See id.* "These wholesale auctions serve to balance supply and demand on a continuous basis, producing prices for electricity that reflect its value at given locations and times throughout each day." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016). New England has a day-ahead market that runs auctions for electricity to be delivered in each of the 24 hours of the next day and a real-time market in five-minute increments for immediate delivery to meet spikes in demand. *See generally Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1293 (2016) (explaining day-ahead and real-time markets). A capacity supplier must offer its capacity into the day-ahead and real-time energy markets every day of the Capacity Year that the resource is physically available. *See* Complaint Rehearing Order P 2, JA 599.

Generation resources are not the only bidders in the energy markets. Virtual traders, sometimes called arbitrageurs or financial marketers, are companies that participate in organized energy markets by "submit[ting] bids for purely financial purchases or sales of energy, which do not entail physical generation or consumption of energy." *N.Y. Indep. Sys. Operator, Inc.*, 98 FERC ¶ 61,282 at

62,216 (2002); *see also ISO New Eng., Inc.*, 113 FERC ¶ 61,055 at P 5 (2005) (explaining the role of virtual traders); *cf. Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 232 (D.C. Cir. 2013) (discussing virtual marketers). Virtual traders attempt to profit from differences in prices between a regional day-ahead market and its real-time market, buying in one market and selling in the other. The Commission has explained that virtual traders "are beneficial to bid-based markets by helping to ensure that day-ahead and real-time prices do not diverge significantly, as well as by providing enhanced price discovery and liquidity to the market." *ISO New Eng. Inc.*, 113 FERC ¶ 61,055 at P 30.

### C. Peak Energy Rent Adjustment and Reserve Constraint Penalty Factors

These consolidated cases arise from the relationship between two administratively-determined mechanisms in the System Operator's tariff: the Peak Energy Rent Adjustment and the Reserve Constraint Penalty Factors.

At the center of the Generators Association's objections is the Peak Energy Rent Adjustment, which the System Operator adopted in the forward capacity market rate design. *See Devon Power*, 115 FERC ¶ 61,340 at P 24. The Adjustment operates as a deduction from monthly capacity payments. *Id.* It was designed to serve both as a hedge for load and a disincentive for suppliers to withhold energy. The Adjustment would provide load-serving entities with a hedge against high prices in the energy market by adjusting the capacity payments,

which are paid by load to suppliers, to return "'peak energy rents' (i.e., those revenues earned when real-time clearing prices exceed an administratively-determined strike price) earned in the energy market . . . ." Complaint Order P 3, JA 546. The Adjustment also was intended "to help mitigate incentives to create price spikes in the energy market through economic or physical withholding" by removing any profits gained from such price spikes. *Id.* *See also ISO New Eng. Inc.*, 134 FERC ¶ 61,128 at P 3 (2011).

The Peak Energy Rent Adjustment was designed to approximate the additional revenues that a hypothetical proxy peaking unit (that is, the last generation resource that would clear in the real-time market) would earn in the real-time market during the highest-priced hours reflecting scarcity. *See* Complaint Order P 4, JA 546. Each day, the System Operator calculates a strike price that is slightly higher than the marginal running cost of the most expensive generation resource in New England. *See id.* For any hour in which the real-time locational marginal price is higher than that strike price, the System Operator calculates the difference by which the market price exceeds the strike price (with certain adjustments). *See id.* That difference is the hourly Peak Energy Rent value; the hourly values are summed to determine a monthly Peak Energy Rent value, which in turn is used to calculate the rolling average of the monthly Peak Energy Rent values for the previous 12 months. This rolling average Peak Energy

Rent value is deducted from the monthly capacity payments paid to capacity suppliers. *See id.*; Complaint Rehearing Order P 3 n.3, JA 600; *ISO New Eng. Inc.*, 134 FERC ¶ 61,128 at PP 5-6, 24. .

The other relevant mechanism is the Reserve Constraint Penalty Factor, which is a rate used in the real-time market to set the price that the System Operator may pay to procure reserves in the event of a reserve shortage. *See* Complaint Order P 6, JA 547; *New Eng. Power Pool and ISO New Eng. Inc.*, 115 FERC ¶ 61,175 at P 90 (2006).

## III. THE COMMISSION PROCEEDINGS AND ORDERS

### A. The Capacity Performance Proceeding (Tariff Orders) [Case No. 16-1023]

#### 1. The Capacity Performance Proposals

In January 2014, the System Operator and the New England Power Pool Participants Committee ("Power Pool") submitted alternative proposals to revise the System Operator's tariff to address resource performance problems in New England. (The agreement governing participation in ISO New England contains a so-called "jump ball" provision to the effect that, in certain circumstances, the System Operator must include, in its filing under Federal Power Act section 205, 16 U.S.C. § 824d, an alternative proposal supported by the Power Pool; the Commission may adopt any or all of either proposal as it finds "just and reasonable and preferable." *See* Tariff Order P 1 n.2, JA 211.)

The System Operator proposed changes to the capacity market design that would link capacity revenues to resource performance during reserve deficiencies, using two-part capacity payments that pay resources separately for committing their capacity in the forward auctions and then for actual performance in the Capacity Year. *See* Tariff Order PP 4-6, JA 213-14. A resource that provided more than its committed share of energy and reserves in scarcity conditions would receive additional payment, and one that failed to provide its share would incur a negative payment offsetting its base capacity payment. *See id.* P 6, JA 214.

The Power Pool proposed, instead, to address performance problems by increasing incentives in the energy and ancillary services markets. *See id.* P 11, JA 215. Among other changes, the proposal would increase the existing Reserve Constraint Penalty Factors in the real-time market, doubling the maximum price for 30-minute operating reserves from $500 to $1000 per megawatt-hour and raising the cap for 10-minute operating reserves from $850 to $1500 per megawatt-hour. *See id.* P 12, JA 216.

### 2. The Tariff Order

More than 50 parties or groups of parties intervened in the proceeding; more than 30 filed comments or protests. *See* Tariff Order, Appendix A, JA 256. In the only such filing relevant to this appeal, one capacity supplier protested that the Power Pool's proposal to increase the Reserve Constraint Penalty Factors would

exaggerate the inefficiency of the Peak Energy Rent Adjustment. *See id.* P 103, JA 251-52; *see also* Comments of GDF SUEZ Energy Marketing NA, Inc. at 13-14, 18-19, T.R. 59, JA 190, 202-03, 207-08.

On May 30, 2014, the Commission issued the Tariff Order, in which it determined that neither proposal had been shown to be just and reasonable standing alone; accordingly, the Commission instituted a proceeding under section 206 of the Federal Power Act, 16 U.S.C. § 824e, and directed the System Operator to implement a modified version of its proposal that also included the Power Pool's increase in the Reserve Constraint Penalty Factors. Tariff Order PP 1, 23-25, JA 211, 219-20. The two-part capacity payments (also referred to as "the two-settlement process") would go into effect for Capacity Year 9 (2018-2019), for which the capacity auction took place in 2015. *See id.* P 44, JA 228. The Reserve Constraint Penalty Factors would go into effect sooner to provide incentives to address performance problems in the near-term. *See id.* P 107, JA 253. (Following a compliance filing, the modified Reserve Constraint Penalty Factors became effective on December 3, 2014. *See ISO New Eng. Inc.*, 149 FERC ¶ 61,009 at P 23 (2014).)

On the only issue raised in this appeal, the Commission dismissed GDF SUEZ's argument "as beyond the scope of this proceeding" because the "potential inefficiency" of the Peak Energy Rent Adjustment "exists independent of, and is

not impacted by, the increase to the Reserve Constraint Penalty Factors." Tariff Order P 110, JA 254.

### 3. The Tariff Rehearing Order

Seven parties or groups of parties filed requests for rehearing of the Tariff Order, and two — the Generators Association and the Power Pool — filed requests for clarification of that Order. *See* Tariff Rehearing Order P 9, JA 318; *see also supra* pp. 2-3 (discussing separate filings by the Association and a group of generators). The Commission denied rehearing in all respects, addressing numerous issues, only one of which is raised on appeal: whether the Peak Energy Rent Adjustment should be modified. *See* Tariff Rehearing Order PP 104-06, JA 364-65. A group of generators argued that the Commission had incorrectly dismissed GDF SUEZ's argument that the changes to the Reserve Constraint Penalty Factors required modification of the Peak Energy Rent Adjustment. *Id.* P 104, JA 364. (The Generators Association did not adopt this issue in its own request for clarification, nor did it join the group's request for rehearing.[2])

[2] The Generators Association only sought clarification of the Commission's finding that, in the new capacity performance rate design, an exemption for resource nonperformance was appropriate in instances where an intra-zonal transmission constraint might lead to improper price signals; the Association asked the Commission to clarify that the exemption would apply when generators followed dispatch instructions that limited their output. *See id.* P 69, JA 347-48. The Commission dismissed the request as moot because it had already eliminated

The Commission acknowledged that the Adjustment "might incent resources to clear in the real-time market rather than the day-ahead market," but again concluded that this potential inefficiency has always existed. Tariff Rehearing Order P 105, JA 364. The Commission had approved the mechanism anyway because it served an important hedging function. *Id.* Though increasing the Reserve Constraint Penalty Factors could affect that inefficiency, the Commission remained unpersuaded that the Peak Energy Rent Adjustment must be changed in the same proceeding. *Id.*, JA 365. The Commission also noted that it had separately approved a proposal by the System Operator and the Power Pool to eliminate the Adjustment beginning with Capacity Year 10. *Id.* P 106, JA 365 (citing *ISO New England Inc.*, 151 FERC ¶ 61,096 (2015)); *see infra* pp. 24-25. The Commission further encouraged stakeholders to pursue any further tariff revisions they believed to be necessary through the regional stakeholder process. Tariff Rehearing Order P 106, JA 365.

### B. The Complaint Proceeding (Complaint Orders) [Case No. 16-1024]

#### 1. The Generators Association's Complaint

On December 3, 2014, the Generators Association filed a complaint under section 206 of the Federal Power Act, 16 U.S.C. § 824e, seeking to modify the

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the exemption in an interceding order on the System Operator's compliance filing. *See id.* P 80, JA 352.

Peak Energy Rent Adjustment by raising the strike price by $250 per megawatt-hour for Capacity Years 5 through 8 and to eliminate or modify the adjustment for Capacity Years 9 and beyond. *See* Complaint at 1, 29, C.R. 1, JA 376, 404.

The System Operator filed an answer to the complaint. Answer of ISO New England Inc. ("Answer"), C.R. 24, JA 495. With respect to Capacity Year 9, the System Operator opposed the elimination of the Adjustment because capacity suppliers had included the impact of the Adjustment in their bids in the ninth capacity auction; the System Operator also opposed the complaint as to Capacity Year 10 and beyond because the New England stakeholders were already considering eliminating the Adjustment from that period forward. Answer at 1-3, 10-12, JA 495-97, 504-06. Because the complaint as to Capacity Years 5 through 8 "involves equitable issues of revenue allocation among market participants but has no impact on reliability or economic efficiency" (*id.* at 6, JA 500), the System Operator took no position regarding those years, but commented on several aspects of the Association's arguments. *See id.* at 2, 6-10, JA 496, 500-04. The Power Pool filed comments urging the Commission to deny the complaint without prejudice, allowing the Generators Association to re-file if the ongoing stakeholder process did not result in further changes to the Peak Energy Rent Adjustment. *See* Comments of the New England Power Pool Participants Committee at 1-3, C.R. 23, JA 483-85.

### 2. The Complaint Order

On January 30, 2015, the Commission denied the complaint, finding that the Generators Association had failed to meet its burden, under Federal Power Act section 206, 16 U.S.C. § 824e, to demonstrate that the existing tariff provisions governing the Peak Energy Rent Adjustment were unjust and unreasonable. Complaint Order P 35, JA 558. (Having found that the Association had not met its burden to show that the existing rate was unjust and unreasonable, the Commission did not consider whether its proposed replacement rate was just and reasonable. *See id.* The Commission did, however, note that the Association had failed to address the dual purposes of the Peak Energy Rent mechanism — both to provide a hedge against high energy prices on the demand side and to discourage market manipulation on the supply side (*see supra* pp. 14-15) — and to explain how its proposed replacement would serve both purposes. Complaint Order P 35 n.48, JA 558.)

As discussed more fully in Part III of the Argument, *infra*, the Commission found, as to Capacity Years 5 through 8, that the Generators Association had failed to support the predictive value of its limited data and retrospective simulation, and had also failed to account both for the probability of price convergence in the day-ahead and real-time markets and for the overall revenues received by capacity resources. *See* Complaint Order PP 36-40, JA 558-61. Nevertheless, the

Commission again encouraged the regional stakeholders to consider whether to change the Peak Energy Rent mechanism going forward. *See id.* P 40, JA 561. The Commission also noted that it would consider future complaints if the Generators Association or any other party could provide specific evidence that the interaction has made rates unjust and unreasonable in Capacity Years 5 through 8. *Id.*

As to Capacity Year 9, for which the capacity auction was imminent (and suppliers' de-list bids had already been finalized), the Commission found that "capacity suppliers were afforded the opportunity to factor the impacts of the higher Reserve Constraint Penalty Factors into their capacity auction de-list bids," and that the Peak Energy Rent Adjustment had been accounted for in calculating the demand curve; therefore, the Association had not met its burden of showing that the Adjustment was unjust and unreasonable. *Id.* P 42, JA 561. As to Capacity Year 10, the Commission noted that the System Operator and its stakeholders were negotiating possible revisions to the Peak Energy Rent mechanism, and declined to "pre-empt the orderly unfolding of that process." *Id.* P 43, JA 562.

### 3. The Complaint Rehearing Order

The Generators Association filed a timely request for rehearing. C.R. 32, JA 564. (One generator, Entergy Nuclear Power Marketing, LLC, also filed a

request for rehearing, C.R. 33, which adopted the Association's arguments and raised others that are not at issue in this appeal.) The Commission denied rehearing, issuing the Complaint Rehearing Order on the same day as the Tariff Rehearing Order.

These appeals followed.

### C. Related Proceeding

In March 2015, while both of the proceedings underlying these consolidated appeals remained ongoing, the System Operator and the Power Pool filed revisions to the Tariff to eliminate the Peak Energy Rent Adjustment starting with Capacity Year 10 (June 2019-May 2020). The Commission accepted the revisions in *ISO New England Inc.*, 151 FERC ¶ 61,096 (2015). (The Generators Association supported the proposal, though it asked the Commission to direct the System Operator to initiate further stakeholder consideration of the Adjustment for earlier Capacity Years. *See id.* P 6. The Commission found that request to be beyond the scope of the proceeding. *Id.* P 11.) The System Operator explained that the Adjustment was no longer necessary because changes in the regional markets had reduced concerns about the exercise of market power; the Operator cited the performance incentives adopted for the capacity market beginning in 2018 (*see supra* pp. 17-18), improved mitigation measures, and a high percentage of

expected real-time load clearing in the day-ahead market. *Id.* P 3. No party sought rehearing of the order.

## SUMMARY OF ARGUMENT

This case concerns the Commission's responsibility under the Federal Power Act to balance the various interests of all parties involved in regional, auction-based capacity and energy markets. In both sets of challenged orders, the Commission appropriately considered all parties' arguments in the context of those regional markets and its own policy judgments, and properly exercised its responsibilities under the Federal Power Act.

First, as discussed *supra* at pp. 2-4, the Generators Association's challenge to the Tariff Orders is jurisdictionally barred by the judicial review provision of the Federal Power Act. The Association did not raise any of the arguments that it now pursues on appeal in a request for agency rehearing, as required by section 313(b) of the Act, 16 U.S.C. § 825*l*(b).

Assuming jurisdiction, in the Tariff Orders the Commission reasonably exercised its discretion to order its proceedings, declining to reach beyond the reliability-focused rate proposals that were at issue in the Capacity Performance Proceeding to modify a rate that would not affect reliability. The Commission explained that the flaws in the Peak Energy Rent mechanism had been known from the outset, and that changes to the rate had been implemented in the past, and could

be addressed in the future, independent of the decision to increase Reserve Constraint Penalty Factors to incent resource performance.

In the Complaint Orders, the Commission reasonably found that the Generators Association had failed to meet its statutory burden to show that the existing Peak Energy Rent Adjustment was unjust and unreasonable. The Commission did not conclude, as the Association claims, that the Association provided too little data or the wrong kinds of data, but that it failed to support the predictive value of retrospective data, or to account for likely market dynamics, or to show what its evidence meant in the context of overall revenues for capacity suppliers. The Association showed only that the magnitude of capacity deductions might increase (by speculative amounts), but failed to demonstrate that such deductions would push overall capacity revenues outside the zone of reasonableness.

The Association also, in relying on a simulation using retrospective data, failed to account for the likelihood that, going forward, day-ahead and real-time prices would converge, on average, in response to the increase in the real-time price caps. Instead, the Association's proffered case was reductive: any shortage event that triggered the price caps in the real-time market would also trigger a capacity deduction, and any such loss of capacity revenues would necessarily be unjust and unreasonable. The Commission properly concluded that the

Association's incomplete showing did not meet the burden for challenging an existing rate under Federal Power Act section 206, 16 U.S.C. § 824e.

## ARGUMENT

### I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The "scope of review under [that] standard is narrow." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (citation omitted). The relevant inquiry is whether the agency has "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (finding reasoned decisionmaking where Commission "weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice").

The Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see*

*also Me. Pub. Utils. Comm'n*, 454 F.3d at 287 ("[Because] matters of rate design . . . are technical and involve policy judgments at the core of FERC's regulatory responsibilities . . . the court's review of whether a particular rate design is just and reasonable is highly deferential."). In particular, the Commission's ratemaking decisions are subject to a "'zone of reasonableness.'" *Permian Basin*, 390 U.S. at 767 (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)); *see also Morgan Stanley*, 554 U.S. at 532 ("The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984) (reasonableness is a "zone," not a precise point, and FERC has discretion to consider legitimate non-cost factors to allow variation within that zone).

The Commission's policy assessments also are afforded "great deference." *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). *See also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014) ("the Commission must have considerable latitude in developing a methodology responsive to its regulatory challenge") (internal quotation marks and citations omitted); *New Eng. Power Generators*, 757 F.3d at 293 (court "properly defers to policy

determinations invoking the Commission's expertise in evaluating complex market conditions") (internal quotation marks and citation omitted).

The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b). Substantial evidence "requires 'more than a scintilla' but 'less than a preponderance' of evidence . . . ." *South Carolina*, 762 F.3d at 54 (citation omitted).

## II. ASSUMING JURISDICTION, THE COMMISSION APPROPRIATELY DECLINED TO CONSIDER MODIFYING THE PEAK ENERGY RENT ADJUSTMENT IN THE CAPACITY PERFORMANCE PROCEEDING [CASE NO. 16-1023]

The Generators Association raises a number of challenges to the Commission's determination, in the Tariff Orders, that potential modifications to the Peak Energy Rent Adjustment, based on its interaction with the Reserve Constraint Penalty Factors, were beyond the scope of the Capacity Performance Proceeding. *See* Br. 25-27, 30-31, 33-36, 48-50. As discussed *supra* at pp. 2-4, however, the Generators Association did not raise *any* of those arguments in a request for rehearing of the Tariff Orders in the Capacity Performance Proceeding, as required for this Court to have jurisdiction to consider its objections under

section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).[3] Accordingly, the Court lacks jurisdiction to consider the Association's arguments and should dismiss the petition for review of the Tariff Orders in Case No. 16-1023.

Assuming jurisdiction, the Commission properly declined to consider modifying the Peak Energy Rent Adjustment in the Capacity Performance Proceeding. Both the System Operator and the Power Pool had proposed measures to address problems with resource performance: The System Operator proposed changes to the forward capacity market that would link capacity revenues to resource performance, whereas the Power Pool proposed increased performance incentives in the energy and ancillary markets instead of a capacity market redesign. *See* Tariff Rehearing Order PP 2-3, JA 315-16. Dozens of parties submitted comments, protests, and (later) requests for rehearing concerning myriad facets of those proposals. *See supra* p. 17. One party, a capacity supplier, opposed

[3] Making the Association's jurisdictional footing even more tenuous, its arguments on appeal stray from the objections raised by the group of generators that did seek rehearing. For example, those parties did not argue, as the Association now does, that the Commission had a duty to consider "the full rate impact" on generators' capacity revenues (*see* Br. 25, 31, 33-34, 49) or that the Commission was improperly shifting the burden of proof (*see* Br. 27, 48-50). Rather, they primarily argued that excluding consideration of the Peak Energy Rent Adjustment would be "counterproductive" because the Adjustment would "undercut" the price-signaling incentives of the increased Reserve Constraint Penalty Factors. Request for Rehearing of Indicated Generators at 12, T.R. 118, JA 266, 277; *see also id.* at 4-5, 11-14, JA 269-70, 276-79.

the Power Pool's proposal on the ground that increasing the Reserve Constraint Penalty Factors would increase the "inefficiency" of the Peak Energy Rent mechanism (referring to the fact that a supplier has its capacity payments reduced by the Peak Energy Rent Adjustment whether or not it actually sold energy at the triggering price in the real-time market). *See* Tariff Order P 103, JA 251-52; *supra* pp. 17-18. The Commission determined that it need not address the Peak Energy Rent mechanism in the instant proceeding because the potential inefficiency "exists independent of, and is not impacted by, the increase to the Reserve Constraint Penalty Factors." Tariff Order P 110, JA 254.

Indeed, that inefficiency had existed since the System Operator designed the Adjustment. *See* Tariff Rehearing Order P 105 n.196, JA 364 (citing System Operator's acknowledgment, and defense, of the alleged mismatch between the deduction, based on real-time price spikes, from payments to suppliers that may have collected only day-ahead prices); *see also* Request for Rehearing of Indicated Generators at 13, JA 278 (asserting that the Adjustment was "already unjust and unreasonable"). The Commission had approved the mechanism "notwithstanding the potential inefficiency" because the Adjustment "served an important function, i.e., it acted as a hedge against price spikes." Tariff Rehearing Order P 105, JA 364 (citing *Devon Power*, 115 FERC ¶ 61,340 at PP 24, 29). *See generally*

*New Eng. Power Generators*, 757 F.3d at 293 (deferring to Commission's "proper exercise of its role in balancing competing interests").

Moreover, the Peak Energy Rent Adjustment and the Reserve Constraint Penalty Factors have long been considered and revised separately. The Commission has previously approved changes to the Reserve Constraint Penalty Factors without corresponding modifications to the Peak Energy Rent Adjustment. *See* Letter Order, *ISO New Eng. Inc. and New Eng. Power Pool*, FERC Docket No. ER10-97 (Dec. 15, 2009), *and* Letter Order, *ISO New Eng. Inc. and New Eng. Power Pool*, FERC Docket No. ER12-1314 (May 21, 2012), *cited in* Answer of ISO New England Inc. at 9, JA 503 (citing FERC proceedings), *cited in* Complaint Order P 21 n.28, JA 553. And the Peak Energy Rent Adjustment has been modified without changes to the Reserve Constraint Penalty Factors. *See ISO New Eng. Inc.*, 134 FERC ¶ 61,128 at PP 24-25 (2011) (revising calculation of strike price based on variability in fuel prices).

The Commission further explained that it was appropriate, given the Capacity Performance Proceeding's focus on reliability, to approve the higher price caps in the real-time market, which would increase incentives for resource performance, without considering a corresponding change to the Peak Energy Rent Adjustment, which "does not affect the incremental incentives to produce energy . . . ." Tariff Order P 110, JA 254. Moreover, by the time it issued the

Tariff Rehearing Order in November 2015, the Commission already had accepted tariff revisions negotiated among the New England stakeholders that eliminated the Peak Energy Rent Adjustment beginning in Capacity Year 10. Tariff Rehearing Order P 106, JA 365.

For all of these reasons, the Commission reasonably declined to go beyond the complex aspects of market design that were at issue in the Capacity Performance Proceeding to consider changes to the Peak Energy Rent mechanism. That decision as to scope was within the Commission's "broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities," such as to address a particular issue in a different proceeding that "would generate more appropriate information." *Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991), *quoted in South Carolina*, 762 F.3d at 81; *see also Tenn. Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) ("An agency has broad discretion to determine when and how to hear and decide the matters that come before it.") (citing cases). The Commission had broad discretion to structure the proceeding before it — in which neither the System Operator nor the Power Pool had suggested any change to the Peak Energy Rent Adjustment — and adequately justified its decision not to expand that reliability-focused proceeding to revise a separate tariff mechanism that had no impact on resource performance.

The Association objects that the Commission "shifted" its own burden to the Association (by declining to reach beyond the reliability-oriented proposals before it to modify other aspects of the tariff), leaving the Association to bear the burden of challenging an existing rate. *See* Br. 48-50. But the Association's objection (never raised below) is to the Federal Power Act itself. *See supra* pp. 6-7 (discussing statutory burdens). Because the Commission reasonably declined to expand the scope of an already-complex proceeding, the Association was left with the same statutory procedure available to any third party seeking to change an existing tariff — and the same burden of proof under FPA § 206, 16 U.S.C. § 824e. *See, e.g.*, *Blumenthal*, 552 F.3d at 881.

## III. THE COMMISSION REASONABLY FOUND THAT THE GENERATORS ASSOCIATION HAD FAILED TO MEET ITS BURDEN OF SHOWING THAT THE PEAK ENERGY RENT ADJUSTMENT WAS UNJUST AND UNREASONABLE [CASE NO. 16-1024]

The Association appears not to dispute the Commission's ruling as to the Capacity Years 9 and 10 (2018-2019 and 2019-2020). *See* Br. 60 (seeking relief as to commitment periods from 2014-2015 through 2017-2018, i.e., Capacity Years 5 through 8). As noted *supra* at pp. 24-25, the Commission previously accepted tariff revisions that eliminated the Peak Energy Rent Adjustment for Capacity Year 10. The Commission denied relief for Capacity Year 9 because capacity suppliers had the opportunity to factor the increased Reserve Constraint Penalty Factors into

their de-list bids for that period, and the Peak Energy Rent Adjustment had been factored into calculating the administratively-set demand curve for that capacity auction. *See* Complaint Order P 42, JA 561; *see also* Answer of ISO New England Inc. at 10-12, JA 504-06; *ISO New Eng. Inc.*, 151 FERC ¶ 61,096 at PP 1, 10 (2015) (accepting proposal to eliminate mechanism for Capacity Year 10).

With respect to Capacity Years 5 through 8, the Commission reasonably concluded that the Generators Association failed to make its case under the evidentiary burden that the Federal Power Act requires for a third party to compel a change to an existing rate. The Association spends much of its brief arguing that the Commission unreasonably dismissed the proffered data, ignored the costs to suppliers of the shortage event in December 2014, and improperly required proof of actual harm. *See* Br. 42-47, 50-59. That misses the Commission's point: that the Generators Association failed to place its evidence in a useful context. The Association showed that, had the new Reserve Constraint Penalty Factors been in effect in Capacity Year 4, those price caps would have exceeded the Peak Energy Rent strike price a certain number of times, resulting in Peak Energy Rent deductions of a certain magnitude. But the Generators Association failed to account for the likely effects of the revised price caps on market prices, and failed to show that the level of the simulated deductions, in the context of overall

revenues in Capacity Years 5 through 8, would result in unjust and unreasonable rates.

### A. The Commission Reasonably Found That The Generators Association Failed To Show That Predicted Revenue Losses, In The Context Of Overall Revenues, Would Be Unjust And Unreasonable

The Commission repeatedly emphasized that the Association had failed to place the lost capacity revenues that it predicted in "the larger context of the overall revenue picture for capacity suppliers." Complaint Order P 36, JA 558; Complaint Rehearing Order P 23, JA 608; *see also id.* PP 29, 34, JA 612, 615. That failure is the crux of this case. While the Association appears to presume that it could meet its statutory burden merely by showing that capacity suppliers would lose expected revenues (*see, e.g.*, Br. 38-39, 41), the Commission appropriately required the Association to show that the predicted loss would be outside the zone of reasonableness.

The Commission found that the Generators Association's analysis lacked the necessary context in two key respects: First, the Association failed to address the likelihood of gains in energy revenues that could offset losses in capacity revenues; and second, the Association, in presuming that any decrease in capacity payments would be unjust and unreasonable, did not account for the fact that all of the capacity prices in Capacity Years 5 through 8 were set by administrative rules,

rather than by actual market-clearing prices. *See* Complaint Order PP 37-39, JA 559-60; Complaint Rehearing Order PP 29-30, JA 612-13.

### 1. The Generators Association Failed To Consider The Likelihood Of Price Convergence Between The Day-Ahead And Real-Time Markets

In particular, the Association failed to address the likelihood that potential increases in Peak Energy Rent deductions from capacity revenues might be offset by higher revenues from energy sales due to higher day-ahead prices. *See* Complaint Order P 38, JA 559. That is, for hours where Reserve Constraint Penalty Factors in the real-time market could be expected (e.g., in high-demand periods of the hottest summer or coldest winter weather), resource owners and virtual bidders "may want to reflect the possibility of high real-time [locational marginal prices] in their day-ahead offers" for energy to be delivered in those hours. *Id.* Indeed, that is consistent with the very purpose of the increase in Reserve Constraint Penalty Factors. Tariff Order P 101, JA 251 (summarizing the Power Pool's explanation that its proposal to increase the maximum prices would encourage market participants to schedule in the day-ahead market and pursue other hedging activities to limit exposure to real-time prices). As a result, suppliers in the day-ahead market could be expected to earn higher energy revenues, offsetting potential deductions from capacity payments. *See* Complaint Order P 38, JA 559-60; Complaint Rehearing Order P 29, JA 612.

Over time, the day-ahead and real-time prices could level out, on average. "Both the higher day-ahead offers from resources and the participation of virtual bidders could reduce the gap between the day-ahead and real-time market clearing prices, on average . . . ." Complaint Order P 38, JA 560. Moreover, when resources anticipated such shortages and raised day-ahead prices accordingly, the anticipated real-time spikes might not even occur. *See id.*, JA 559 ("These higher [day-ahead] offers may increase day-ahead [locational marginal prices] not only during hours when the real-time price reflects Reserve Constraint Penalty Factors, but also in other hours when Reserve Constraint Penalty Factors are not triggered.").

Though the Association disputed the possibility that day-ahead and real-time prices could converge, its analysis focused narrowly on hours when the price caps in the real-time market would actually be triggered, and failed to account for the possibility that day-ahead prices would also anticipate spikes that would *not* occur in the real-time market: "[The Association] does not address the likelihood that convergence will occur *on average* over a longer period, namely, the hours when, in the day-ahead time frame, there is some probability that the real-time [price] might exceed the strike price. . . . [T]his broader set of hours may include hours when a Reserve Constraint Penalty Factor is not actually triggered . . . ." Complaint Order P 39, JA 560.

That determination was particularly within the Commission's purview, as courts give deference "to policy determinations invoking the Commission's expertise in evaluating complex market conditions." *New Eng. Power Generators*, 757 F.3d at 293 (internal quotation marks and citation omitted); *see also id.* at 297 (considering incentive effects of market rule is "precisely the sort of policy matter FERC is charged with considering"); *South Carolina*, 762 F.3d at 96 ("[I]t is within the scope of the agency's expertise to make . . . a prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view.") (internal quotation marks and citations omitted); *Blumenthal*, 552 F.3d at 885 (electricity market "presents 'intensely practical difficulties' demanding a solution from FERC . . . and the Commission must be given the latitude to balance the competing considerations and decide on the best resolution") (citation omitted).

Because the Association focused on capacity revenues without accounting for revenue from the energy and ancillary service markets — and potential changes thereto — the Commission reasonably found that it had failed to address the likely *overall* rate impact on capacity suppliers.

### 2. The Generators Association Failed To Address The Overall Revenue Picture For Capacity Suppliers In Capacity Years 5 Through 8

In addition, the Commission found that the Generators Association, in focusing on a predicted increase in deductions from capacity revenues, failed to place its asserted losses in the context of those capacity prices. The Commission noted that most capacity prices in Capacity Years 5 through 8 were set by administrative rules, and that the Generators Association had failed to address whether the prices were "above-market." Complaint Order P 37, JA 559.

In the capacity auctions for Capacity Years 5 through 8 (which took place in 2011 through 2014), capacity prices were set by administrative rules. Specifically, in the fifth through seventh capacity auctions, all resources selected in the auctions, with the sole exception of the Northeastern Massachusetts/Boston area in the seventh capacity auction, received a "floor price" set by market rules above the price that otherwise would have cleared the market. Complaint Order P 37, JA 559. *See ISO New Eng. Inc.*, 137 FERC ¶ 61,056 at PP 1, 5, 15 (2011) (accepting results of fifth capacity auction, which priced selected capacity resources at the floor price); *ISO New Eng. Inc.*, 140 FERC ¶ 61,143 at PP 1, 5, 6, 23 (2012) (same as to results of sixth capacity auction); Letter Order, *ISO New Eng. Inc.*, FERC Docket No. ER13-992 (June 11, 2013) (accepting results of seventh capacity auction); Forward Capacity Auction Results Filing at 2, *ISO New*

*Eng. Inc.*, FERC Docket No. ER13-992 (filed Feb. 26, 2013) (explaining that, in the seventh capacity auction, bids in all but one capacity zone reached the price floor, with the Northeastern Massachusetts/Boston zone clearing at a much higher price, also set by a tariff rule); Forward Capacity Auction Results Filing at 2, 4-5, *ISO New Eng. Inc.*, FERC Docket No. ER14-1409 (filed Feb. 28, 2014) (explaining that, in the eighth capacity auction, capacity prices in all but one zone were set by a tariff rule for insufficient competition, and the Northeastern Massachusetts/Boston zone was set by another tariff rule).[4]

The Association objects that prices set by FERC-approved market rules are just and reasonable. *See* Br. 26, 38-39. On that point, the Association is correct. But an above-market rate — meaning one that is higher than the market-clearing price — can be (free of the exercise of market power) just and reasonable. Courts, and the Commission, have long recognized that a reasonableness is a zone, not a precise point. *See Blumenthal*, 552 F.2d at 883 ("there is not one reasonable rate but rather a 'zone of reasonableness'") (quoting *Permian Basin*, 390 U.S. at 796-98); *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983)

[4] The results of the eighth Capacity Auction became effective by operation of law, in the absence of Commission action by majority vote. An appeal on the question whether that outcome is judicially reviewable is pending before this Court in *Public Citizen, Inc. v. FERC*, Case Nos. 14-1244, *et al.* (oral argument held Sept. 6, 2016).

("reasonableness is not a fixed point but a zone"). In *Farmers Union*, this Court suggested that the zone of reasonableness lies between "less than compensatory" and "excessive." 734 F.2d at 1502. Here, where the capacity rates were set by administrative rules, the Commission merely suggested that the rates could be higher within that zone than where the market-clearing price would be. The Commission never implied that the above-market rates might be "excessive revenue" (Br. 40), nor did the Commission ever refer to "'extra'" revenue, as the Association repeatedly implies (*see* Br. 23, 26, 32). (Conversely, the Generators Association never — on rehearing or on appeal — alleged, let alone tried to show, that the claimed increase in Peak Energy Rent deductions would prevent capacity suppliers from recovering their costs (i.e., make the rates "less than compensatory").)

The Generators Association disregards the zone of reasonableness entirely and maintains that any unanticipated reduction of capacity revenues is necessarily unjust and unreasonable. *See* Br. 25-26, 37-42. Of course, the Peak Energy Rent Adjustment mechanism existed when suppliers bid into the capacity auctions. And some Peak Energy Rent-triggering events, like the December 4, 2014 shortage, are not predictable. The Generators Association showed only that the amount of the Peak Energy Rent deductions might be greater under the increased Reserve Constraint Penalty Factors than the suppliers had previously anticipated. But "in a

competitive market, the Commission does not provide any guarantees as to the revenue that a supplier will earn in a given hour." Complaint Rehearing Order P 28 n.40, JA 612; *cf. New Eng. Power Generators*, 757 F.3d at 286 (noting that the Generators Association "is correct when it tells us that FERC's duty is to ensure that rates are just and reasonable, not [to] ensure equitability between participants"). Accordingly, the Generators Association bore the burden not only to show that the interaction between the Reserve Constraint Penalty Factors and the Peak Energy Rent Adjustment would likely increase deductions from capacity payments, but to show why such increases would make the overall revenue picture unjust and unreasonable for suppliers. The Commission rightly concluded that the Association had failed to do so, and nothing in their argument to this Court disputes that finding.

### B. The Commission Reasonably Found That The Generators Association Failed To Explain Why The Predicted Losses Were Likely To Occur

The Generators Association devotes much of its brief to arguing that the Commission unreasonably dismissed evidence that the Association submitted to meet its burden. The Association claims that the Commission rejected the use of historical data, required a showing of actual harm, ignored evidence regarding the shortage event in December 2014, and refused to explain what evidence would be sufficient. *See* Br. 42-47, 53-59. Again, the Association misses the Commission's

point: the Association failed to meet its burden not because it relied on historical data, but because it failed to show the predictive value of its data and how the impact on overall revenues would result in unjust and unreasonable rates.

To show that the interaction between the Reserve Constraint Penalty Factors and the existing Peak Energy Rent mechanism would cause capacity suppliers to lose revenues going forward, the Generators Association used a "back-cast" that the System Operator had conducted, using actual market data from the already-completed Capacity Year 4 (2013-2014), and simulating the revenue impact if the newly-increased real-time price caps had been in effect for that year. *See* Complaint at 15-16, JA 390-91; Complaint Rehearing Order PP8, 23, JA 602, 608.[5]

But the Commission found that the Generators Association failed to show why the simulated results for Capacity Year 4 "would necessarily occur" in Capacity Years 5 and beyond. Complaint Order P 36, JA 558-59. As discussed in Part III.A.1, *supra*, the Association's analysis failed to account for the likelihood that the higher price caps in the real-time market would lead to higher prices in the

[5] The System Operator had prepared the back-cast for a presentation to stakeholders to consider a potential filing to revise the tariff under section 205 of the Federal Power Act, 16 U.S.C. § 824d, not to meet the "unjust or unreasonable" standard required for a third party to compel modification under section 206, 16 U.S.C. § 824e. *Cf.* Answer of ISO New England Inc. at 8-9, JA 502-03 (making a similar point about a previous revision to the Peak Energy Rent mechanism).

day-ahead market. *See id.* PP 38-39, JA 559-60; *see also* Motion to Intervene and Protest of the New England States Committee on Electricity at 17, C.R. 21, JA 458, 474 ("[The Association] relies on a simulation that does not take into account the very reason for the increased [Reserve Constraint Penalty Factors] in the first place: better operational performance by capacity resources during scarcity conditions."); *id.* at 18, JA 475 ("the analysis excludes the potential impact of higher [price caps] on day-ahead energy market revenues").

The Generators Association maintains that a December 4, 2014 event, when an emergency in Quebec caused real-time prices in New England to rise for a three-hour period to a level that triggered the Peak Energy Rent strike price, showed "actual harm." *See* Br. 23, 52. The Commission, however, found the evidence lacking because the Generators Association provided no information "as to how often such events might occur, or the magnitude of revenue impacts that might result from them." Complaint Order P 40, JA 560. The Association mistakes that judgment as requiring proof of "additional instances of actual harm" (Br. 43) — a claim that the Commission repudiated, Complaint Rehearing Order PP 29, 39, JA 612-13, 618 — but in fact the Association offered no evidence of *any* kind to explain why that single event was typical, anomalous, common, rare, or any other characteristic that would provide a basis for predicting the likelihood or magnitude of future Peak Energy Rent deductions. "[T]o project that generators

will as a general matter experience significant losses due to the interaction of the [Peak Energy Rent] Adjustment and the [h]igher Reserve Constraint Penalty Factors" based on extrapolations from that single event, absent any evidence regarding the likely occurrence and impact of such events in the future, was, in the Commission's judgment, too speculative. Complaint Rehearing Order P 28, JA 611-12.

In sum, the Commission's ruling is entirely consistent with this Court's holding in *TransCanada Power Marketing Ltd. v. FERC*, 811 F.3d 1 (D.C. Cir. 2015), *cited in* Br. 31, 33, 35, 49. In that case, the Court remanded Commission orders approving a filing by the System Operator, because the Commission had failed to explain how the relevant factors justified the result and had drawn conclusions about profit margins without explanation and without any evidence in the record regarding those margins. *See* 811 F.3d at 12-13. If the Commission was wrong (in *TransCanada*) to approve a new rate as just and reasonable under Federal Power Act section 205, 16 U.S.C § 824d, without considering evidence of costs and explaining the overall balance and interaction of cost and non-cost factors, it would likewise be wrong (here) to change an existing rate under the unjust and unreasonable standard of Federal Power Act section 206, 16 U.S.C. § 824e, based only on speculative projections of capacity payment deductions, without considering energy market dynamics and overall capacity revenues.

As the Commission's formulation of the burden that the Generators Association must meet to show that the existing rate was unjust and unreasonable, and the Commission's assessment of the Association's evidence, "involve[] both technical understanding and policy judgment," it is not enough that the Generators Association disagrees with the Commission's conclusion. *Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("The Commission addressed that issue seriously and carefully . . . . It is not our job to render that [policy] judgment, on which reasonable minds can differ."); *see also New Eng. Power Generators*, 757 F.3d at 293 ("FERC evaluated the relative importance of several parameters . . . . Such a juggling act would not benefit from our rearranging."). The Commission addressed the issues "seriously and carefully, providing reasons in support of its position and responding" to the Association's arguments. 136 S. Ct. at 784. That satisfies the standard of reasoned decisionmaking. *See id.*

## CONCLUSION

For the reasons stated, the petition in Case No. 16-1023 should be dismissed for lack of jurisdiction; alternatively, the petition should be denied on the merits and the Tariff Orders should be affirmed. In Case No. 16-1024, the petition should be denied and the Complaint Orders should be affirmed.

Respectfully submitted,

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September 22, 2016
Final Brief: November 28, 2016

## CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 2010, in 14-point Times New Roman) and contains 10,628 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

/s/ *Carol J. Banta*
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November 28, 2016

# ADDENDUM
# Statutes

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

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

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

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

### § 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

#### (c) Electric energy in interstate commerce

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

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

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

#### (e) "Public utility" defined

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

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

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

#### (g) Books and records

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

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

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

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

(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.

Subsec. (g)(5). Pub. L. 109–58, § 1277(b)(1), substituted ''2005'' for ''1935''.

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

1978—Subsec. (b). Pub. L. 95–617, § 204(b)(1), designated existing provisions as par. (1), inserted ''except as provided in paragraph (2)'' after ''in interstate commerce, but'', and added par. (2).

Subsec. (e). Pub. L. 95–617, § 204(b)(2), inserted ''(other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title)'' after ''under this subchapter''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1277(b)(1) of Pub. L. 109–58 effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such date, see section 1274 of Pub. L. 109–58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Pub. L. 95–617, title II, § 214, Nov. 9, 1978, 92 Stat. 3149, provided that:

''(a) PRIOR ACTIONS.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall apply to, or affect, any action taken by the Commission [Federal Energy Regulatory Commission] before the date of the enactment of this Act [Nov. 9, 1978].

''(b) OTHER AUTHORITIES.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title.''

### § 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

#### (a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon

TRANSFER OF FUNCTIONS

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

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

**(a) Just and reasonable rates**

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

**(b) Preference or advantage unlawful**

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

**(c) Schedules**

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

**(d) Notice required for rate changes**

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under

any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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.

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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.

[1] See References in Text note below.

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

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

CODIFICATION

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

***New England Power Generators Association, Inc., v. FERC***
**D.C. Cir. Nos. 16-1023 & 16-1024 (consolidated)**

## 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 28th day of November 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system as indicated below:

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