ORAL ARGUMENT NOT YET SCHEDULED

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

No. 16-1111

OLD DOMINION ELECTRIC COOPERATIVE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Final Brief: December 7, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent submits:

A. Parties and Amici

To counsel's knowledge, the parties and intervenors appearing before this Court and before the Federal Energy Regulatory Commission in the underlying proceeding, FERC Docket No. ER14-2242, are identified in Petitioner's brief.

B. Rulings Under Review

1. *Old Dominion Electric Cooperative*, Order Denying Petition for Waiver, 151 FERC ¶ 61,207 (June 9, 2015), R. 32, JA 12-38; and

2. *Old Dominion Electric Cooperative*, Order Denying Rehearing, 154 FERC ¶ 61,155 (March 1, 2016), R. 38, JA 39-52.

C. Related Cases

This case has not been before this Court or any other court. Another case, *Duke Energy Corp. v. FERC*, D.C. Cir. No. 16-1133 (filed April 28, 2016, briefing in progress), arises from similar facts, involves many of the same parties, and presents a related issue.

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December 7, 2016

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GLOSSARY

Commission or FERC	Respondent Federal Energy Regulatory Commission.
Duke	Petitioner in related case, D.C. Cir. No. 16-1133.
Initial Order	*Old Dominion Electric Cooperative*, Order Denying Petition for Waiver, 151 FERC ¶ 61,207 (2015), R. 32, JA 12-38.
Make-Whole Payments Orders	*PJM Interconnection, L.L.C.*, FERC Docket No. ER14-1144, 146 FERC ¶ 61,041 (2014), *on reh'g*, 149 FERC ¶ 61,059 (2014).
Offer Cap Waiver Orders	*PJM Interconnection, L.L.C.*, FERC Docket No. ER14-1145, 146 FERC ¶ 61,078 (2014), *on reh'g*, 149 FERC ¶ 61,060 (2014).
Old Dominion	Petitioner Old Dominion Electric Cooperative.
PJM	Intervenor PJM Interconnection, L.L.C., the regional transmission organization that operates the mid-Atlantic electricity grid and related wholesale energy markets.
Rehearing Order	*Old Dominion Electric Cooperative*, Order Denying Rehearing, 154 FERC ¶ 61,155 (2016), R. 38, JA 39-52.

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BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

INTRODUCTION

In January 2014, a southward shift in the polar vortex—a mass of Arctic air—produced unusually cold temperatures and record-high natural gas prices across the eastern United States. In the face of these severe conditions, regional grid operator PJM Interconnection, L.L.C. (PJM) implemented emergency measures to ensure system reliability. ("PJM" is not an acronym coined for this brief; rather, it takes its name from the home states—Pennsylvania, New Jersey, and Maryland—of the first mid-Atlantic utilities to pool their excess capacity.)

This is one of two companion cases before the Court relating to financial losses that generation owners incurred when they bought fuel for electric generation facilities at high prices during the polar vortex-related cold weather events, but were not called into operation by PJM. In the related case, D.C. Cir. No. 16-1133, Duke Energy Corporation ("Duke") seeks contract-based relief under PJM's electric transmission tariff. In this case, Petitioner Old Dominion Electric Cooperative ("Old Dominion"), eschewing tariff-based relief, pursues equitable relief only for its financial losses.

STATEMENT OF THE ISSUE

Under section 205 of the Federal Power Act, 16 U.S.C. § 824d, and this Court's precedents, the Federal Energy Regulatory Commission ("FERC" or the "Commission") has no power to alter a rate retroactively, unless ratepayers have notice that a rate is tentative and may be later adjusted with retroactive effect. Five months after incurring losses in connection with the polar vortex-related severe weather of January 2014, Old Dominion requested that the Commission waive certain provisions of the PJM tariff so that it could recover its losses from PJM ratepayers.

The question presented is: Did the Commission reasonably conclude that it lacked authority to grant Old Dominion's requested relief?

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Generation Capacity Resources in PJM

PJM operates a transmission system that spans all or part of thirteen mid-Atlantic and midwestern states, plus the District of Columbia. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1293 (2016). In this role, it is responsible for ensuring that electric power is reliably transmitted from power generators to load-serving entities, i.e., organizations that deliver electricity to retail consumers. *Id.* at 1292-93.

To meet current demand and ensure reliability, PJM administers competitive wholesale auctions, in particular, a "same-day auction" for immediate delivery of electricity to load-serving entities, a "next-day auction" to satisfy load-serving entities' near-term demand, and a "capacity auction" to ensure the availability of an adequate supply of power in the future. *Id. See also NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165, 169 & n.1 (2010) (discussing responsibilities of regional system operators).

"'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." *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009); *see also NRG*, 558 U.S. at 168 ("In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself."). In PJM's annual capacity auction, entities bid to offer capacity to PJM for delivery three years in the future. *Hughes*, 136 S. Ct. at 1292-94 (describing PJM capacity auction). Resources selected in the auction qualify as "generation capacity resources" under the PJM tariff. *See* Order Denying Petition for Waiver, 151 FERC ¶ 61,207, P 2 & n.2 (2015) ("Initial Order"), R. 32, JA 12.

Generation capacity resources receive payments in exchange for being available to generate electricity in the future, whenever "called upon" by PJM. *Delaware Dep't of Nat. Res. and Envtl. Control v. EPA*, 785 F.3d 1, 12 (D.C. Cir. 2015). In particular, generators "must offer" their capacity into PJM's day-ahead and real-time markets in the delivery year, and receive payments in those markets for supplying electricity. *See generally* PJM Operating Agreement Schedule 1, § 1.7.20(b) (market participants selling from generation resources must respond to PJM's "directives to start, shutdown or change output levels of generation units"),

JA 154; § 1.10.1A(d) (owners of generation capacity resources are subject to day-ahead and real-time energy market "must-offer" requirements), JA 158.

PJM's tariff establishes the market rules and compensation mechanism for generators, and constitutes the "filed rate" under which generators and market participants operate. *See generally NRG*, 558 U.S. at 171. Consumers ultimately "shoulder the[se] costs in their utility bills." *Connecticut Dep't of Pub. Util. Control*, 569 F.3d at 479.

Old Dominion is a not-for-profit generation and transmission electric cooperative utility and participates in PJM as a load-serving entity to secure power for its member distribution cooperatives. Initial Order P 2, JA 12. As relevant here, Old Dominion owns three natural gas-fired power plants in Maryland and Virginia designated as PJM generation capacity resources. *Id.* Old Dominion thus receives capacity payments and energy market revenues in return for the commitment to provide electricity from these units whenever called upon by PJM.

B. January 2014: PJM and Market Participants Respond to the Unintended Collision of Adverse Market Conditions and PJM Market Rules

The combination of extremely cold weather, surging demand, and spiking fuel costs in January 2014, along with the operation of certain PJM market rules, posed significant challenges for PJM and market participants. *See* Initial Order P 4, JA 13. Certain generators, in particular, faced a dilemma: one PJM tariff

provision obligated them to offer energy into the day-ahead energy market,[1] but another—i.e., the offer cap[2]—prohibited them from offering that energy at their marginal costs of producing it. *See PJM Interconnection, L.L.C.*, 149 FERC ¶ 61,059, PP 2-4 (2014) (PJM explaining that $1,000 per megawatt-hour offer cap precluded some cost-based offers, with marginal energy costs approaching approximately $1,200 per megawatt-hour). In other words, due to the confluence of market conditions and PJM tariff provisions, it appeared that some generators may have been required to sell energy into PJM markets at a loss, contrary to the intent of the PJM market construct. *See generally Delaware Dep't of Nat. Res.*, 785 F.3d at 12.

Responding to the situation, PJM issued a statement to market participants on January 21, 2014. The statement reiterated the requirement that generation capacity resources "must offer" into the PJM energy market, and also indicated that PJM planned to file both a request for temporary, prospective waiver of the offer cap, and a request for retroactive relief, to permit generators to recover their fuel costs. *See* Request of PJM Interconnection, L.L.C. for Waiver and for

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[1] *See* PJM Operating Agreement Schedule 1, § 1.10.1A(d) ("must-offer" requirements), JA 158.

[2] *Id.* § 1.10.1A(d)(viii) (offers from generation capacity resources into the day-ahead energy market shall not exceed an energy offer price of $1,000 per megawatt hour), JA 160.

Commission Action by January 24, 2014 at 6-7 & Attachment A, FERC Docket No. ER14-1144 (filed Jan. 23, 2014), JA 129-30, 137.

On January 23, PJM initiated two proceedings at the Commission, seeking relief for generators subject to its rules. Both requests sought prospective relief only. In one filing, PJM requested temporary "make-whole relief"—effective the next day (January 24)—that would permit certain generators to receive payments reflecting the difference between their costs and the market clearing price. *Id.* at 2-3, JA 125-26.

In the second filing, PJM requested a waiver of the $1,000 offer cap, to allow sellers to include their true marginal costs in cost-based offers. Request of PJM Interconnection, L.L.C. for Waiver, Request for 7-Day Comment Period, and Request for Commission Action by February 10, 2014, FERC Docket No. ER14-1145 (filed Jan. 23, 2014), JA 138-50. The requested waiver would supersede the make-whole payments measure and would extend prospectively from the date of the Commission's order granting it through March 31, 2014, the end of the winter season. *See id.* at 3, JA 140.

The Commission granted both requests. *See PJM Interconnection, L.L.C.*, FERC Docket No. ER14-1144, 146 FERC ¶ 61,041 (Jan. 24, 2014), *on reh'g*, 149 FERC ¶ 61,059 (2014) ("Make-Whole Payments Orders") (granting request for interim relief to allow generators to receive make-whole payments, effective

January 24, 2014 and expiring either upon issuance of a Commission order granting the offer cap waiver request, or March 31, 2014, whichever was earlier); *PJM Interconnection, L.L.C.*, FERC Docket No. ER14-1145, 146 FERC ¶ 61,078 (Feb. 11, 2014), *on reh'g*, 149 FERC ¶ 61,060 (2014) ("Offer Cap Waiver Orders") (granting PJM's requested waiver and permitting bids into the energy markets from generation capacity resources to exceed the $1,000 offer cap, effective February 11 through March 31).

Some generators sought relief for polar vortex-related financial losses beyond the relief granted in the PJM-initiated proceedings. As discussed above, Duke filed a complaint with the Commission arguing that it was entitled to indemnification under the PJM tariff for losses incurred when it purchased high-priced fuel in January 2014. Before the Commission, Duke also argued, in the alternative, that the Commission should grant it equitable relief by retroactively waiving the offer cap provision. The Commission denied Duke's request on both tariff and equitable grounds. *See Duke Energy Corp. v. PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,206, PP 57-68 (2015), *on reh'g*, 154 FERC ¶ 61,156, PP 23-33, 45-55 (2016). Although it found that Duke could not obtain relief under the specific circumstances presented, the Commission initiated an investigation to consider whether the tariff should be revised, prospectively, to address issues

raised in Duke's complaint. The Commission orders in the Duke proceeding are before the Court in D.C. Circuit No. 16-1133.

Similarly, one year after incurring financial losses during the January 2014 cold snap, generation owner New Jersey Energy Associates requested that the Commission retroactively waive the application of certain tariff provisions to permit it to recover its fuel costs. The Commission denied the request. *New Jersey Energy Assocs., a Ltd. P'ship*, 152 FERC ¶ 61,181 (2015), *on reh'g*, 155 FERC ¶ 61,079 (2016). New Jersey Energy Associates did not appeal.

II. THE PROCEEDING UNDER REVIEW

A. Old Dominion's Waiver Request

In June 2014—approximately five months after the cold weather events had resolved—Old Dominion filed a petition for waiver of certain provisions of the PJM tariff and Operating Agreement to permit Old Dominion to recover natural gas costs incurred in January 2014. Petition of Old Dominion Elec. Coop. for Waiver of PJM Tariff and Operating Agreement Provisions in Order to Make [Old Dominion] Whole for Certain January 2014 Operations at 1-2 ("Old Dominion Petition"), R. 2, JA 56-57.

Unlike Duke and New Jersey Energy Associates, Old Dominion conceded that its request to be made whole for unrecovered natural gas costs incurred during the January 2014 cold snap "is not currently allowed by the PJM [tariff] or

Operating Agreement." Initial Order P 46, JA 33. Old Dominion sought only equitable relief, asking the Commission to retroactively waive tariff provisions precluding it from recovering three categories of costs relating to operation of its generation capacity resources during the January 2014 cold snap:

1. *Costs Above $1,000 Offer Cap*: Old Dominion requested waiver of the offer cap, so that it could recover costs in excess of $1,000 per megawatt-hour incurred to operate certain generation units on January 23, 2014. In particular, Old Dominion asked that the relief granted by the Commission in the Make-Whole Payments Order—permitting generators, effective January 24, 2014, to recover legitimate costs incurred in excess of the $1,000 offer cap—be extended one day back to January 23. *Id.* PP 8-10, JA 15-16;

2. *Canceled Dispatch Costs*: Old Dominion requested waiver of tariff provisions precluding recovery for losses it incurred when PJM scheduled Old Dominion generation units for dispatch on certain days in January, but canceled the dispatches. *Id.* PP 11-14, JA 16-20; and

3. *Natural Gas Balancing Losses*: Old Dominion also requested waiver of tariff provisions precluding recovery for losses incurred when PJM dispatched Old Dominion generation units on January 23 and January 28, but cut the dispatches short. *Id.* PP 15-17, JA 20-21.

PJM submitted comments generally supportive of Old Dominion's waiver request, as a matter of policy. *Id.* PP 22-23, JA 23-24. The PJM Market Monitor submitted comments largely opposing Old Dominion's request, but supporting recovery for one subcategory of losses. *Id.* PP 24-30, JA 24-27.[3] Multiple parties also filed comments opposing Old Dominion's request. *Id.* PP 31-34, JA 27-29; *see also* Order Denying Rehearing, 154 FERC ¶ 61,155, P 27 (2016) ("Rehearing Order"), R. 38, JA 52.

B. The Commission's Orders

The Commission concluded (over the dissent of former Commissioner Moeller to the Initial Order) that it could not grant Old Dominion's requested relief. In particular, the filed rate doctrine and rule against retroactive ratemaking precluded the retroactive tariff waivers sought by Old Dominion. Initial Order PP 45-48, JA 33-34. As the Commission explained, "the filed rate doctrine 'forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.'" *Id.* P 46, JA 33 (quoting *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)). And "[t]he related rule

[3] PJM's Market Monitor is Monitoring Analytics, LLC, an independent entity charged with ensuring the competitive and efficient operation of PJM markets. The PJM Market Monitor seeks leave to intervene in this proceeding; Old Dominion opposes the motion, arguing that the Market Monitor lacks standing. *See* Br. 2 (issue 4), 36-42. The Commission expresses no view on the standing of the Market Monitor to participate in this appeal.

against retroactive ratemaking also 'prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods.'" *Id.* (quoting *Towns of Concord v. FERC*, 955 F.2d 67, 71 & n.2 (D.C. Cir. 1992)).

In particular, the Commission concluded that this Court's precedents established that the agency may not waive the filed rate doctrine based on equitable considerations, thus precluding the grant of retroactive, equitable relief to Old Dominion. Rehearing Order P 12, JA 43-44 (citing *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135 (D.C. Cir. 1987) ("*Columbia Gas I*"), *Columbia Gas Transmission Corp. v. FERC*, 844 F.2d 879 (D.C. Cir. 1988) ("*Columbia Gas II*"), and *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1990) ("*Columbia Gas III*")).

The Commission observed that prior notice could transform "what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice . . . that the rates being promulgated are provisional only and subject to later revision." Rehearing Order P 16, JA 45 (quoting *Columbia Gas III*, 895 F.2d at 797). The Commission determined, however, that PJM customers lacked notice that rates paid for past sales could be retroactively adjusted to compensate Old Dominion for the unrecovered fuel costs. Rehearing Order PP 17, 23-24, JA 46-47, 50-51.

Because the Commission concluded that it lacked discretion under this Court's precedents "to waive the filed rate doctrine, regardless of other equitable considerations," the Commission did not proceed to analyze Old Dominion's request under the standard it typically applies to requests for waivers of tariff provisions. Rehearing Order PP 25-26, JA 51; Initial Order P 48, JA 34. (By contrast, the Commission analyzed, and granted, PJM's requests for prospective relief under equitable standards. *See, e.g.*, Offer Cap Waiver Order, 146 FERC ¶ 61,078, P 38; Make-Whole Payments Order, 149 FERC ¶ 61,059, P 19.)

Former Commissioner Moeller dissented from the majority view in the Initial Order.[4] Commissioner Moeller expressed concern regarding the inflexibility of certain PJM market rules, and further expressed the view that the majority had "applie[d] an overly-narrow reading of the prior notice rule and prohibition against retroactive ratemaking." Moeller dissent at 1-2, JA 36-37.

STANDARD OF REVIEW

This Court reviews Commission actions under the Administrative Procedure Act's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow," and the Court "may not substitute [its] own judgment for that of the Commission." *FERC v.*

[4] Commissioner Moeller departed the agency prior to the issuance of the Rehearing Order.

Electric Power Supply Ass'n, 136 S. Ct. 760, 782 (2016) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Court upholds the Commission's factual findings if they are supported by substantial evidence. *E.g.*, *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010). Substantial evidence "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (internal quotation marks and citation omitted).

SUMMARY OF ARGUMENT

The Commission recognizes that generators such as Old Dominion faced extremely challenging market conditions in January 2014, exacerbated by certain PJM market rules. For that reason, the Commission initiated a separate investigation into whether PJM's tariff should be revised. Contrary to Old Dominion's position, however, the Commission lacked discretion to grant retroactive relief to individual generators to compensate for their January 2014 losses.

This appeal turns on the Commission's conclusion that, under this Court's decisions in the *Columbia Gas* cases, the filed rate doctrine and rule against retroactive ratemaking bar Old Dominion's requested relief. *See Columbia Gas III*, 895 F.2d at 797; *Columbia Gas I*, 831 F.2d at 1140-41. Here, the Commission

reasonably determined that PJM ratepayers lacked notice that they could be subject to surcharges to cover Old Dominion's losses. In the absence of notice, *Columbia Gas* precludes Old Dominion's requested relief. There is thus no basis for applying the Commission's general standards for evaluating requests for equitable relief.

The cases cited by Old Dominion reflect these principles and do not dictate a different result. Since *Columbia Gas III*, no Commission order has gone so far as to claim the right to grant retroactive rate relief in the circumstances presented here. The Commission's decision faithfully applies this Court's precedents and should be upheld.

ARGUMENT

I. THE COMMISSION REASONABLY CONCLUDED THAT THE FILED RATE DOCTRINE AND RULE AGAINST RETROACTIVE RATEMAKING BARRED IT FROM GRANTING OLD DOMINION'S REQUEST FOR EQUITABLE RELIEF

The filed rate doctrine prohibits public utilities (such as PJM) from charging rates for services other than those on file with the Commission. *See Arkansas La.*, 453 U.S. at 578; *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007). The doctrine arises out of section 205 of the Federal Power Act, 16 U.S.C. § 824d. That provision requires public utilities to "file with the Commission" and keep open for public inspection "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission." *Id.* § 824d(c).

When a public utility seeks to change its filed rate, it must file and make public "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." *Id.* § 824d(d).

The rule against retroactive ratemaking is a corollary to the filed rate doctrine and "prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods." *Towns of Concord*, 955 F.2d at 71 & n.2; *see also Arkansas La.*, 453 U.S. at 578 ("[T]he [Natural Gas Act] bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold.").[5]

The purpose of the rules is to "maintain predictability in the rates that will be charged, and this purpose is accomplished by the guarantee that rate changes will only be made prospectively." *Columbia Gas III*, 895 F.2d at 793. Thus, "once a rate is in place with ostensibly full legal effect and is not made provisional, it can . . . be changed only prospectively." *Id.* at 797.

Relying on the Court's application of these principles in the *Columbia Gas* cases, the Commission concluded that the filed rate doctrine and rule against

[5] The Court applies "interchangeably" judicial interpretations of Natural Gas Act provisions and their "substantially identical" counterparts in the Federal Power Act. *Arkansas La.*, 453 U.S. at 577 n.7.

retroactive ratemaking precluded it from granting the equitable relief sought by Old Dominion: "The United States Court of Appeals for the District of Columbia Circuit carefully considered the issue of the Commission's authority to waive the filed rate retroactively on equitable considerations . . . , and the [C]ourt concluded unequivocally that the Commission has no such authority." Rehearing Order P 12, JA 43-44 (citing *Columbia Gas I*, 831 F.2d 1135, *Columbia Gas II*, 844 F.2d 879, and *Columbia Gas III*, 895 F.2d 791).

A. *Columbia Gas* Establishes That the Commission Lacks Discretion to Waive the Filed Rate Doctrine and Rule Against Retroactive Ratemaking on Equitable Grounds

Columbia Gas arose after the Commission issued orders permitting natural gas producers, as "first sellers" of natural gas, to pass certain production costs through to their pipeline customers. *Columbia Gas III*, 895 F.2d at 792. The Commission subsequently approved several pipelines' proposals to recover the additional production costs by imposing retroactive surcharges on natural gas previously sold by the pipelines to their downstream customers. *Columbia Gas I*, 831 F.2d at 1139-40. In support of its approval of the retroactive surcharges on downstream customers, the Commission reasoned that: (1) customers were on notice that production costs would be retroactively collected, and (2) the pipelines' proposals produced an "equitable result." *Id.* at 1140.

On appeal, the Court reversed, finding that the Commission action constituted impermissible retroactive ratemaking. *Id*. As the Court stated, "[D]ownstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased. However described, this constitutes a retroactive rate increase that we find to be prohibited by the [Natural Gas Act]." *Id*.

The Court observed that notice of potential rate changes can satisfy the filed rate doctrine and rule against retroactive ratemaking. *Columbia Gas III*, 895 F.2d at 797. As the Court explained, "[n]otice does *not* relieve the Commission from the prohibition against retroactive ratemaking. Instead, it changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision." *Id*. However, the Court rejected the Commission's notice argument, finding that the Commission orders permitting first sellers of natural gas to pass production costs through to their pipeline customers did not place the relevant audience—i.e., pipelines' downstream customers—on notice that "they in turn would be expected to absorb those costs . . . . " *Columbia Gas I*, 831 F.2d at 1140.

After the Court's *Columbia Gas I* decision, the Commission argued that the Natural Gas Act, 15 U.S.C. § 717c(d), conferred on the agency "implied authority"

to waive the filed rate doctrine. *Columbia Gas III*, 895 F.2d at 793-94. Section 717c(d) of the Natural Gas Act provides that a natural gas company must provide 30 days' notice to the Commission and to the public before changing a rate, but the Commission may cut the 30-day notice period short "for good cause shown." 15 U.S.C. § 717c(d). (The Federal Power Act provides for the same "good cause" authority; the only difference is that the statutory notice period runs for 60, not 30, days. 16 U.S.C. § 824d(d).)

Analyzing the relevant statutory language, the Court held that "this statutory notice, which the Commission may waive on a showing of good cause, is not the notice of prospective rate adjustments to which we referred in *Columbia [Gas] I* when we stated that the [Natural Gas Act]'s prohibition against retroactive rate increases might have been overridden if FERC had provided 'adequate notice that [downstream] purchasers would be expected to pay the deferred charges at a later date.'" *Columbia Gas III*, 895 F.2d at 795-96 (quoting *Columbia Gas I*, 831 F.2d at 1140). Instead, "[t]hat statement was addressed to those circumstances in which the Commission has authorized increases in prices previously paid by purchasers who were already on notice that the prices they were paying were provisional only." *Columbia Gas III*, 895 F.2d at 795-96. *See also Consolidated Edison Co. v. FERC*, 958 F.2d 429, 434 (D.C. Cir. 1992) (describing distinction established in *Columbia Gas* between "advance" or "actual" notice that a rate will be increased—

the prerequisite for satisfying the filed rate doctrine—and the "statutory notice" period required to implement a rate change, "which FERC may cut short for good cause").

Thus, although "[t]he Commission may well be correct in its assessment of the equities" of the case, in the absence of adequate notice to downstream purchasers that the prices they paid would be subject to adjustment, the agency lacked authority to impose a retroactive surcharge "for whatever cause." *Columbia Gas III*, 895 F.2d at 797.

B. Applying *Columbia Gas* to the Circumstances Presented, the Commission Reasonably Concluded That It Lacked Authority to Grant Old Dominion's Requested Relief

Applying the "unambiguous" principles set forth in *Columbia Gas III*, the Commission concluded that the filed rate doctrine and rule against retroactive ratemaking barred it from granting equitable relief to Old Dominion. Rehearing Order P 17, JA 46. As the Commission explained, "a central purpose of the filed rate doctrine and the rule against retroactive ratemaking is to protect ratepayers from being subjected to an additional surcharge above the rate on file for service already performed." *Id.* P 19, JA 48. And Old Dominion's request "presents the classic situation addressed by the filed rate doctrine and the prohibition against retroactive ratemaking of a utility seeking to impose on ratepayers an additional surcharge for service already performed." *Id.*

In particular, the Commission found that PJM ratepayers lacked notice that they could be assessed retroactive charges to cover Old Dominion's polar vortex-related losses. *Id.* PP 17, 23-24, JA 46-47, 50-51. In so finding, the Commission reasonably rejected Old Dominion's contention, *see* Br. 22-24, that PJM's tariff generally "put[s] ratepayers on notice that as market conditions change, so will their market rates." *See* Rehearing Order P 23, JA 50 (explaining that the Court "rejected a similar contention in *Columbia [Gas] I*," where Commission's authorization for producers to recover certain costs from pipelines did not constitute notice to pipelines' downstream customers that they would, in turn, be subject to retroactive surcharges); *see also* Rehearing Order P 27, JA 52 ("[I]n this proceeding, numerous parties objected to having to pay these retroactive assessments . . . . ").

There is no support for Old Dominion's contention that it may recover costs beyond those permitted by tariff because ratepayers are generally "on notice" that their rates may increase during extreme weather conditions. Indeed, Old Dominion's unduly broad proposition would effectively read the filed rate doctrine out of existence. The PJM tariff represents the system operator's rate schedule: specific rates for transactions are determined under the relevant tariff provisions. *See West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 22 (D.C. Cir. 2014) (tariffs that provide a formula for calculating rates, rather than a specific rate number,

satisfy the requirements of the filed rate doctrine because ratepayers have notice that rates will be determined in accordance with the formula); *NSTAR*, 481 F.3d at 801 (rates established by tariff may constantly change, "as long as they do so consistently with the formula"). Thus, under the PJM tariff, ratepayers may experience price changes in response to market conditions, but such fluctuations are governed by the PJM tariff.

As the Commission observed, Old Dominion acknowledged that the PJM tariff in effect in January 2014 "did not permit recovery of the costs which [Old Dominion] seeks to recover through . . . waiver." Rehearing Order P 17, JA 46; Initial Order P 46, JA 33 (same). If, as Old Dominion acknowledges, the costs it seeks to recover are disallowed by the tariff, PJM ratepayers could not have been on notice that they might be subject to retroactive surcharges to cover such extra-tariff costs: "[T]he mere fact that [Old Dominion] faced circumstances in January 2014 that might cause it to incur costs *not otherwise recoverable under PJM's filed tariff* did not provide sufficient notice that PJM and its ratepayers could be subject to a retroactive surcharge" for such costs. Rehearing Order P 23, JA 50 (emphasis added).

The Commission likewise found unpersuasive Old Dominion's contention, Br. 29-30, that PJM ratepayers had notice at least with respect to Old Dominion's

request to recover costs above the $1,000 offer cap.[6] Rehearing Order P 24, JA 50-51. Although PJM issued a statement on January 21, 2014 indicating that it planned to file requests for both prospective waiver of the offer cap, and for retroactive relief, PJM's actual pleadings on January 23 requested prospective relief only. *See supra* pp. 6-7. The Commission granted PJM's requests for prospective relief, effective January 24, as requested. Make-Whole Payments Orders, 146 FERC ¶ 61,041, P 1, *on reh'g*, 149 FERC ¶ 61,059, P 1. As the Commission observed, Old Dominion was a party to the proceedings resulting in the Make-Whole Payments Orders, but did not seek rehearing regarding the January 24 effective date. Rehearing Order P 24, JA 50-51. Moreover, in the same proceeding, the PJM Market Monitor requested that the Commission set an effective date of January 22, 2014, but the Commission denied the request, finding that the Market Monitor failed to establish sufficient notice for an earlier effective date. *Id.* (citing Make-Whole Payments Order, 149 FERC ¶ 61,059, P 17).

In these circumstances, the Commission reasonably concluded that PJM's January 21 non-binding statement, along with PJM's January 23 filings requesting prospective relief effective January 24, failed to provide adequate notice to ratepayers "that they could be responsible for [Old Dominion's] excess charges on

[6] *See supra* p. 10 (describing offer cap-related waiver request, the first of three categories of costs for which Old Dominion seeks recovery).

January 23, 2014." Rehearing Order P 24, JA 50-51. The Commission's finding is consistent with the Court's determination in *West Deptford*, 766 F.3d at 23, that statements by PJM in a "non-binding pleading in litigation" failed to provide "fair notice" regarding revisions to a tariff provision. *See* Rehearing Order P 24 & n.51, JA 50. As the Court explained in *West Deptford*, "the so-called notice exception to the filed rate doctrine" generally "has been confined to two scenarios": (1) the filing of "tariffs that provide a formula for calculating rates, rather than a specific rate number," and (2) "judicial invalidation of Commission decisions" resulting in retroactive rate changes. 766 F.3d at 22-23. Neither scenario applies here.

The cases cited by Old Dominion at pages 29-30 of its brief (in which notice was deemed adequate) concern the second of the two scenarios identified in *West Deptford*, 766 F.3d at 22-23. *See Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075-77 (D.C. Cir. 1992) (no violation of filed rate doctrine where Commission retroactively approved pipeline's proposed rate after judicial invalidation of Commission order disapproving rate and Commission order expressly acknowledged that rate was subject to legal challenge); *Pub. Utils. Comm'n of California v. FERC*, 988 F.2d 154, 160-66 (D.C. Cir. 1993) (customers had notice in light of specific litigation circumstances).

C. Commission Precedents Addressing Its General Standards for Evaluating Notice and Tariff Waivers Are Inapplicable

In light of *Columbia Gas* and related judicial precedents, the Commission concluded that it lacked discretion to grant Old Dominion's request for equitable relief. Thus, it reasonably did not proceed to review the merits of Old Dominion's request under Commission standards applicable where equitable relief is not barred by the filed rate doctrine or rule against retroactive ratemaking. Rehearing Order P 26, JA 51. The Commission consistently applied this approach in other cases where individual generators sought to retroactively recover polar vortex-related costs on equitable grounds. *See Duke Energy Corp.,* 151 FERC ¶ 61,206, PP 66-68 (denying request for retroactive waiver as barred by filed rate doctrine and rule against retroactive ratemaking); *New Jersey Energy Assocs.*, 152 FERC ¶ 61,181, PP 19-21 (same).

Old Dominion's citations to Commission decisions applying general equitable standards—such as the 67 cases listed in Petitioner's Appendix as cases in which the Commission "considered" requests for retroactive relief, *see* Br. 15 & n.4—are inapposite. As the Commission observed, many of the cases cited by Old Dominion "are distinguishable . . . because they deal with non-rate terms and conditions, such as deadlines and other qualification requirements for participating in . . . capacity auctions or penalties for untimely or inaccurate information submissions." Rehearing Order P 19, JA 47. *See, e.g.*, *3 Phases Energy Servs.,*

LLC, 149 FERC ¶ 61,151 (2014) (denying waiver of tariff provision imposing penalties for late submission of meter data); *American Mun. Power*, 140 FERC ¶ 61,102 (2012) (granting extension of deadline to submit information to PJM); *Appalachian Power Co.*, 143 FERC ¶ 61,015 (2013) (same). Likewise, some of the cases do not implicate the filed rate doctrine or rule against retroactive ratemaking because equitable relief was sought on a prospective basis, or ratepayers had prior notice that they would be responsible for the costs at issue. *See* Rehearing Order P 20 & n.44, JA 48. *See, e.g., Invenergy Nelson, LLC*, 147 FERC ¶ 61,067, P 23 & n.12 (2014) (cited at Br. 20) (granting waiver of must-offer requirement for upcoming capacity auction, and related deadlines); *Southwest Power Pool, Inc.*, 153 FERC ¶ 61,180 (2015) (granting waiver of tariff provision to permit system operator to adjust past invoices due to computer software issues, where affected entities were aware of software functionality problems).

Similarly unhelpful is Old Dominion's citation, on brief, to a regulation and Commission decisions concerning waiver of the 60-day notice period for rate changes required by Federal Power Act section 205, 16 U.S.C. § 824d(d). *See, e.g.*, Br. 15 (citing 18 C.F.R. § 35.11) & 17 (citing *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106 (1992)). Section 205 expressly permits the Commission to waive the 60-day notice period for "good cause." 16 U.S.C. § 824d(d); *see also*

18 C.F.R. §§ 35.3(a)(1) (60-day notice requirement for rate schedules and tariffs), 35.11 (Commission may waive notice requirement "for good cause shown").

Old Dominion did not raise the Commission's authority to waive this statutory notice period in the agency proceeding. In any event, the Commission's discretion to waive the statutory notice period does not extend to the actual notice requirement imposed by the filed rate doctrine and rule against retroactive ratemaking. *See NSTAR*, 481 F.3d at 800-801 (although the filed rate doctrine, rule against retroactive ratemaking, and 60-day notice requirement "jointly arise out of [Federal Power Act section] 205, a rate change that qualifies for waiver of the 60-day requirement doesn't necessarily survive scrutiny under the filed rate and retroactive ratemaking doctrines") (citations omitted); *Columbia Gas III*, 895 F.2d at 795-96 (distinguishing between "statutory notice," which the Commission may cut short for good cause, and advance notice, the essential requirement for the filed rate doctrine); *Consolidated Edison*, 958 F.2d at 430-31 (upholding Commission's waiver of statutory notice requirement under Natural Gas Act, where pipeline requested effective date for rate increase one day after filing).

The Commission's actions in these proceedings are consistent with former Commissioner Moeller's observation that the Commission previously has applied its standard test for considering tariff requests and granted equitable relief to compensate generators. Moeller dissent at 1-2, JA 36-37. In the cases discussed

by Commissioner Moeller, unlike this case, the filed rate doctrine and rule against retroactive ratemaking did not preclude relief. *See New York Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,061, P 20 (2014) (in connection with January 2014 cold snap, granting January 22 request for waiver of bid cap in New York markets, effective for January 22 – February 28 time period); *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,170, P 84 & n.94 (2013), *on reh'g*, 144 FERC ¶ 61,128 (2013) (granting retroactive effective date to agreement providing compensation to generator participating in reliability program, where Commission determined in earlier order that generators must be fully compensated for reasonable costs incurred under the program; effective date issue not presented for rehearing). *See also* Rehearing Order P 20 n.44, JA 48 (citing *Midwest Indep. Transmission Sys. Operator*, 142 FERC ¶ 61,170, as a case in which ratepayers had notice that they would be responsible for the costs at issue).

II. ALTHOUGH PRECLUDED FROM GRANTING THE SPECIFIC RELIEF REQUESTED BY OLD DOMINION, THE COMMISSION HAS ADDRESSED EQUITABLE CONCERNS ARISING FROM THE JANUARY 2014 COLD WEATHER EVENTS

Although the Commission found that it lacked discretion to grant Old Dominion's requested relief, it has taken action—within the scope of its statutory authority—to grant relief to PJM market participants and address flaws in the PJM market rules that became apparent during the January 2014 cold weather events. Thus, for example, the Commission acted within 24 hours of PJM's January 23

request for authorization to provide "make-whole payments" to generators reflecting the difference between their costs and the market clearing price. *See supra* pp. 7-8. Under the Commission's order, generators could obtain relief commencing January 24, the same day FERC's order issued. Make-Whole Payments Order, 146 FERC ¶ 61,041, P 5.

In addition, the Commission opened an investigation regarding specific PJM market rules that adversely affected market participants in January 2014. *See* Initial Order P 49, JA 34 (noting that the Commission initiated investigation in response to concerns raised in the related *Duke* proceeding). As the Commission explained, it had examined PJM's tariff and concluded that certain provisions may be "unjust, unreasonable, unduly discriminatory or preferential" in failing to provide "adequate supply offer flexibility" to market participants. *Duke Energy Corp.*, 151 FERC ¶ 61,206, PP 69, 72. Citing its intent to "provide maximum protection to customers," the Commission set the effective refund date under Federal Power Act section 206(b), 16 U.S.C. § 824e(b), at the earliest possible date, i.e., the date of publication of the notice of investigation. *Duke Energy Corp.*, 151 FERC ¶ 61,206, P 74.

When PJM later submitted tariff revisions intended to increase generation offer flexibility, the Commission found that PJM's tariff was, indeed, unjust and unreasonable. *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,282, P 32 (2016).

Finding that PJM's submission lacked specific details necessary to demonstrate that the proposed tariff revisions were just and reasonable, however, the Commission directed PJM to make additional changes. *Id.* P 33. PJM subsequently submitted a compliance filing proposing further revisions, and interested parties filed comments, protests and answers. *See* Compliance Filing Implementing Hourly Offers and Cost-Based Offer Requirements, Docket No. ER16-372 (Aug. 16, 2016). As of October 2016, PJM's compliance filing remains pending before the Commission.

It is entirely appropriate for the Commission to address issues such as these one step at a time, using procedures best suited to gathering information and resolving the underlying problem. *See Mobil Oil Explor. & Prod. Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) (the Commission "enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures" and could "compile relevant data more effectively in a separate proceeding"); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 81 (D.C. Cir. 2014) (same; approving Commission's decision to address broad policy issue in rulemaking proceeding, but application of that policy to specific utilities in later proceedings, on a case-by-case basis).

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,649 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

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injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

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§ 801. Congressional review

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

(i) a copy of the rule;

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

(iii) the proposed effective date of the rule.

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

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

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

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

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

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.

upon written notice to the Commission. The State commission may notify the Commission of any alleged safety violations. The Commission shall transmit information regarding such allegations to the appropriate Federal agency, which shall take appropriate action and notify the State commission.

(e) Emergency Response Plan

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

(2) A cost-sharing plan developed under paragraph (1) shall include a description of any direct cost reimbursements that the applicant agrees to provide to any State and local agencies with responsibility for security and safety—

(A) at the LNG terminal; and

(B) in proximity to vessels that serve the facility.

(June 21, 1938, ch. 556, § 3A, as added Pub. L. 109–58, title III, § 311(d), Aug. 8, 2005, 119 Stat. 687.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (a), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) 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 4321 of Title 42 and Tables.

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas 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 declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas 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) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) 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 transportation 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) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty 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 thirty 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) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, 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 natural-gas company 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 the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of

for actual or expected Area Control Error needs.

(16 U.S.C. 284(d), 792 *et seq.;* Pub. L. 95–617; Pub. L. 95–91; E.O. 12009, 42 FR 46267)

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended at 28 FR 11404, Oct. 24, 1963; 43 FR 36437, Aug. 17, 1978; 44 FR 16372, Mar. 19, 1979; 44 FR 20077, Apr. 4, 1979; Order 39, 44 FR 46454, Aug. 8, 1979; Order 699, 72 FR 45325, Aug. 14, 2007; Order 701, 72 FR 61054, Oct. 29, 2007; Order 714, 73 FR 57530, Oct. 3, 2008; Order 755, 76 FR 67285, Oct. 31, 2011]

§ 35.3 Notice requirements.

(a)(1) *Rate schedules or tariffs.* All rate schedules or tariffs or any part thereof shall be tendered for filing with the Commission and posted not less than sixty days nor more than one hundred-twenty days prior to the date on which the electric service is to commence and become effective under an initial rate schedule or tariff or the date on which the filing party proposes to make any change in electric service and/or rate, charge, classification, practice, rule, regulation, or contract effective as a change in rate schedule or tariff, except as provided in paragraph (b) of this section, or unless a different period of time is permitted by the Commission. Nothing herein shall be construed as in any way precluding a public utility from entering into agreements which, under this section, may not be filed at the time of execution thereof by reason of the aforementioned sixty to one hundred-twenty day prior filing requirements. The proposed effective date of any rate schedule or tariff filing having a filing date in accordance with § 35.2(d) may be deferred by the public utility making a filing requesting deferral prior to the rate schedule or tariff's acceptance by the Commission.

(2) *Service agreements.* Service agreements that are required to be filed and posted authorizing a customer to take electric service under the terms of a tariff, or any part thereof, shall be tendered for filing with the Commission and posted not more than 30 days after electric service has commenced or such other date as may be specified by the Commission.

(b) *Construction of facilities.* Rate schedules, tariffs or service agreements predicated on the construction of facilities may be tendered for filing and posted no more than one hundred-twenty days prior to the date set by the parties for the contract to go into effect. The Commission, upon request, may permit a rate schedule or service agreement or part thereof to be tendered for filing and posted more than one hundred-twenty days before it is to become effective.

(16 U.S.C. 284(d); Pub. L. 95–617; Pub. L. 95–91; E.O. 12009, 42 FR 46267)

[44 FR 16372, Mar. 19, 1979; 44 FR 20077, Apr. 4, 1979; as amended by Order 714, 73 FR 57531, Oct. 3, 2008]

§ 35.4 Permission to become effective is not approval.

The fact that the Commission permits a rate schedule, tariff or service agreement or any part thereof or any notice of cancellation to become effective shall not constitute approval by the Commission of such rate schedule or tariff or part thereof or notice of cancellation.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 714, 73 FR 57531, 57533, Oct. 3, 2008]

§ 35.5 Rejection of material submitted for filing.

(a) The Secretary, pursuant to the Commission's rules of practice and procedure and delegation of Commission authority, shall reject any material submitted for filing with the Commission which patently fails to substantially comply with the applicable requirements set forth in this part, or the Commission's rules of practice and procedure.

(b) A rate filing that fails to comply with this Part may be rejected by the Director of the Office of Energy Market Regulation pursuant to the authority delegated to the Director in § 375.307(a)(1)(ii) of this chapter.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 614, 65 FR 18227, Apr. 7, 2000; Order 699, 72 FR 45325, Aug. 14, 2007; Order 701, 72 FR 61054, Oct. 29, 2007]

§ 35.6 Submission for staff suggestions.

Any public utility may submit a rate schedule, tariff or service agreement or any part thereof or any material relating thereto for the purpose of receiving

(c) For purposes of this section, the following wholesale sales made by a non-public utility with more than a *de minimis* market presence are excluded from the EQR filing requirement:

(1) Sales by a non-public utility, such as a cooperative or joint action agency, to its members; and

(2) Sales by a non-public utility under a long-term, cost-based agreement required to be made to certain customers under Federal or state statute.

[Order 768, 77 FR 61924, Oct. 11, 2012, as amended by Order 770, 77 FR 71299, Nov. 30, 2012]

§ 35.11 Waiver of notice requirement.

Upon application and for good cause shown, the Commission may, by order, provide that a rate schedule, tariff, or service agreement, or part thereof, shall be effective as of a date prior to the date of filing or prior to the date the rate schedule or tariff would become effective in accordance with these rules. Application for waiver of the prior notice requirement shall show (a) how and the extent to which the filing public utility and purchaser(s) under such rate schedule or tariff, or part thereof, would be affected if the notice requirement is not waived, and (b) the effects of the waiver, if granted, upon purchasers under other rate schedules. The filing public utility requesting such waiver of notice shall serve copies of its request therefor upon all purchasers.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 714, 73 FR 57532, 57533, Oct. 3, 2008]

Subpart B—Documents To Be Submitted With a Filing

§ 35.12 Filing of initial rate schedules and tariffs.

(a) The letter of a public utility transmitting to the Commission for filing an initial rate schedule or tariff shall list the documents submitted with the filing; give the date on which the service under that rate schedule or tariff is expected to commence; state the names and addresses of those to whom the rate schedule or tariff has been mailed; contain a brief description of the kinds of services to be furnished at the rates specified therein; and summarize the circumstances which show that all requisite agreement to the rate schedule or tariff or the filing thereof, including any contract embodied therein, has in fact been obtained. In the case of coordination and interchange arrangements in the nature of power pooling transactions, all supporting data required to be submitted in support of a rate schedule or tariff filing shall also be submitted by parties filing certificates of concurrence, or a representative to file supporting data on behalf of all parties may be designated as provided in § 35.1.

(b) In addition, the following material shall be submitted:

(1) Estimates of the transactions and revenues under an initial rate schedule. This shall include estimates, by months and for the year, of the quantities of services to be rendered and of the revenues to be derived therefrom during the 12 months immediately following the month in which those services will commence. Such estimates should be subdivided by classes of service, customers, and delivery points and shall show all billing determinants, e.g., kw, kwh, fuel adjustment, power factor adjustment. These estimates will not be required where they cannot be made with relative accuracy as, for example, in cases of interconnection arrangements containing schedules of rates for emergency energy, spinning reserve or economy energy or in cases of coordination and integration of hydroelectric generating resources whose output cannot be predicted quantitatively due to water conditions.

(2)(i) Basis of the rate or charge proposed in an initial rate schedule or tariff and an explanation of how the proposed rate or charge was derived. For example, is it a standard rate of the filing public utility; is it a special rate arrived at through negotiations and, if so, were unusual customer requirements or competitive factors involved; and is it designed to produce a return substantially equal to the filing public utility's overall rate of return or is it essentially an increment cost plus a share of the savings rate? Were special

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, on December 7, 2016, I served the foregoing brief on all parties to this proceeding through the Court's CM/ECF system.

/s/ Susanna Y. Chu
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