

**In the United States Court of Appeals
for the Ninth Circuit**

Nos. 08-74439 and 08-74443

**RICHARD BLUMENTHAL, ATTORNEY GENERAL
FOR THE STATE OF CONNECTICUT, *ET AL.*,**

AND

**PUBLIC CITIZEN, INC., *ET AL.*,
*PETITIONERS,***

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
*RESPONDENT.***

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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GLOSSARY

2005 Act	Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594 (2005)
Br.	Petitioners' Brief
ER	Petitioners' Excerpts of Record
FERC or Commission	Federal Energy Regulatory Commission
FPA	Federal Power Act
MBR Rule	FERC's market-based rate program, as set forth in Order No. 697
NGA	Natural Gas Act
Order No. 697	Final Rule, <i>Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities</i> , Order No. 697, 72 Fed. Reg. 39,904, FERC Stats. & Regs. ¶ 31,252, 119 FERC ¶ 61,295 (2007), ER 2
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Petitioners	Petitioners Richard Blumenthal, Attorney General for the State of Connecticut; Lisa Madigan, Attorney General of the State of Illinois; Patrick Lynch, Attorney General of the State of Rhode Island; Public Citizen, Inc.; Colorado Office of Consumer Counsel; and Public Utility Law Project of New York, Inc.

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**ON PETITIONS FOR REVIEW OF ORDERS OF THE
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**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably determined that its rules governing market-based rates for wholesale sales of electricity (1) will ensure that such rates are “just and reasonable” within the meaning of the Federal Power Act and (2) are consistent with the rate-filing requirements of that Act.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case is the latest challenge to the Commission's longstanding policy of allowing electric energy to be sold at rates determined by competition in wholesale electricity markets. Over the last 20 years, the Commission has granted market-based rate authority, on a case-by-case basis, to sellers who can show that they lack market power. The Commission then monitors those sellers' transactions to guard against anticompetitive behavior or market manipulation. In the face of repeated challenges to this market-based rate program, the Commission's policy judgment has been consistently affirmed by this and other courts, as entirely consistent with its statutory responsibilities under the Federal Power Act, and effectively ratified by Congress.

The instant appeal arises from the Commission's most recent efforts to improve and enhance its market-based program for jurisdictional electricity markets: a formal rulemaking proceeding that considered all aspects of the Commission's standards and procedures for granting and reviewing market-based rate authorizations, as well as its oversight of transactions and market behaviors and enforcement of market rules. That rulemaking, which the Commission

initiated in 2004 to review and revise its market-based rates policy, culminated in the issuance of the Final Rule, *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 (2007), ER 2, *on reh'g and clarification*, Order No. 697-A, 73 Fed. Reg. 25,382, FERC Stats. & Regs. ¶ 31,268, 123 FERC ¶ 61,055 (2008), ER 146.¹

These consolidated appeals followed. Petitioners do not, however, challenge any specific, substantive aspect of the MBR Rule or the many enhancements adopted, for their benefit, in these orders. Rather, Petitioners simply repeat the same broad-based challenges to the permissibility of market-based rates under the Federal Power Act that this and other courts have rejected time and again.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

1. 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

¹ “ER” refers to the Excerpts of Record filed by the Petitioners. “P” refers to the internal paragraph number within a FERC order. “Br.” refers to Petitioners’ Initial Brief, dated September 23, 2010.

For simplicity and consistency with Petitioners’ Initial Brief, this brief refers to the challenged orders as “Order No. 697” and “Order No. 697-A,” respectively, and generally to FERC’s market-based rate program set forth in those Orders as the “MBR Rule.”

transmission and sale at wholesale of electric energy in interstate commerce. *See* 16 U.S.C. §§ 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002). 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).

To enable such FERC review, the FPA requires every public utility to file with the Commission, pursuant to rules developed by the Commission, “schedules showing all [jurisdictional] rates and charges . . . together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.” FPA § 205(c), 16 U.S.C. § 824d(c); *see* 18 C.F.R. Part 35 (filing obligations). Any change in a jurisdictional rate, charge, or contract requires 60 days’ advance notice to the Commission and the public, “[u]nless the Commission otherwise orders.” FPA § 205(d), 16 U.S.C. § 824d(d).

2. 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 1996, the Commission furthered the development of such competition with a landmark rulemaking, affirmed by the Supreme Court, that ordered functional unbundling of wholesale generation and transmission services, requiring utilities to provide open, non-discriminatory access to their transmission facilities to competing suppliers.² *See New York*, 535 U.S. at 11-13; *cf. Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 128 S. Ct. 2733, 2740 (2008) (“the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity”).

To broaden the geographic reach of wholesale competition and to promote efficiencies, the Commission has also encouraged the creation of “regional transmission organizations,” independent regional entities that operate the transmission grid on behalf of transmission-owning member utilities. *See Morgan Stanley*, 128 S. Ct. at 2741. These regional entities also run auction markets for

² *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part, Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

electricity sales. *See id.* at 2741. 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 regional entities' own market monitors. *See, e.g.*, Order No. 697 at P 955, ER 116; Order No. 697-A at P 395, ER 203.

3. Market-Based Rate Authorizations

“Against this backdrop of technological change and market-based reforms, the Commission over the past two decades has begun to permit sellers of wholesale electricity to file ‘market-based’ tariffs.” *Morgan Stanley*, 128 S. Ct. at 2741. Indeed, the Commission began considering proposals for market-based pricing of wholesale power sales as early as 1988. *See* Order No. 697 at P 7, ER 6; *see also, e.g., Heartland Energy Servs., Inc.*, 68 FERC ¶ 61,223 at pp. 62,060-62 (1994) (explaining Commission’s standards for market-based rates). In April 2004, the Commission announced an interim policy updating its standards and procedures for obtaining market-based rate approval. *See* Order No. 697 at P 9, ER 6. The Commission simultaneously initiated a formal rulemaking to amend its regulations governing market-based rate authorizations for wholesale power sales, which culminated in the MBR Rule that gave rise to this appeal.

As developed over the years and now formalized in the MBR Rule, the Commission’s market-based rate program combines pre-approval analysis of a

seller's market position (and regular reviews of updated analyses thereafter) with detailed post-approval reporting requirements and market behavior rules. Order No. 697 at P 2, ER 5.

A utility must obtain prior FERC approval by filing an initial market-based rate tariff and showing that it lacks (or has adequately mitigated) market power. *See* 18 C.F.R § 35.12. The utility must show that it lacks both horizontal (generation) and vertical (transmission) market power. Order No. 697 at PP 13, 21, ER 6, 7.

As refined in the 2004 interim policy and the final MBR Rule, the market power analysis uses two indicative screens. *See id.* at P 13, ER 6. The wholesale market share screen is applied on a seasonal basis and evaluates the applicant's size in relation to others in the market. *See id.* at P 34, ER 8. The pivotal supplier screen measures market power at peak times, evaluating an applicant's potential to exercise market power based on the relevant market's annual peak demand. *See id.* at P 35, ER 8. Together, therefore, the screens enable the Commission to measure generation market power at both peak and off-peak times and to assess the applicant's ability to exercise market power both unilaterally and in coordination with other sellers. *See id.* at P 36, ER 8.

The Commission explained that this analysis is intended to screen out sellers that clearly do not possess the potential to exercise market power and to identify

the subset of applicants who require closer scrutiny. *See* Order No. 697 at P 62, ER 11-12; *see also id.* at PP 65, 77, ER 12, 14. Passage of both screens creates a rebuttable presumption that the company lacks market power; intervenors may present evidence to rebut that presumption. *See id.* at PP 62, 75, ER 11-12, 13; Order No. 697-A at P 5, ER 148.

Failure to pass either screen, however, provides the basis for an investigation under FPA § 206, 16 U.S.C. § 824e, and creates a rebuttable presumption that the applicant *does* possess generation market power. *See* Order No. 697 at P 63, ER 12. The applicant then has three options: attempt to rebut the presumption; take measures to mitigate its market power; or adopt cost-based rates. *See id.*; *see also, e.g., Duke Power*, 111 FERC ¶ 61,506 (2005) (finding that seller failed to rebut presumption; ordering seller to file cost-based rates); *Entergy Servs., Inc.*, 116 FERC ¶ 61,276 at P 4 (2006) (in previous order, applicant failed market share screen and Commission set hearing to consider whether applicant's analysis rebutted presumption of market power; applicant then withdrew application and submitted cost-based rates).

Once a seller obtains a market-based authorization, it must submit an updated market power analysis regularly, or at the Commission's request, so the Commission can determine whether the seller has gained market power since the initial approval (or the previous review). 18 C.F.R. § 35.37(a)(1); Order No. 697

at PP 1109-10 (reaffirming and codifying triennial review requirement), ER 134.

The Commission has revoked the market-based rate authority of sellers who failed to submit updated market power analyses or otherwise demonstrate continuing eligibility. *See, e.g., 3E Technologies, Inc.*, 113 FERC ¶ 61,124 (2005); *Pinnacle West Capital Corp.*, 122 FERC ¶ 61,035 at PP 3-6 (2006) (Commission had revoked market-based rate authority for failure to perform market power study properly, then reinstated authority based on revised studies, but required refunds as mitigation for sales made while authority was revoked).

4. FERC Rules: Reporting, Monitoring, and Enforcement

Beyond the initial authorization (and periodic reconsideration) of a market-based tariff, the Commission imposes a variety of ongoing rules and obligations on sellers.

Quarterly Reports of All Sales. Wholesale power sales under market-based tariffs are subject to regular reporting requirements; each seller must file quarterly reports with the Commission summarizing all transactions during the most recent three-month period. Order No. 697 at PP 854-55, ER 104-05. The reports are filed electronically and must contain: “A summary of the contractual terms and conditions in every effective service agreement for all jurisdictional services, including market-based and cost-based power sales and transmission services, and transaction information for effective short-term (less than one year) and long-term

(one year or greater) power sales during the most recent calendar quarter.” Order No. 697 at P 717 (citing *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127 (2002)), ER 87; *accord id.* at P 855, ER 105. *See* 18 C.F.R. § 35.10b (electric quarterly reports); *see also Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004) (describing reporting requirements); *Morgan Stanley*, 128 S. Ct. at 2741 (same).

As this Court has noted, some short-term transactions may be sales lasting only minutes, which nevertheless must be reported. *See Lockyer*, 383 F.3d at 1013. Here, too, the Commission has in some cases revoked the market-based rate authority of sellers who failed to submit the mandated reports. *See* Order No. 697 at P 855 & n.1003 (citing cases), ER 105; *see, e.g., Electric Quarterly Reports*, 115 FERC ¶ 61,073 (2006) (revoking authority for four sellers who failed to submit reports); *Electric Quarterly Reports*, 114 FERC ¶ 61,171 (2006) (same, for eight sellers).

Reporting of Changes in Status. In addition, any seller with a market-based tariff must file a report notifying the Commission of any change in status, including acquisition of a net increase of 100 MW or more of generation; the report must be filed within 30 days after the date of that change in status. *See* 18 C.F.R. § 35.42; *see also* Order No. 697 at PP 1008-45 (revising requirements for change in status reporting), ER 123-28.

Market Behavior Rules. The Commission also has implemented a series of “Market Behavior Rules” that prohibit certain practices that it found to be anticompetitive and manipulative; it imposed those rules as conditions on all existing and future market-based tariffs. *See* 18 C.F.R. §§ 35.36, 35.37; *Conditions for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, 114 FERC ¶ 61,163 at P 4 (2006) (market-based rate tariffs and authorizations “would be unjust and unreasonable unless they included clearly-delineated rules governing market participant conduct”). *See generally Californians for Renewable Energy, Inc. v. Cal. Pub. Utils. Comm’n*, 119 FERC ¶ 61,058 at P 35 (2007) (describing additional rules and policies).

Regional Transmission Organizations. As noted *supra* at p. 6, the organized regional markets add further safeguards against anticompetitive influences, with additional market rules, some price caps, and oversight by the regional organizations’ own market monitors. *See* Order No. 697 at P 955, ER 116; Order No. 697-A at PP 395, 410, 425, ER 203, 206, 209.

Office of Enforcement. The Commission also relies on its own Office of Enforcement to “monitor[] activity in the electric markets and conduct[] investigations to determine whether market participants are violating” market rules. Order No. 697-A at P 58, ER 157. The Commission created the Office in 2001 to strengthen oversight by identifying market problems, assuring compliance

with rules and regulations, and crafting remedies for market failures and penalties for manipulation. *See CALifornians for Renewable Energy*, 119 FERC ¶ 61,058 at P 37. The Office enforces the quarterly reporting requirements and coordinates the work of regional transmission organizations' market monitors. *Id.* *See also* 18 C.F.R. Part 1c (Office's enforcement of rules prohibiting manipulation of wholesale electricity and natural gas markets).

5. Energy Policy Act of 2005

In 2005, Congress enacted legislation that imposed greater transparency in electricity markets and gave the Commission additional authority to punish market manipulation and violations of market rules. Several provisions of that statute are premised on the existence of the market-based rate system and aimed at enhancing that system and ensuring its smooth functioning.

For example, Congress adopted broad prohibitions on “market manipulation” (modeled on the Securities Exchange Act of 1934) and directed FERC “to facilitate price transparency” in electric energy markets. *See Energy Policy Act of 2005* (“2005 Act”), §§ 1281, 1283, Pub. L. 109-58, 119 Stat. 594, 978, 979 (codified at 16 U.S.C. §§ 824t, 824v).³ Congress also expanded the

³ Congress enacted similar amendments to the Natural Gas Act (“NGA”), governing wholesale sales of natural gas. *See* 2005 Act §§ 315 (market manipulation), 316 (market transparency), 119 Stat. 691-92 (codified at 15 U.S.C. §§ 717c-1, 717t-2).

Commission's remedial and enforcement authority, amending its investigatory powers, increasing civil and criminal penalties, and extending refund provisions of the FPA. *See* 2005 Act §§ 1284, 1285, 1286, 119 Stat. 980-81 (amending 16 U.S.C. § 824e and other FPA provisions). *See also infra* Argument Section IV (discussing provisions of Energy Policy Act of 2005).

B. The Commission Proceedings and Orders on Review

As noted above, the Commission in 2004 initiated a rulemaking proceeding to refine and codify its standards and procedures to assure that market-based electricity pricing is just and reasonable. *See* Order No. 697 at PP 8-9, ER 6. The Commission held four technical conferences over the following year (*see id.* at P 9), before issuing its Notice of Proposed Rulemaking, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 115 FERC ¶ 61,210 (May 19, 2006). The Commission proposed to amend its regulations governing market-based rate authorizations for jurisdictional wholesale sales of electric energy, capacity, and ancillary services, and to modify all existing market-based authorizations and tariffs to reflect any new requirements adopted in the rulemaking. *See generally id.*; *see also* Order No. 697 at P 1, ER 5.

The Commission received more than 100 comments and reply comments from parties spanning all aspects of the electricity industry. Order No. 697 at P 11, ER 6; *id.* Appendix E, ER 144-45.

1. Final Rule: Order No. 697

On June 21, 2007, the Commission issued its Final Rule, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, 119 FERC ¶ 61,295 (2007), ER 2. The Commission largely reaffirmed and codified the standards it had set forth in its interim policy (*see supra* pp. 6-7). *See* Order No. 697 at P 12, ER 6. It adopted the indicative market power screens (horizontal and vertical), and extensively discussed all elements of the market power analysis. *See id.* at PP 13-22, 33-463, ER 6-7, 8-59.

The Commission also established, among other features, a predetermined schedule to coordinate, by regional grouping, individual sellers' periodic submissions of updated market power analyses, so that the Commission can examine each seller's position at the same time it reviews other sellers in the same and neighboring markets. *See id.* at P 882 ("This will give the Commission a more complete view of market forces in each region and the opportunity to reconcile conflicting submissions, enhancing our ability to ensure that sellers' rates remain just and reasonable."), ER 107. Smaller producers and marketers (owning or controlling 500 megawatts or less of generation per region and unaffiliated with any transmission owner or franchised public utility in that region) were exempted from those mandatory periodic reviews, but remained subject to all other reporting

requirements and monitoring, as well as further market power reviews at any time the Commission demands. *See id.* at P 853, ER 104.

Responding to comments of the Petitioners and others, the Commission extensively discussed the legal authority for its approval of market-based rates under the FPA. *See id.* at PP 938-71, ER 114-19.

The Final Rule became effective on September 18, 2007. *Id.* at P 1132, ER 137. On December 14, 2007, the Commission issued an order clarifying certain technical aspects of the Rule that are not at issue in this appeal. Order Clarifying Final Rule, 121 FERC ¶ 61,260 (2007).

2. Rehearing Order: Order No. 697-A

Following issuance of Order No. 697, the Commission received 26 requests for rehearing and/or clarification. On April 21, 2008, the Commission issued its Order on Rehearing and Clarification, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697-A, 73 Fed. Reg. 25,382, FERC Stats. & Regs. ¶ 31,268, 123 FERC ¶ 61,055 (2008), ER 146. Among other things, the Commission responded at length to broad challenges by Petitioners and others to the legality of the market-based rate program. *Id.* at PP 394-495, ER 203-22.

Various parties timely filed a total of seven petitions for review — four in this Court and three (including those of States⁴ and Public Citizen⁵) in the District of Columbia Circuit — challenging various aspects of the Commission’s rulemaking. The D.C. Circuit transferred the petitions before it to this Court; ultimately, all petitioners except States and Public Citizen withdrew their petitions for review.

The Commission subsequently issued five additional orders in the rulemaking proceeding, addressing various requests for rehearing and/or clarification on issues that are not raised on appeal. *See* Order on Rehearing and Clarification, 124 FERC ¶ 61,055 (July 17, 2008); Order on Rehearing and Clarification, Order No. 697-B, 125 FERC ¶ 61,326 (Dec. 19, 2008); Order on Rehearing and Clarification, Order No. 697-C, 127 FERC ¶ 61,284 (June 18, 2009); Order on Rehearing and Clarification, Order No. 697-D, 130 FERC ¶ 61,206 (Mar. 18, 2010); Order on Request for Clarification, 131 FERC ¶ 61,021 (Apr. 15, 2010).

⁴ “States” means Petitioners Richard Blumenthal, Attorney General for the State of Connecticut; Lisa Madigan, Attorney General of the State of Illinois; and Patrick Lynch, Attorney General of the State of Rhode Island, who jointly filed a petition in 9th Cir. 08-74439 (transferred from D.C. Cir. No. 08-1216).

⁵ “Public Citizen” means Petitioners Public Citizen, Inc.; Colorado Office of Consumer Counsel; and Public Utility Law Project of New York, Inc., who jointly filed a petition in 9th Cir. No. 08-74443 (transferred from D.C. Cir. No. 08-1223).

SUMMARY OF ARGUMENT

Over the course of several decades, responding to and fostering technological advances and industry trends, the Commission has designed its market-based rate program to harness for electricity consumers the benefits of market efficiencies, competitive pricing, and reliable energy supplies. That program rests on both before-the-fact analysis of each seller's market power and — critically — after-the-fact oversight of market transactions and conduct.

Specifically, the Commission accepts a seller's market-based rate tariff upon a determination, made in a publicly noticed proceeding and based upon a market-power analysis (updated regularly), that the seller's market-based rates will be determined by competitive forces, not the exercise of market power. The Commission further imposes continuing oversight that includes quarterly reporting of all transactions in detailed public filings, as well as market rules that promote transparency and prevent manipulation, and monitoring by FERC's dedicated Office of Enforcement and by independent regional entities.

Courts have consistently upheld the Commission's market-based rate program as a reasonable exercise of its statutory discretion, both substantive and procedural, under the Federal Power Act — most notably in this Court's 2004 *Lockyer* decision, which rejected a facial challenge (like Petitioners' here) to market-based tariffs. Both this Court and the D.C. Circuit have repeatedly held

that market-based ratemaking, if grounded in both a pre-approval analysis of market power and rigorous post-approval reporting, meets the FPA's requirement of "just and reasonable" rates (FPA § 205(a), 16 U.S.C. § 824d(a)).

Furthermore, the courts have recognized the Commission's broad discretion to establish filing requirements and, where appropriate, to waive advance notice (FPA § 205(c)-(d), 16 U.S.C. § 824d(c)-(d)). Courts have upheld the Commission's efforts to provide procedural flexibility in modern energy markets, through such mechanisms as formula rates and umbrella tariffs, while ensuring public disclosure and public opportunity to challenge rates. Though this Court in *Lockyer* faulted the Commission for its failure to conduct rigorous post-approval oversight during the 2000-2001 Western energy crisis, the Commission has substantially improved its market-based rate program, having enhanced its reporting requirements (in 2002) and modified its analysis of sellers' market power (in 2004 and 2007). The Commission's efforts were aided by Congress's passage in 2005 of legislation to promote market transparency, prevent market manipulation, and grant the Commission additional remedial, investigative, and enforcement powers.

Nevertheless, Petitioners persist in rearguing claims that the courts have already rejected. Their positions are grounded both in their misunderstanding of modern energy markets and, more important, in their disregard for the

Commission's statutory discretion, the Commission's substantial improvements to its reporting requirements and market oversight, and Congress's effective ratification of the Commission's market-based approach.

ARGUMENT

I. STANDARD OF REVIEW

Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), the Court reviews FERC's orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See, e.g., City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003). "If the record reflects that the decision was based on a consideration of relevant factors, and there was no clear error of judgment, FERC's decision is not arbitrary and capricious." *Cal. Dep't of Water Res. v. FERC*, 489 F.3d 1029, 1035 (9th Cir. 2007) (internal quotation marks and citation omitted).

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). Moreover, "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [courts] afford great deference to the Commission in its rate decisions." *Morgan Stanley*, 128 S. Ct. at 2738; *see also Permian Basin*, 390 U.S. at 767 ("[C]ourts are without authority to

set aside any rate selected by the Commission which is within a ‘zone of reasonableness.’”) (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)); *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); *Me. Pub. Utils. Comm’n v. FERC*, 520 F.3d 464, 471 (D.C. Cir. 2008) (reviewing cases and noting FERC’s pricing flexibility), *rev’d on other grounds sub nom. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 130 S. Ct. 693 (2010); *see also Pub. Utils. Comm’n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) (“Because issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is highly deferential.”) (internal quotation marks and citations omitted).

The Commission’s policy assessments are similarly owed “great deference.” *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000), *aff’d*, *New York v. FERC*, 535 U.S. 1 (2002); *see Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) (“We defer to the specific policy decisions of an administrative agency unless they are arbitrary, capricious or manifestly contrary to statute.”).

The Commission's interpretation of the Federal Power Act is subject to the familiar two-step *Chevron* analysis. See *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 914 (9th Cir. 2005). If Congress has "directly spoken to the precise question at issue" and its intent is clear, "that is the end of the matter." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); accord *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000). If the statute is silent or ambiguous as to the question, the Court gives deference to the Commission's interpretation if it is a "permissible construction of the statute." *Chevron*, 467 U.S. at 843. Accord *Bonneville*, 422 F.3d at 914; *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1073 (9th Cir. 2003).

Deference is owed to the agency's reasonable interpretation of an ambiguous statutory provision intended by Congress to be left to the agency's discretion. *Dillingham v. INS*, 267 F.3d 996, 1004 (9th Cir. 2001). To the extent there is ambiguity in the meaning of § 205 of the Federal Power Act, 16 U.S.C. § 824d — the rate-setting and rate-filing section of the statute that Petitioners claim has been violated — that section, with its explicit grant of discretion to the Commission, is precisely the type of statute deserving of *Chevron* deference. See FPA § 205(c), 16 U.S.C. § 824d(c) (rate filing and review is subject to "such rules and regulations as the Commission may prescribe" and "such form as the Commission may designate"); FPA § 205(d), 16 U.S.C. § 824d(d) (changed rates become effective

after advance notice and filing, “[u]nless the Commission otherwise orders” or the Commission grants waiver “for good cause shown”).

II. THE COMMISSION REASONABLY DETERMINED THAT ITS MBR RULE WOULD PRODUCE JUST AND REASONABLE RATES

A. The MBR Rule Is Consistent With Cases That Have Upheld Market-Based Ratemaking

The Federal Power Act grants FERC broad discretion as to how the Act’s ratemaking mandates will be satisfied. Though the statute requires that “[a]ll rates and charges made . . . shall be just and reasonable” (FPA § 205(a), 16 U.S.C. § 824d(a)), it does not dictate or even prefer a particular ratemaking methodology to be followed. *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (“Under the statutory standard of ‘just and reasonable’ it is the result reached not the method employed which is controlling.”); *Natural Gas Pipeline*, 315 U.S. at 586 (“The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.”); *accord Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989) (Commission is not bound to use any particular rate methodology) (citing *Hope Natural Gas*). Indeed, as noted above, the Commission has discretion to set any rate that is within a “zone of reasonableness.” *Permian Basin*, 390 U.S. at 767.

1. The MBR Rule Does Not Repeat The Mistakes Of The Earliest Market-Based Efforts

In permitting market-based tariffs under the Federal Power Act, the Commission employs a combination of pre-approval market power analysis and rigorous post-approval monitoring to ensure that competitive market forces produce just and reasonable rates. That dual approach sets FERC's MBR Rule apart from the few cases (*see* Br. 43-44, 47-48) that invalidated other forms of market-based ratemaking. Where courts have rejected market-based pricing, their objections were to policies that left regulated rates to be determined entirely by markets, without even a determination that market forces could be expected to produce reasonable rates and without further regulatory oversight to identify and correct market failures. But where the Commission both has found that sellers lack market power, so that effective competition will determine pricing, and has committed to monitor the results, courts have uniformly upheld FERC's market-based rate policies.

For example, in *FPC v. Texaco Inc.*, 417 U.S. 380 (1974), a case under the Natural Gas Act, the Supreme Court overturned the agency's decision to evaluate small gas producers' rates by reference to prevailing market prices. The Court explained that market pricing could not be assumed to produce just and reasonable rates given the anticompetitive nature of the "heavily concentrated" natural gas industry, in which "monopolistic forces were distorting the market price." *Id.* at

397-98. Therefore, the Court held that the prevailing market price “cannot be the *final* measure of ‘just and reasonable’ rates.” *Id.* at 397 (emphasis added); *see also id.* at 400 (Commission “lacks the authority to place *exclusive* reliance on market prices”) (emphasis added). Nevertheless, rates were not required to be strictly cost-based, either. *Id.* at 387, *cited in* Order No. 697 at P 946, ER 115.

Similarly, in *Farmers Union*, the Commission had set maximum ceilings for oil pipeline rates at a level higher than the zone of reasonableness, positing that rate regulation should rely principally on competitive market forces and protect against only egregious market behavior. *See* 734 F.2d at 1502. In theory, the D.C. Circuit did not necessarily disagree with reliance on market forces: “Congress may indeed have imposed the requirement that rates be ‘just and reasonable’ in order to restore the ‘true’ market price — the price that would result through the mechanism of a truly competitive market” *Id.* at 1510. But the court found little support for the Commission’s premise that sufficient competition in fact existed in the oil pipeline industry to drive down prices. *See id.* at 1508-09 & n.50 (criticizing agency’s “largely undocumented reliance on market forces,” given “only anecdotal evidence of intermodal competition on certain pipeline routes” and an evaluation of competition that was “‘not entirely clear’”), *quoted in* Order No.

697-A at P 428, ER 210. More important, the Commission also had no mechanism in place to ensure that prices were, in fact, driven by competition:

FERC's methodology, therefore, exposes a range of permissible prices that would exceed the "zone of reasonableness" by definition, unless competition in the oil pipeline market drives the actual prices back down into the zone. *But nothing in the regulatory scheme itself acts as a monitor to see if this occurs or to check rates if it does not.* That is the fundamental flaw in the Commission's scheme.

734 F.2d at 1509 (emphasis added). *See* Order No. 697-A at P 428 ("the fundamental flaw in the Commission's regulatory scheme in *Farmers Union* was that there was no monitoring"), ER 210.

2. Courts Have Consistently Upheld FERC's More Refined Approaches To Market-Based Ratemaking

Indeed, later decisions — including by this Court — have understood those cases to allow market-based regulations that are properly designed. In upholding the Commission's approval of market-based pricing of certain services subject to regulation under the Natural Gas Act, the D.C. Circuit held that "nothing in *FPC v. Texaco, Inc.* precludes the FERC from relying upon market-based pricing." *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993), *quoted in* Order No. 697 at P 949, ER 115. First, in the orders upheld in *Elizabethtown*, the Commission had specifically found that the pipeline's markets were sufficiently competitive to preclude it from exercising significant market power; thus, the Court agreed that the "market discipline" imposed by competition would hold

prices to just and reasonable levels. 10 F.3d at 871; *see* Order No. 697 at P 950, ER 115; *cf.* *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 130 S. Ct. 693, 700 n.4 (2010) (“well-informed wholesale market participants of approximately equal bargaining power generally can be expected to negotiate just and reasonable rates”); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) (“In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable”), *cited in* Order No. 697-A at P 408 n.587, ER 206. Moreover, in contrast to *Texaco*, where the Commission had relied only on the prevailing market price to determine reasonableness of rates, the D.C. Circuit in *Elizabethtown* noted approvingly the Commission’s commitment to use its complaint and investigation authority to assure that market rates were indeed reasonable. *See* Order No. 697 at P 949 (quoting 10 F.3d at 870), ER 115.

The D.C. Circuit similarly upheld the Commission’s approval of market-based electricity rates under the Federal Power Act. *See La. Energy & Power Auth. v. FERC*, 141 F.3d 364 (D.C. Cir. 1998). In that case, the Commission had found that the energy supplier lacked market power, and further concluded that FERC’s new open access transmission rules had transformed the industry by introducing more competition into energy markets. *See* 141 F.3d at 369-70, *cited in* Order No. 697 at P 950, ER 115; *see also* 141 F.3d at 371 (“the likelihood is that

competition and consumer welfare will be enhanced rather than undercut by the ability of [the power supplier] to sell at market-based rates, and hence the direction in which FERC has chosen to err, if it errs at all, seems perfectly reasonable”); *cf. Blumenthal v. FERC*, 552 F.3d 875, 885 (D.C. Cir. 2009) (noting with approval FERC’s view of the “necessary price-signaling function served by market-based rates”).

3. This Court Has Held That Market-Based Ratemaking Can Be Consistent With The “Just And Reasonable” Standard

Likewise, this Court has previously approved FERC’s approach, upholding market-based rates against a facial challenge. *See Lockyer*, 383 F.3d at 1014 n.5 (“market-based tariffs do not *per se* violate the FPA”), *quoted in* Order No. 697 at P 953, ER 116; *cf. Morgan Stanley*, 128 S. Ct. at 2741 (observing that “[b]oth the Ninth Circuit and the D.C. Circuit have generally approved FERC’s scheme of market-based tariffs.”). The *Lockyer* Court found that the Commission does not rely on market forces alone in approving market-based rate tariffs; rather, the Commission’s initial analysis of a seller’s market power before approving a market-based tariff, together with ongoing oversight of market-based transactions and reconsideration of market-based rate authorization on complaints, enables the Commission to ensure that rates are (and remain) just and reasonable as required by the FPA. *Lockyer*, 383 F.3d at 1013; *id.* at 1014 (market-based tariff complied with the FPA, “so long as it was coupled with enforceable post-approval reporting

that would enable FERC to determine whether rates were ‘just and reasonable’ and whether market forces were truly determining the price”), *quoted in* Order No. 697 at P 953 n.1087, ER 116.

To be sure, the *Lockyer* Court found that the Commission had not rigorously followed its post-approval reporting requirements for market-based transactions during the Western energy crisis in 2000-2001 (well before the Commission overhauled its reporting requirements, market behavior rules, and market power analysis). *See* 383 F.3d at 1014. Nevertheless, the Court determined that the Commission’s approach — *if* followed — avoided the failures in *Texaco* and similar cases and satisfied the FPA’s requirement of “just and reasonable” rates. *See id.* at 1013 (holding that FERC’s “dual requirement of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements” was “the crucial difference” between FERC’s market-based rate program and other market-based approaches that courts had rejected) (emphasis added), *quoted in* Order No. 697 at P 953, ER 116; *see also* Order No. 697-A at P 411 (same), ER 206; *Blumenthal*, 552 F.3d at 882 (“FERC reasonably relied on its continuing oversight of the market to guard against potential abuses of market power”); *cf.* *Montana Consumer Counsel v. FERC*, 9th Cir. No. 07-73256, 2009 U.S. App. LEXIS 12560 at *11 (9th Cir. June 8, 2009) (holding that FERC appropriately

considered quarterly reports in determining that wholesale electricity supplier, exercising market-based rate authority, lacked market power).

Indeed, the Court found that “rampant” noncompliance with those reporting requirements meant that “the very mechanism that distinguished FERC’s tariff” from earlier cases “was, for all practical purposes, non-existent” during the energy crisis. *Lockyer*, 383 F.3d at 1014. But the Commission has strengthened, considerably, its requirements in the years after the Western energy crisis period examined in *Lockyer*. See Order No. 697-A at P 459 (“[T]he market-based rate requirements and oversight adopted in the Final Rule are more rigorous than those reviewed by the *Lockyer* court.”), ER 216. The Commission revised its reporting requirements following the energy crisis (even before this Court faulted the Commission’s earlier enforcement failures in the *Lockyer* decision), concluding that transaction-specific data is the “minimum needed for market monitoring purposes.” *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, at P 54 (2002); see also Order No. 697 at P 117 (“as part of our ongoing monitoring activities, we examine the [electric quarterly report] data in an effort to identify whether market prices may indicate an exercise of market power”), ER 18. Cf. *Lockyer*, 383 F.3d at 1017 (reporting requirements are “essential to a valid administration of [FERC’s] market-based system” and “an integral part of a market-based tariff that could pass legal muster”).

Though Petitioners (at Br. 52) emphasize the Court's apparent misunderstanding that FERC's "triennial" review of updated market power analyses would take place three times per year, rather than every three years (*see* 383 F.3d at 1013), the Court went on to focus unmistakably on the quarterly reports (since improved) of all transactions. *Id.* at 1013, 1017; *see, e.g.*, Order No. 697 at PP 717, 855 (requirements, enhanced by FERC in 2002, mandate specific, not aggregate, data in standardized, comprehensible format, allowing for customer complaints and effective agency monitoring), ER 87, 105. Of course, the Commission has made clear that it will promptly investigate any exercise of market power that is reported to the Commission or detected by the Commission itself. *See* Order No. 697 at P 964, ER 118. The Commission has also noted that one seller's market analysis using the market screens (*see supra* pp. 7-8) might show that *another* seller has market power (in which case the Commission could require the second company to file an updated market power analysis — even though its own periodic reexamination was otherwise not yet due). *See* Order No. 697-A at P 455, ER 215.

(This Court later reaffirmed that market-based rates with effective post-approval oversight meet the FPA's "just and reasonable" standard. *See Pub. Util. Dist. No. 1 of Snohomish County v. FERC*, 471 F.3d 1053, 1081 (9th Cir. 2006) (confirming that market-based rate authority satisfies FERC's statutory duty under

rate review sections of FPA, “insofar as FERC implements and uses an effective oversight mechanism *after* the market-based rate authorization is initially granted[.]”). That decision subsequently was vacated, *see* 547 F.3d 1081 (9th Cir. 2008), after the Supreme Court in *Morgan Stanley* remanded the case for other reasons.)

In the rulemaking challenged here, the Commission explained that its market-based rate program was unlike that reviewed in *Texaco* because “the Commission is not relying solely on the market, without adequate regulatory oversight, to set rates.” Order No. 697 at P 952, ER 115. To the contrary, the filing requirements — including quarterly reports of market-based transactions, change-in-status filings, and regularly updated market power analyses — as well as market manipulation rules, additional market rules and monitoring in organized regional markets, and a vigilant Office of Enforcement, address the courts’ concern about unchecked market forces and “enable[.] the Commission to meet its statutory duty to ensure that all rates are just and reasonable.” *Id.* at 952-53, ER 115-16.

B. The Commission Reasonably Concluded That Its MBR Rule Will Ensure That Market-Based Rates Are Just And Reasonable

1. The Commission Reasonably Determined That Prices Set By Competitive Forces Will Be Just And Reasonable

Petitioners argue that the Commission merely assumed, absent substantial evidence or empirical analysis, that market-based rates are necessarily reasonable.

Br. 50-52. But the Commission based its policy judgment on its substantive expertise and decades of experience with energy markets, and in particular on more than 20 years of experience with developing its market-based rate program. *See, e.g., Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 689 (D.C. Cir. 2000) (affirming FERC’s landmark open-access rulemaking, where FERC had relied “upon extensive commentary as well as its own experiences” with the electric transmission industry), *aff’d, New York v. FERC*, 535 U.S. 1 (2002); *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1146 (D.C. Cir. 1996) (FERC’s “experience with the [natural gas] industry provides substantial evidence” supporting policy judgment); *Cal. Trout v. FERC*, 572 F.3d 1003, 1023 (9th Cir. 2009) (“An agency’s learned expertise with certain types of decisions gives it the ability to make the sort of informed policy choices that [courts] cannot.”).

For example, the Commission explained what its market power screens are designed to identify: “An examination of both horizontal (generation market share) and vertical (transmission and other barriers to entry) market power in the relevant markets gives the Commission assurance that the seller cannot increase price by restricting supply or denying customers access to alternative suppliers.” Order No. 697-A at P 409, ER 206. In those circumstances, the Commission determines

that the resulting rates will be established through competitive forces, not the exercise of market power, and thus will fall within a zone of

reasonableness which protects customers against excessive rates, on the one hand, but allows the seller the opportunity to recover costs and earn a reasonable rate of return, on the other hand.

Id.

Of course, as the Commission explained throughout the challenged FERC Orders, it does not rely solely on market forces to produce just and reasonable rates. Rather,

we find that the multiple layers of filing and reporting requirements incorporated into the market-based rate program[,] . . . in conjunction with our enhanced market oversight and enforcement functions within the Commission, as well as the ability of the public to file [FPA] section 206 complaints, provide adequate protection from excessive rates.

Order No. 697 at P 967, ER 118; *accord* Order No. 697-A at P 417 (same, in greater detail), ER 208; *see also id.* at P 410 (same, highlighting additional protections in organized regional markets, including market rules and monitors), ER 206. *Cf. Lockyer*, 383 F.3d at 1013 (emphasizing role of post-approval reporting and continuing oversight).

2. The Commission Appropriately Decided To Analyze Each Seller's Ability To Exercise Market Power

Petitioners further contend that the Commission must, as “the necessary premise” of a market-based system, make a finding “that the market for wholesale electrical power is in fact competitive.” Br. 50. Though a few early cases referred in passing to competitiveness of markets, not one court that has considered FERC’s market-based rate program has adopted such a requirement. Indeed, the D.C.

Circuit has flatly rejected this very argument (raised before it by one of these same Petitioners): “We have never held that FERC must establish the competitiveness of an entire market before permitting any participant to charge market-based rates. . . . [W]hat matters is whether an individual seller is able to exercise anticompetitive market power, not whether the market as a whole is structurally competitive.” *Blumenthal v. FERC*, 552 F.3d 875, 882 (D.C. Cir. 2009).

Even the *Elizabethtown* case, which Petitioners believe to have required a market-wide finding (Br. 50), in fact focused on the applicant’s own ability to exercise market power, and explained how a seller’s lack of market power would impose “market discipline” on its prices. Relying on FERC’s finding that other suppliers’ access to markets through unbundled transportation would hold prices in check, the court explained: “Transco will not be able to raise its price above the competitive level without losing substantial business to rival sellers. Such market discipline provides strong reason to believe that Transco will be able to charge only a price that is ‘just and reasonable’” 10 F.3d at 871.

In this rulemaking proceeding, the Commission explained that, while it has used both seller-focused and market-wide standards and considers both valid, its approach in the electric area since the mid-1980s “has been primarily to rely on an analysis of individual seller market power” Order No. 697-A at P 425, ER 209; *accord id.* at P 427, ER 210. (The Commission also noted that, for sales

within regional transmission organizations, even where individual sellers lack market power, it has used a blend of market- and cost-based elements, such as cost caps or mitigated bids. *Id.* at P 425, ER 209.) In short, the Commission (and the industry) has over two decades of experience in using (and improving) that existing test, is comfortable with its analysis and with the results it yields, and has chosen not to alter its focus.

That said, the Commission did observe, in establishing a schedule to coordinate the periodic updates of sellers' market power analyses by regional grouping, that the Commission will be able to examine each seller's position at the same time it reviews other sellers in the same and neighboring markets. *See* Order No. 697 at P 882, ER 107. "This will give the Commission a more complete view of market forces in each region and the opportunity to reconcile conflicting submissions, enhancing our ability to ensure that sellers' rates remain just and reasonable." *Id.*

III. THE COMMISSION'S MBR RULE IS CONSISTENT WITH STATUTORY FILING REQUIREMENTS

Petitioners' procedural challenge to the Commission's market-based ratemaking, based on Federal Power Act notice and filing requirements, fares no better than their substantive challenge. First, Petitioners disregard the wide latitude that the statute grants to the Commission to determine the timing, form, and treatment of rate filings. Second, Petitioners begin from the premise — incorrect,

as shown in Part II, *supra* — that market-based rates are inconsistent with the Federal Power Act, and thus Petitioners fail to account for the role of market-based tariffs in noticing, challenging, and investigating rates.

A. The Commission Reasonably Exercised Its Broad Discretion To Construe The FPA’s Notice And Filing Requirements

FERC’s market-based rate system is fully consistent with the plain language and structure of section 205 of the Federal Power Act, which grants the Commission broad discretion as to how the statute’s ratemaking mandates will be satisfied. As discussed *supra* at pp. 22-23, 16 U.S.C. § 824d(a) requires that “[a]ll rates and charges . . . shall be just and reasonable,” but does not prescribe any particular ratemaking methodology. *See Hope Natural Gas*, 320 U.S. at 602; *see also Farmers Union*, 734 F.2d at 1502 (reasonableness is a “zone,” not a precise point). Petitioners focus their arguments on other provisions of § 824d, all of which are designed to give effect to that first, substantive mandate.

In particular, § 824d(c) requires that every public utility file with the Commission schedules showing rates and charges for jurisdictional transmission or sales, but explicitly leaves the timing and form of those filings to the Commission’s full discretion:

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 . . . schedules*⁶ showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission.

16 U.S.C. § 824d(c) (emphases added); *see also* Order No. 697 at P 959, ER 117; *accord* Order No. 697-A at P 454, ER 214. “Thus, so long as FERC has approved a tariff within the scope of its FPA authority, it has broad discretion to establish effective reporting requirements for administration of the tariff.” *Lockyer*, 383 F.3d at 1013.

Petitioners suggest that § 824d(c) requires an exact numerical sale price to be on file with the Commission before any sale is executed. *See, e.g.*, Br. 9. The Commission, however, has appropriately exercised its broad discretion in determining that the rate-filing requirements of this provision are satisfied when a seller, having demonstrated to the Commission that it lacks market power, files a generally-applicable “umbrella” market-based tariff and subsequently provides details of all transactions, including prices, in its mandatory quarterly reports. *See* Order No. 697 at P 961, ER 117. Interpreting both the Federal Power Act and FERC’s own market-based rate rules, the Commission has reasonably concluded that “[t]he market-based rate tariff, with its appurtenant conditions and requirement for filing transaction-specific data in [electric quarterly reports], is the filed rate.”

⁶ The statute does not define “schedules,” leaving that to FERC as well. The Commission defines “rate schedule” in its regulations at 18 C.F.R. § 35.2(b).

Id. (emphasis added). In *Lockyer*, this Court agreed, holding that a market-based tariff can be a valid filed rate, provided that the Commission determines in advance that the seller lacks market power and mandates sufficient post-approval reporting of specific transactions. 383 F.3d at 1013.

For those reasons, Petitioners largely ignore § 824d(c) and focus their attack instead on § 824d(d), which governs changes in rates. *See* Br. 14, 17-18, 28-42. That provision states that, “[u]nless the Commission otherwise orders,” a public utility can make no change in any rate, charge, classification, or service, except after 60 days’ notice to the Commission and the public, in the form of “new schedules stating plainly the change or changes to be made . . . and the time when the change or changes will go into effect.” 16 U.S.C. § 824d(d). The statute further provides that “[t]he Commission, for good cause shown, may allow changes to take effect without requiring the sixty days’ notice . . . 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.” *Id.* That language, much like similar language in § 824d(c), affords broad discretion to the Commission to waive the advance filing requirement. *See NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007) (“Our review of the Commission’s waiver rulings is quite limited, as Congress, through [FPA] § 205, has clearly delegated waiver discretion to the Commission and not to the courts.”) (internal quotation

marks and citations omitted); *accord Xcel Energy Servs. Inc. v. FERC*, 510 F.3d 314, 318 (D.C. Cir. 2007) (same).

The key purpose of § 824d(d), as Petitioners argue (Br. 13-15), is to afford notice and an opportunity to challenge the changed rate. *Cf.* 16 U.S.C. § 824d(e) (providing for suspension of rates pending hearing on lawfulness). Petitioners contend that FERC's market-based rate program has eliminated the requisite advance notice, replacing it with after-the-fact reporting. *See* Br. 17. The Commission, however, consistent with its determination that a market-based rate tariff is the pertinent rate schedule (and the filed rate) under § 824d(c), construes the rate change to be when a seller applies for market-based rate authority — *not* when it subsequently enters into transactions at market rates under its existing authority. Order No. 697-A at PP 456, 461, ER 215, 216. All applications for market-based tariffs are publicly noticed and subject to challenges, with the applicant bearing the burden to show that it lacks (or has mitigated) market power; in addition, as noted *supra* at p. 8, even where a seller has passed FERC's market power screens, parties can intervene to rebut the presumption by showing that the seller does have such power. “That investigation fully satisfies the requirements” of § 824d(d) and (e). Order No. 697-A at P 461, ER 216.

The Commission's interpretation falls within its broad statutory discretion, both to prescribe the timing and form of rate filings under § 824d(c) and to opt to

waive advance notice of changes under § 824d(d). Indeed, the Commission has previously exercised that statutory discretion, with judicial approval, to provide flexibility in electricity transactions.

For example, the Commission has long interpreted the FPA's notice and filing provisions to allow the filing of formula rates, without requiring separate notice of changes in resulting rates that are set under the formula. *See, e.g., Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) (affirming FERC's approval of formula rate); *see also id.* n.3 (“the formula itself is the filed rate that provides sufficient notice to ratepayers for purposes of the [filed rate] doctrine”); *see also Ala. Power Co. v. FERC*, 993 F.2d 1557, 1567-68 (D.C. Cir. 1993) (endorsing FERC's position that, when it accepts a formula rate, FERC “grants waiver of the filing and notice requirements of [FPA § 205]. . . . [The utility's] rates, then, can change repeatedly, without notice to the Commission, *provided* those changes are consistent with the formula.”) (internal quotation marks and citation omitted; alterations in original).

The petitioners in *Public Utilities Commission of California*, like those here, urged a narrow construction of the statute to require more specific rate filings (*see* 254 F.3d at 253), but the D.C. Circuit upheld the Commission's latitude:

[E]xactly how much detail is necessary, and the nature of that detail, for a particular formula rate will vary. . . . [T]he court's concern is not whether the challenged provisions fall short of some absolute prescribed standard literally set forth in the statute and regulations, but

of the minimum specificity that the Commission could reasonably require.

Id. at 255 (internal quotation marks and citation omitted). *Cf. Me. Pub. Utils. Comm'n*, 520 F.3d at 469, 479 (upholding Commission's approval of auction-based pricing model, akin to a formula rate, in an organized regional market), *rev'd on other grounds*, *NRG*, 130 S. Ct. 693.

Similarly, the Commission also permits the filing of "umbrella" tariffs applicable to a broad range of transactions. *See Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at pp. 61,982-83 (1993) (explaining that umbrella tariffs of general applicability set forth the general rates, terms, and conditions of service, leaving details such as the amount and duration of service and the precise rate level to vary with each transaction); *see also id.* at p. 61,283 (umbrella tariffs "give the selling utility the flexibility to respond to market opportunities while satisfying its obligation to have its rate on file. . . . [They are intended to] retain[] maximum flexibility in transacting business in an evolving, increasingly competitive generation market."). Moreover, the Commission has interpreted its waiver authority under FPA § 205 to allow even after-the-fact notice of specific transactions under an umbrella tariff. *See id.* at p. 61,984; *Xcel Energy Servs.*, 510 F.3d at 317 (describing FERC's waiver policy, under which FERC applies less stringent standard to late filings of

new service agreements — even after service has already commenced — if service is under an existing umbrella tariff).

Furthermore, the Commission’s interpretation of the FPA’s notice and filing requirements is consistent with the flexibility inherent in various market transactions. *See* Order No. 697-A at P 456, ER 215. As the Commission explained, Petitioners’ narrow reading of the Federal Power Act would preclude not only the short-term sales that are common in modern, organized energy markets but even some kinds of cost-based transactions. *See id.* (noting that 60 days’ notice would be impossible for day-ahead or even monthly short-term sales, as well as for “‘up to’ rates in which sellers are pre-authorized to sell up to a specified cost-based rate cap”); *cf. NSTAR*, 481 F.3d at 799 (affirming FERC’s decision to grant after-the-fact waivers, principally because the services at issue often became necessary on very short notice); *Prior Notice*, 64 FERC ¶ 61,139, at p. 61,984 (“This Commission does not want to stifle the efficiencies to be gained by permitting transactions to be made on short notice in response to changing market conditions.”).

The Commission rejected such a cramped reading of its own leading statutes: “We simply do not read the FPA [notice provisions] or the parallel NGA . . . provisions to hamstring the Commission in this way.” Order No. 697-A at P 456, ER 215. Most important, when the Commission considers a seller’s

application for market-based rate authority, the public has an opportunity to object, and if the Commission approves a market-based tariff, “the public has notice of the types of rates that may be charged and the manner in which they will be filed and published.” *Id.*

B. Notice And Filing Of Market-Based Tariffs And Of All Transactions Thereunder Stand In Contrast To Cases Involving No Disclosure At All

The public notice provided under the Commission’s market-based rate program sets it apart from the leading cases that Petitioners cite. In *Maislin Industries., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), the Supreme Court found fault with negotiated contracts that differed from the filed tariff rate but were *never* disclosed to the public or subjected to Interstate Commerce Commission review, and therefore could not be challenged for discrimination. *See id.* at 130-33; Order No. 697-A at P 465, ER 216. *See also Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379-80 (D.C. Cir. 1986) (rejecting ICC rule allowing parties to agree upon rates that would never be published or filed with the agency), *discussed in* Order No. 697-A at P 464, ER 216. Under FERC’s market-based rate program, by contrast, all transactions occur pursuant to the published terms of a filed umbrella tariff, which FERC approves only after considering the seller’s market power analysis (and challenges thereto) in a public proceeding. *See id.* The actual rates and other details of

transactions conducted under the tariff are publicly disclosed in quarterly reports and subject to complaints on any grounds available under the FPA, including discrimination or market manipulation. *See id.*

MCI Telecommunications Corp. v. AT&T, 512 U.S. 218 (1994), is likewise inapposite; there, the Federal Communications Commission relieved an entire category of carriers from *any* statutory filing requirements, a wholesale detariffing that effectively removed all rate regulation from that segment of the industry. *See id.* at 231-32; Order No. 697-A at P 466, ER 217. Again, by contrast, FERC requires market-based sellers to apply for (and periodically renew) their authorizations by showing that they lack market power, conditions their tariffs on a variety of market behavior rules and detailed filing requirements, and oversees their transactions with a combination of public disclosures, monitoring by FERC's Office of Enforcement and by market monitors in the regional transmission organizations, and FPA complaint proceedings. "No detariffing occurs in these circumstances." Order No. 697-A at P 466, ER 217. Indeed, as the *MCI* Court noted, the FCC would not have violated the filed rate doctrine had it "modif[ied] the form, contents, and location of required filings, . . . [or] defer[red] filing or perhaps even waive[d] it altogether in limited circumstances." 512 U.S. at 234.

The FCC later tried again to loosen the tariff requirements for the same group of carriers, by allowing them to file a range of possible rates. *Southwestern*

Bell Corp. v. FCC, 43 F.3d 1515, 1516 (D.C. Cir. 1995). The court reversed, holding that “[a] range of rates simply does not cater to public knowledge because the public cannot discern the actual rate” *Id.* at 1521. By contrast, however, the quarterly reports that FERC now requires must disclose, in a standardized format, transaction-specific data that includes actual rates (rather than the aggregated data that, in the earlier period examined in *Lockyer*, offered little opportunity for meaningful after-the-fact-review). Order No. 697-A at P 463, ER 216.

Furthermore, in all of those cases, the statutes at issue — whether the Interstate Commerce Act (*Maislin, Regular Common Carrier Conference*) or the Communications Act (*MCI, Southwestern*) — prohibited the charging of any rate other than the tariffed rate. *See, e.g., Regular Common Carrier Conference*, 793 F.2d at 379; *Southwestern*, 43 F.3d at 1521, 1523. By contrast, the Federal Power Act is unique in allowing a role for negotiated contracts in setting just and reasonable rates:

Unlike the Interstate Commerce Act, . . . the FPA also permits utilities to set rates with individual electricity purchasers through bilateral contracts. . . . [T]he FPA departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting.

Morgan Stanley, 128 S. Ct. at 2738 (internal quotation marks and citation omitted); *see* 16 U.S.C. § 824d(c) (requiring utilities to file “all contracts which in any

manner affect or relate to [wholesale sales or transmission] rates, charges, classifications, and services”). *See* Order No. 697-A at P 464 (distinguishing ICC cases on this basis), ER 216.

Indeed, the Supreme Court in *Morgan Stanley* gave significant weight to the FPA’s respect for contracts, upholding in relevant respect the Commission’s refusal to modify market-based contracts that had been negotiated during the 2000-2001 Western energy crisis. 128 S. Ct. at 2747 (citing “the stabilizing force of contracts that the FPA embraced as an alternative to ‘purely tariff-based regulation’”) (citation omitted); *id.* at 2749-51 (remanding to agency only to clarify findings regarding burden on consumers and allegations of market manipulation); *see also* *NRG*, 130 S. Ct. at 699-700 (Court in *Morgan Stanley* “emphasized the essential role of contracts as a key factor fostering stability in the electricity market, to the longrun benefit of consumers.”). Under the FPA, as recently construed by the Supreme Court, advance notice and filing, along with before-the-fact review by the Commission, is not necessary to assure the reasonableness of a market-based contract negotiated by willing, sophisticated buyers and sellers in wholesale electricity markets; such rates are *presumed* just and reasonable within the meaning of 16 U.S.C. § 824d, “regardless of when the contract is reviewed.” *Morgan Stanley*, 128 S. Ct. at 2746.

IV. CONGRESS HAS EFFECTIVELY RATIFIED FERC'S MARKET-BASED RATEMAKING APPROACH

Finally, the Energy Policy Act of 2005 removed any doubt as to the validity of the Commission's market-based rate program. That statute added to the Federal Power Act (as well as the similar Natural Gas Act) several provisions that are premised on the existence of the market-based rate system and are aimed at enhancing that system and ensuring its smooth functioning. In particular, Congress adopted provisions prohibiting market manipulation, facilitating price transparency, and protecting against anticompetitive behaviors — rules that presuppose the existence of market transactions. *See supra* at pp. 12-13 (describing new market-oriented provisions).

Indeed, the pertinent subtitle of the 2005 Act was captioned “Market Transparency, Enforcement, and Consumer Protection,” and the first provision addressed “Electricity Market Transparency,” directing the Commission “to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.” 2005 Act, § 1281(a)(1), 119 Stat. 978 (adding FPA § 220, codified at 16 U.S.C. § 824t); *see also id.* § 1281(a)(4)(b)(2) (charging FERC to “ensure that consumers and competitive markets are protected” from anticompetitive behaviors related to pricing information), 119 Stat. 978-79. Another provision referenced the

organized regional electricity markets with competitive wholesale pricing (*see supra* pp. 5-6). *See* 2005 Act, § 1286, 119 Stat. 981 (amending FPA § 206 to add new subsection (e), codified at 16 U.S.C. § 824e(e)(2)) (providing new refund authority as to “short-term sale[s] of electricity through an organized market”).⁷

And yet another provision, amending a separate statute that concerns cogeneration and small power producers, modified certain requirements based on such producers’ access to those organized regional markets — and specifically to short-term sales with competitive, auction-based pricing. *See id.* § 1253(a), 119 Stat. 967 (amending Public Utility Regulatory Policies Act of 1978 to add new subsection (m)(1)(A)(i), codified at 16 U.S.C. § 824a-3(m)(1)(A)(i)) (lifting mandatory purchase requirements if certain small producers have open access to “independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy”); *see Am. Forest & Paper Ass’n v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008) (affirming FERC’s interpretation of new provision).

⁷ The Commission has long directed parties to pay refunds related to such sales, in excess of just and reasonable rates, under its existing FPA authority. Congress added this provision to fill a specific gap: refund authority as to power sellers that are governmental entities, which had avoided liabilities arising from sales into organized electricity markets (including regional “spot” markets) during the 2000-2001 Western energy crisis because they are not “public utilities” as defined in the FPA. *See Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005).

Taken together, the new market-oriented provisions reflect Congress's understanding that the technological advances and policy reforms of the last few decades have transformed the energy industry and the role of competitive market mechanisms. *Cf. Morgan Stanley*, 128 S. Ct. at 2740-41 (describing "backdrop of technological change and market-based reforms"); *supra* pp. 4-6.

Furthermore, two provisions of the 2005 Act specifically address FERC's approval of market-based rates. In particular, Congress explicitly relied, as a condition for FERC to exercise "relief for extraordinary violations" in the case of manipulation of wholesale electricity markets, upon FERC's prerogative to *take away* a seller's market-based rate authority. The 2005 Act granted the Commission exclusive jurisdiction to invalidate contractual termination payments under certain circumstances. 2005 Act, § 1290(b), 119 Stat. 984. This new form of relief is premised upon the operation of FERC's market-based rate rules: specifically, the Commission may exercise this invalidation power only if it has already "revoked the seller's authority to sell any electricity at market-based rates." 2005 Act, § 1290(a)(2), 119 Stat. 984.

In another section of the 2005 Act, Congress actually expanded FERC's market-based rate authority program under the related Natural Gas Act. Recognizing, as discussed *supra* at pp. 25-26, that the Commission has long authorized sales of natural gas (like electricity) at market-based rates where the

Commission has found that a seller lacks market power, Congress provided an additional basis for granting market-based rate authority even *without* such a finding. *See* 2005 Act, § 312, 119 Stat. 688 (adding new subsection (f) to NGA § 4, 15 U.S.C. § 717c) (Commission can allow market-based rates for storage and related services, “notwithstanding the fact that the [seller] is unable to demonstrate that [it] lacks market power,” if the Commission determines that such rates are in the public interest and customers are adequately protected).⁸

Accordingly, Congress has “effectively ratified” the Commission’s framework of market-based rates. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000) (finding ratification where Congress enacted legislation that was consistent with agency’s longstanding position). Here, Congress did not merely act “against the backdrop” (*id.* at 144) of FERC’s policy but expressly relied upon, supplemented, and expanded FERC’s authority to implement its market-based rate program. That Congress did so after the Commission had allowed market-based rates for over a decade, and after the Commission announced and implemented the standards for the market power analysis under its 2004 interim policy (*see supra* pp. 6-7) — even before the

⁸ We cite this provision, not to suggest that Congress’s alternative test for certain market-based natural gas rates would in any way alter FERC’s extensive rules for market-based electricity rates, but only to show that the 2005 Act reflects Congress’s endorsement of market-based rates in general.

Commission further enhanced those standards and its oversight and enforcement mechanisms in the final MBR Rule — demonstrates that Congress understood and approved of the Commission's market-based rate program.

CONCLUSION

For the reasons stated, the petitions should be denied, and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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January 7, 2011

STATEMENT OF RELATED CASES

Respondent is not aware of any related case pending in this Court.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and 9th Cir. R. 32-1, I certify that the Brief of Respondent Federal Energy Regulatory Commission is proportionally spaced, has a typeface of 14 points, and contains 11,649 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

/s/ Carol J. Banta
Carol J. Banta
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Regulatory Commission

January 7, 2011

ADDENDUM

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

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

(5) If the Commission finds that the Secretary's final prescription would be inconsistent

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

spect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 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, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

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

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

(g) Books and records

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

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

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

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

wherever located, if such examination is required for the effective discharge of the State

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

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, 824o, 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, 824o, 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, 824o, 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.

for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and de-

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95-617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anti-competitive 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

¹ See References in Text note below.

the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

LIMITATION ON AUTHORITY PROVIDED

Section 3 of Pub. L. 100-473 provided that: “Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)) shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act [16 U.S.C. 791a et seq.] to issue an order that (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; 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. For purposes of this section, 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 [15 U.S.C. 79 et seq.]”

STUDY

Section 5 of Pub. L. 100-473 directed that, no earlier than three years and no later than four years after Oct. 6, 1988, Federal Energy Regulatory Commission perform a study of effect of amendments to this section, analyzing (1) impact, if any, of such amendments on cost of capital paid by public utilities, (2) any change in average time taken to resolve proceedings under this section, and (3) such other matters as Commission may deem appropriate in public interest, with study to be sent to Committee on Energy and Natural Resources of Senate and Committee on Energy and Commerce of House of Representatives.

§ 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

(June 10, 1920, ch. 285, pt. II, §207, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 853.)

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

(b) Request for inventory and cost statements

Every public utility upon request shall file with the Commission on inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 10, 1920, ch. 285, pt. II, §208, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 853.)

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safety inspections in conformance with Federal regulations and guidelines with respect to the LNG terminal 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)(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.”.

SEC. 312. NEW NATURAL GAS STORAGE FACILITIES.

Section 4 of the Natural Gas Act (15 U.S.C. 717c) is amended by adding at the end the following:

“(f)(1) In exercising its authority under this Act or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after the date of enactment of the Energy Policy Act of 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

“(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

“(B) customers are adequately protected.

“(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

“(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.”.

SEC. 313. PROCESS COORDINATION; HEARINGS; RULES OF PROCEDURE.

(a) IN GENERAL.—Section 15 of the Natural Gas Act (15 U.S.C. 717n) is amended—

(1) by striking the section heading and inserting “PROCESS COORDINATION; HEARINGS; RULES OF PROCEDURE”;

(2) by redesignating subsections (a) and (b) as subsections (e) and (f), respectively; and

(3) by striking “SEC. 15.” and inserting the following:

“SEC. 15.(a) In this section, the term ‘Federal authorization’—

“(1) means any authorization required under Federal law with respect to an application for authorization under section

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(1) NATURAL GAS ACT.—The Natural Gas Act (15 U.S.C. 717 et seq.) is amended—

(A) by redesignating sections 22 through 24 as sections 24 through 26, respectively; and

15 USC
717u–717w.

(B) by inserting after section 21 (15 U.S.C. 717t) the following:

“CIVIL PENALTY AUTHORITY

“SEC. 22. (a) Any person that violates this Act, or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this Act, shall be subject to a civil penalty of not more than \$1,000,000 per day per violation for as long as the violation continues.

15 USC 717t–1.

“(b) The penalty shall be assessed by the Commission after notice and opportunity for public hearing.

“(c) In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation.”.

(2) NATURAL GAS POLICY ACT OF 1978.—Section 504(b)(6)(A) of the Natural Gas Policy Act of 1978 (15 U.S.C. 3414(b)(6)(A)) is amended—

(A) in clause (i), by striking “\$5,000” and inserting “\$1,000,000”; and

(B) in clause (ii), by striking “\$25,000” and inserting “\$1,000,000”.

SEC. 315. MARKET MANIPULATION.

The Natural Gas Act is amended by inserting after section 4 (15 U.S.C. 717c) the following:

“PROHIBITION ON MARKET MANIPULATION

“SEC. 4A. It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.”.

15 USC 717c–1.

SEC. 316. NATURAL GAS MARKET TRANSPARENCY RULES.

The Natural Gas Act (15 U.S.C. 717 et seq.) is amended by inserting after section 22 the following:

“NATURAL GAS MARKET TRANSPARENCY RULES

“SEC. 23. (a)(1) The Commission is directed to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.

15 USC 717t–2.

“(2) The Commission may prescribe such rules as the Commission determines necessary and appropriate to carry out the purposes of this section. The rules shall provide for the dissemination, on a timely basis, of information about the availability and prices

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of natural gas sold at wholesale and in interstate commerce to the Commission, State commissions, buyers and sellers of wholesale natural gas, and the public.

“(3) The Commission may—

“(A) obtain the information described in paragraph (2) from any market participant; and

“(B) rely on entities other than the Commission to receive and make public the information, subject to the disclosure rules in subsection (b).

“(4) In carrying out this section, the Commission shall consider the degree of price transparency provided by existing price publishers and providers of trade processing services, and shall rely on such publishers and services to the maximum extent possible. The Commission may establish an electronic information system if it determines that existing price publications are not adequately providing price discovery or market transparency.

“(b)(1) Rules described in subsection (a)(2), if adopted, shall exempt from disclosure information the Commission determines would, if disclosed, be detrimental to the operation of an effective market or jeopardize system security.

“(2) In determining the information to be made available under this section and the time to make the information available, the Commission shall seek to ensure that consumers and competitive markets are protected from the adverse effects of potential collusion or other anticompetitive behaviors that can be facilitated by untimely public disclosure of transaction-specific information.

Deadline.
Memorandum.

“(c)(1) Within 180 days of enactment of this section, the Commission shall conclude a memorandum of understanding with the Commodity Futures Trading Commission relating to information sharing, which shall include, among other things, provisions ensuring that information requests to markets within the respective jurisdiction of each agency are properly coordinated to minimize duplicative information requests, and provisions regarding the treatment of proprietary trading information.

“(2) Nothing in this section may be construed to limit or affect the exclusive jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.).

“(d)(1) The Commission shall not condition access to interstate pipeline transportation on the reporting requirements of this section.

“(2) The Commission shall not require natural gas producers, processors, or users who have a de minimis market presence to comply with the reporting requirements of this section.

“(e)(1) Except as provided in paragraph (2), no person shall be subject to any civil penalty under this section with respect to any violation occurring more than 3 years before the date on which the person is provided notice of the proposed penalty under section 22(b).

“(2) Paragraph (1) shall not apply in any case in which the Commission finds that a seller that has entered into a contract for the transportation or sale of natural gas subject to the jurisdiction of the Commission has engaged in fraudulent market manipulation activities materially affecting the contract in violation of section 4A.”.

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and each nonregulated electric utility, shall complete the consideration, and shall make the determination, referred to in section 111 with respect to the standard established by paragraph (14) of section 111(d).”.

(h) FAILURE TO COMPLY.—Section 112(c) of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622(c)) is amended by adding at the end the following:

“In the case of the standard established by paragraph (14) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraph (14).”.

(i) PRIOR STATE ACTIONS REGARDING SMART METERING STANDARDS.—

(1) IN GENERAL.—Section 112 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2622) is amended by adding at the end the following:

“(e) PRIOR STATE ACTIONS.—Subsections (b) and (c) of this section shall not apply to the standard established by paragraph (14) of section 111(d) in the case of any electric utility in a State if, before the enactment of this subsection—

“(1) the State has implemented for such utility the standard concerned (or a comparable standard);

“(2) the State regulatory authority for such State or relevant nonregulated electric utility has conducted a proceeding to consider implementation of the standard concerned (or a comparable standard) for such utility within the previous 3 years; or

“(3) the State legislature has voted on the implementation of such standard (or a comparable standard) for such utility within the previous 3 years.”.

(2) CROSS REFERENCE.—Section 124 of such Act (16 U.S.C. 2634) is amended by adding the following at the end thereof: “In the case of the standard established by paragraph (14) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraph (14).”.

SEC. 1253. COGENERATION AND SMALL POWER PRODUCTION PURCHASE AND SALE REQUIREMENTS.

(a) TERMINATION OF MANDATORY PURCHASE AND SALE REQUIREMENTS.—Section 210 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 824a–3) is amended by adding at the end the following:

“(m) TERMINATION OF MANDATORY PURCHASE AND SALE REQUIREMENTS.—

“(1) OBLIGATION TO PURCHASE.—After the date of enactment of this subsection, no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to—

“(A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or

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“(B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

“(C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

“(2) REVISED PURCHASE AND SALE OBLIGATION FOR NEW FACILITIES.—(A) After the date of enactment of this subsection, no electric utility shall be required pursuant to this section to enter into a new contract or obligation to purchase from or sell electric energy to a facility that is not an existing qualifying cogeneration facility unless the facility meets the criteria for qualifying cogeneration facilities established by the Commission pursuant to the rulemaking required by subsection (n).

“(B) For the purposes of this paragraph, the term ‘existing qualifying cogeneration facility’ means a facility that—

“(i) was a qualifying cogeneration facility on the date of enactment of subsection (m); or

“(ii) had filed with the Commission a notice of self-certification, self recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by subsection (n).

“(3) COMMISSION REVIEW.—Any electric utility may file an application with the Commission for relief from the mandatory purchase obligation pursuant to this subsection on a service territory-wide basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) of this subsection have been met. After notice, including sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) have been met.

“(4) REINSTATEMENT OF OBLIGATION TO PURCHASE.—At any time after the Commission makes a finding under paragraph (3) relieving an electric utility of its obligation to purchase electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility’s obligation to purchase electric energy under this section. Such application shall set forth the factual basis upon which the application is based and describe

Notice.
Deadline.

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42 USC 16463.

SEC. 1276. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such funds as may be necessary to carry out this subtitle.

SEC. 1277. CONFORMING AMENDMENTS TO THE FEDERAL POWER ACT.

(a) CONFLICT OF JURISDICTION.—Section 318 of the Federal Power Act (16 U.S.C. 825q) is repealed.

(b) DEFINITIONS.—(1) Section 201(g)(5) of the Federal Power Act (16 U.S.C. 824(g)(5)) is amended by striking “1935” and inserting “2005”.

(2) Section 214 of the Federal Power Act (16 U.S.C. 824m) is amended by striking “1935” and inserting “2005”.

Subtitle G—Market Transparency, Enforcement, and Consumer Protection

SEC. 1281. ELECTRICITY MARKET TRANSPARENCY.

Part II of the Federal Power Act is amended by adding at the end the following:

16 USC 824t.

“SEC. 220. ELECTRICITY MARKET TRANSPARENCY RULES.

“(a)(1) The Commission is directed to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.

“(2) The Commission may prescribe such rules as the Commission determines necessary and appropriate to carry out the purposes of this section. The rules shall provide for the dissemination, on a timely basis, of information about the availability and prices of wholesale electric energy and transmission service to the Commission, State commissions, buyers and sellers of wholesale electric energy, users of transmission services, and the public.

“(3) The Commission may—

“(A) obtain the information described in paragraph (2) from any market participant; and

“(B) rely on entities other than the Commission to receive and make public the information, subject to the disclosure rules in subsection (b).

“(4) In carrying out this section, the Commission shall consider the degree of price transparency provided by existing price publishers and providers of trade processing services, and shall rely on such publishers and services to the maximum extent possible. The Commission may establish an electronic information system if it determines that existing price publications are not adequately providing price discovery or market transparency. Nothing in this section, however, shall affect any electronic information filing requirements in effect under this Act as of the date of enactment of this section.

“(b)(1) Rules described in subsection (a)(2), if adopted, shall exempt from disclosure information the Commission determines would, if disclosed, be detrimental to the operation of an effective market or jeopardize system security.

“(2) In determining the information to be made available under this section and time to make the information available, the Commission shall seek to ensure that consumers and competitive

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markets are protected from the adverse effects of potential collusion or other anticompetitive behaviors that can be facilitated by untimely public disclosure of transaction-specific information.

“(c)(1) Within 180 days of enactment of this section, the Commission shall conclude a memorandum of understanding with the Commodity Futures Trading Commission relating to information sharing, which shall include, among other things, provisions ensuring that information requests to markets within the respective jurisdiction of each agency are properly coordinated to minimize duplicative information requests, and provisions regarding the treatment of proprietary trading information. Deadline.

“(2) Nothing in this section may be construed to limit or affect the exclusive jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.).

“(d) The Commission shall not require entities who have a de minimis market presence to comply with the reporting requirements of this section.

“(e)(1) Except as provided in paragraph (2), no person shall be subject to any civil penalty under this section with respect to any violation occurring more than 3 years before the date on which the person is provided notice of the proposed penalty under section 316A.

“(2) Paragraph (1) shall not apply in any case in which the Commission finds that a seller that has entered into a contract for the sale of electric energy at wholesale or transmission service subject to the jurisdiction of the Commission has engaged in fraudulent market manipulation activities materially affecting the contract in violation of section 222.

“(f) This section shall not apply to a transaction for the purchase or sale of wholesale electric energy or transmission services within the area described in section 212(k)(2)(A).”.

SEC. 1282. FALSE STATEMENTS.

Part II of the Federal Power Act (16 U.S.C. 824 et seq.) is amended by adding at the end the following:

“SEC. 221. PROHIBITION ON FILING FALSE INFORMATION.

16 USC 824u.

“No entity (including an entity described in section 201(f)) shall willfully and knowingly report any information relating to the price of electricity sold at wholesale or the availability of transmission capacity, which information the person or any other entity knew to be false at the time of the reporting, to a Federal agency with intent to fraudulently affect the data being compiled by the Federal agency.”.

SEC. 1283. MARKET MANIPULATION.

Part II of the Federal Power Act (16 U.S.C. 824 et seq.) is amended by adding at the end the following:

“SEC. 222. PROHIBITION OF ENERGY MARKET MANIPULATION.

16 USC 824v.

“(a) IN GENERAL.—It shall be unlawful for any entity (including an entity described in section 201(f)), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b))), in contravention

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of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.

“(b) NO PRIVATE RIGHT OF ACTION.—Nothing in this section shall be construed to create a private right of action.”.

SEC. 1284. ENFORCEMENT.

(a) COMPLAINTS.—Section 306 of the Federal Power Act (16 U.S.C. 825e) is amended—

(1) by inserting “electric utility,” after “Any person,”; and

(2) by inserting “, transmitting utility,” after “licensee” each place it appears.

(b) INVESTIGATIONS.—Section 307(a) of the Federal Power Act (16 U.S.C. 825f(a)) is amended—

(1) by inserting “, electric utility, transmitting utility, or other entity” after “person” each place it appears; and

(2) in the first sentence, by inserting before the period at the end the following: “, or in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce”.

(c) REVIEW OF COMMISSION ORDERS.—Section 313(a) of the Federal Power Act (16 U.S.C. 825l) is amended by inserting “electric utility,” after “person,” in the first 2 places it appears and by striking “any person unless such person” and inserting “any entity unless such entity”.

(d) CRIMINAL PENALTIES.—Section 316 of the Federal Power Act (16 U.S.C. 825o) is amended—

(1) in subsection (a)—

(A) by striking “\$5,000” and inserting “\$1,000,000”; and

(B) by striking “two years” and inserting “5 years”; (2) in subsection (b), by striking “\$500” and inserting “\$25,000”; and

(3) by striking subsection (c).

(e) CIVIL PENALTIES.—Section 316A of the Federal Power Act (16 U.S.C. 825o–1) is amended—

(1) by striking “section 211, 212, 213, or 214” each place it appears and inserting “part II”; and

(2) in subsection (b), by striking “\$10,000” and inserting “\$1,000,000”.

SEC. 1285. REFUND EFFECTIVE DATE.

Section 206(b) of the Federal Power Act (16 U.S.C. 824e(b)) is amended as follows:

(1) By striking “the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period” in the second sentence and inserting “the date of the filing of such complaint nor later than 5 months after the filing of such complaint”.

(2) By striking “60 days after” in the third sentence and inserting “of”.

(3) By striking “expiration of such 60-day period” in the third sentence and inserting “publication date”.

(4) By striking the fifth sentence and inserting the following: “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

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why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision.”.

SEC. 1286. REFUND AUTHORITY.

Section 206 of the Federal Power Act (16 U.S.C. 824e) is amended by adding at the end the following:

“(e)(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 201(f) 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.”.

SEC. 1287. CONSUMER PRIVACY AND UNFAIR TRADE PRACTICES.

42 USC 16471.

(a) **PRIVACY.**—The Federal Trade Commission may issue rules protecting the privacy of electric consumers from the disclosure of consumer information obtained in connection with the sale or delivery of electric energy to electric consumers.

(b) **SLAMMING.**—The Federal Trade Commission may issue rules prohibiting the change of selection of an electric utility except with the informed consent of the electric consumer or if approved by the appropriate State regulatory authority.

(c) **CRAMMING.**—The Federal Trade Commission may issue rules prohibiting the sale of goods and services to an electric consumer unless expressly authorized by law or the electric consumer.

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of \$10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of \$10,000,000 without first having secured an order of the Commission authorizing it to do so.

“(3) Upon receipt of an application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. Notice.

“(4) After notice and opportunity for hearing, the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

“(5) The Commission shall, by rule, adopt procedures for the expeditious consideration of applications for the approval of dispositions, consolidations, or acquisitions, under this section. Such rules shall identify classes of transactions, or specify criteria for transactions, that normally meet the standards established in paragraph (4). The Commission shall provide expedited review for such transactions. The Commission shall grant or deny any other application for approval of a transaction not later than 180 days after the application is filed. If the Commission does not act within 180 days, such application shall be deemed granted unless the Commission finds, based on good cause, that further consideration is required to determine whether the proposed transaction meets the standards of paragraph (4) and issues an order tolling the time for acting on the application for not more than 180 days, at the end of which additional period the Commission shall grant or deny the application. Regulations. Procedures. Deadlines.

“(6) For purposes of this subsection, the terms ‘associate company’, ‘holding company’, and ‘holding company system’ have the meaning given those terms in the Public Utility Holding Company Act of 2005.”

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect 6 months after the date of enactment of this Act. 16 USC 824b note.

(c) TRANSITION PROVISION.—The amendments made by subsection (a) shall not apply to any application under section 203 of the Federal Power Act (16 U.S.C. 824b) that was filed on or before the date of enactment of this Act.

SEC. 1290. RELIEF FOR EXTRAORDINARY VIOLATIONS.

(a) APPLICATION.—This section applies to any contract entered into the Western Interconnection prior to June 20, 2001, with a seller of wholesale electricity that the Commission has—

(1) found to have manipulated the electricity market resulting in unjust and unreasonable rates; and

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(2) revoked the seller's authority to sell any electricity at market-based rates.

(b) RELIEF.—Notwithstanding section 222 of the Federal Power Act (as added by section 1262), any provision of title 11, United States Code, or any other provision of law, in the case of a contract described in subsection (a), the Commission shall have exclusive jurisdiction under the Federal Power Act (16 U.S.C. 791a et seq.) to determine whether a requirement to make termination payments for power not delivered by the seller, or any successor in interest of the seller, is not permitted under a rate schedule (or contract under such a schedule) or is otherwise unlawful on the grounds that the contract is unjust and unreasonable or contrary to the public interest.

(c) APPLICABILITY.—This section applies to any proceeding pending on the date of enactment of this section involving a seller described in subsection (a) in which there is not a final, nonappealable order by the Commission or any other jurisdiction determining the respective rights of the seller.

Subtitle H—Definitions

SEC. 1291. DEFINITIONS.

42 USC 16481.

(a) COMMISSION.—In this title, the term “Commission” means the Federal Energy Regulatory Commission.

(b) AMENDMENT.—Section 3 of the Federal Power Act (16 U.S.C. 796) is amended—

(1) by striking paragraphs (22) and (23) and inserting the following:

“(22) ELECTRIC UTILITY.—(A) The term ‘electric utility’ means a person or Federal or State agency (including an entity described in section 201(f)) that sells electric energy.

“(B) The term ‘electric utility’ includes the Tennessee Valley Authority and each Federal power marketing administration.

“(23) TRANSMITTING UTILITY.—The term ‘transmitting utility’ means an entity (including an entity described in section 201(f)) that owns, operates, or controls facilities used for the transmission of electric energy—

“(A) in interstate commerce;

“(B) for the sale of electric energy at wholesale.”; and

(2) by adding at the end the following:

“(26) ELECTRIC COOPERATIVE.—The term ‘electric cooperative’ means a cooperatively owned electric utility.

“(27) RTO.—The term ‘Regional Transmission Organization’ or ‘RTO’ means an entity of sufficient regional scope approved by the Commission—

“(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

“(B) to ensure nondiscriminatory access to the facilities.

“(28) ISO.—The term ‘Independent System Operator’ or ‘ISO’ means an entity approved by the Commission—

“(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

“(B) to ensure nondiscriminatory access to the facilities.

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by calling or writing to the Hotline at the telephone number and address in paragraph (f) of this section. The Hotline Staff will informally seek information from the caller and any respondent, as appropriate. The Hotline Staff will attempt to resolve disputes without litigation or other formal proceedings. The Hotline Staff may not resolve matters that are before the Commission in docketed proceedings.

(c) All information and documents obtained through the Hotline Staff shall be treated as non-public by the Commission and its staff, consistent with the provisions of section 1b.9 of this part.

(d) Calls to the Hotline may be made anonymously.

(e) Any person who contacts the Hotline is not precluded from filing a formal action with the Commission if discussions assisted by Hotline Staff are unsuccessful at resolving the matter. A caller may terminate use of the Hotline procedure at any time.

(f) The Hotline may be reached by calling (202) 502-8390 or 1-888-889-8030 (toll free), by e-mail at hotline@ferc.gov, or writing to: Enforcement Hotline, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

[Order 602, 64 FR 17097, Apr. 8, 1999, as amended by Order 647, 69 FR 32438, June 10, 2004]

PART 1c—PROHIBITION OF ENERGY MARKET MANIPULATION

Sec.

1c.1 Prohibition of natural gas market manipulation.

1c.2 Prohibition of electric energy market manipulation.

AUTHORITY: 15 U.S.C. 717-717z; 16 U.S.C. 791-825r, 2601-2645; 42 U.S.C. 7101-7352.

SOURCE: 71 FR 4258, Jan. 26, 2006, unless otherwise noted.

§ 1c.1 Prohibition of natural gas market manipulation.

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission,

(1) To use or employ any device, scheme, or artifice to defraud,

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(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

(b) Nothing in this section shall be construed to create a private right of action.

§ 1c.2 Prohibition of electric energy market manipulation.

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission,

(1) To use or employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

(b) Nothing in this section shall be construed to create a private right of action.

PART 2—GENERAL POLICY AND INTERPRETATIONS

STATEMENTS OF GENERAL POLICY AND INTERPRETATIONS OF THE COMMISSION

Sec.

2.1 Initial notice; service; and information copies of formal documents.

2.1a Public suggestions, comments, proposals on substantial prospective regulatory issues and problems.

2.1b Availability in contested cases of information acquired by staff investigation.

2.1c Policy statement on consultation with Indian tribes in Commission proceedings.

STATEMENTS OF GENERAL POLICY AND INTERPRETATIONS UNDER THE FEDERAL POWER ACT

2.2 Transmission lines.

2.4 Suspension of rate schedules.

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tariff shall not be filed with the Commission. All agreements must, however, be retained and be made available for public inspection and copying at the public utility's business office during regular business hours and provided to the Commission or members of the public upon request. Any individually executed service agreement for transmission, cost-based power sales, or other generally applicable services that deviates in any material respect from the applicable form of service agreement contained in the public utility's tariff and all unexecuted agreements under which service will commence at the request of the customer, are subject to the filing requirements of this part.

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended by Order 541, 40 FR 56425, Dec. 3, 1975; Order 541-A, 41 FR 27831, July 7, 1976; 46 FR 50520, Oct. 14, 1981; Order 337, 48 FR 46976, Oct. 17, 1983; Order 541, 57 FR 21734, May 22, 1992; Order 2001, 67 FR 31069, May 8, 2002; Order 714, 73 FR 57530, 57533, Oct. 3, 2008; 74 FR 55770, Oct. 29, 2009]

§ 35.2 Definitions.

(a) *Electric service.* The term *electric service* as used herein shall mean the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale for resale in interstate commerce, and may be comprised of various classes of capacity and energy sales and/or transmission services. *Electric service* shall include the utilization of facilities owned or operated by any public utility to effect any of the foregoing sales or services whether by leasing or other arrangements. As defined herein, *electric service* is without regard to the form of payment or compensation for the sales or services rendered whether by purchase and sale, interchange, exchange, wheeling charge, facilities charge, rental or otherwise.

(b) *Rate schedule.* The term *rate schedule* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in

writing and may take the physical form of a contract, purchase or sale or other agreement, lease of facilities, or other writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A rate schedule is designated with a Rate Schedule number.

(c)(1) *Tariff.* The term *tariff* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section offered on a generally applicable basis, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A tariff is designated with a Tariff Volume number.

(2) *Service agreement.* The term *service agreement* as used herein shall mean an agreement that authorizes a customer to take electric service under the terms of a tariff. A service agreement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A service agreement is designated with a Service Agreement number.

(d) *Filing date.* The term *filing date* as used herein shall mean the date on which a rate schedule, tariff or service agreement filing is completed by the receipt in the office of the Secretary of all supporting cost and other data required to be filed in compliance with the requirements of this part, unless such rate schedule is rejected as provided in § 35.5. If the material submitted is found to be incomplete, the Director of the Office of Energy Market Regulation will so notify the filing utility within 60 days of the receipt of the submittal.

(e) *Posting* (1) The term *posting* as used in this part shall mean:

(i) Keeping a copy of every rate schedule, service agreement, or tariff of a public utility as currently on file,

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or as tendered for filing, with the Commission open and available during regular business hours for public inspection in a convenient form and place at the public utility's principal and district or division offices in the territory served, and/or accessible in electronic format, and

(ii) Serving each purchaser under a rate schedule, service agreement, or tariff either electronically or by mail in accordance with the service regulations in Part 385 of this chapter with a copy of the rate schedule, service agreement, or tariff. Posting shall include, in the event of the filing of increased rates or charges, serving either electronically or by mail in accordance with the service regulations in Part 385 of this chapter each purchaser under a rate schedule, service agreement or tariff proposed to be changed and to each State Commission within whose jurisdiction such purchaser or purchasers distribute and sell electric energy at retail, a copy of the rate schedule, service agreement or tariff showing such increased rates or charges, comparative billing data as required under this part, and, if requested by a purchaser or State Commission, a copy of the supporting data required to be submitted to this Commission under this part. Upon direction of the Secretary, the public utility shall serve copies of rate schedules, service agreements, or tariffs, and supplementary data, upon designated parties other than those specified herein.

(2) Unless it seeks a waiver of electronic service, each customer, State Commission, or other party entitled to service under this paragraph (e) must notify the public utility of the e-mail address to which service should be directed. A customer, State Commission, or other party may seek a waiver of electronic service by filing a waiver request under Part 390 of this chapter providing good cause for its inability to accept electronic service.

(f) *Effective date.* As used herein the *effective date* of a rate schedule, tariff or service agreement shall mean the date on which a rate schedule filed and posted pursuant to the requirements of this part is permitted by the Commission to become effective as a filed rate schedule. The effective date shall be 60

days after the filing date, or such other date as may be specified by the Commission.

(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 741, 73 FR 57530, Oct. 3, 2008]

§ 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

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public utility under its tariff(s). The standard format for each generally applicable service must reference the service to be rendered and where it is located in its tariff(s). The standard format must provide spaces for insertion of the name of the customer, effective date, expiration date, and term. Spaces may be provided for the insertion of receipt and delivery points, contract quantity, and other specifics of each transaction, as appropriate.

(b) Forms of service agreement submitted under this section shall be filed electronically as prescribed in §35.7 for the filing of rate schedules.

[Order 2001, 67 FR 31069, May 8, 2002; as amended by Order 741, 73 FR 57532, Oct. 3, 2008]

§ 35.10b Electric Quarterly Reports.

Each public utility shall file an updated Electric Quarterly Report with the Commission covering all services it provides pursuant to this part, for each of the four calendar quarters of each year, in accordance with the following schedule: for the period from January 1 through March 31, file by April 30; for the period from April 1 through June 30, file by July 31; for the period July 1 through September 30, file by October 31; and for the period October 1 through December 31, file by January 31. Electric Quarterly Reports must be prepared in conformance with the Commission's software and guidance posted and available for downloading from the FERC Web site (<http://www.ferc.gov>).

[Order 2001, 67 FR 31069, May 8, 2002]

§ 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,

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er, 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 741, 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

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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 cost of service studies prepared in connection with the derivation of the rate?

(ii) A summary statement of all cost (whether fully distributed, incremental or other) computations involved in arriving at the derivation of the level of the rate, in sufficient detail to justify the rate, shall be submitted with the filing, except that if the filing includes nothing more than service to one or more added customers under an established rate of the utility for a particular class of service, such summary statement of cost computations is not required. In all cases, the Secretary is authorized to require the submission of the complete cost studies as part of the filing and each filing public utility shall submit the same upon request by the Secretary in such form as he or she shall direct.

(3) A comparison of the proposed initial rate with other rates of the filing public utility for similar wholesale for resale and transmission services.

(4) If any facilities are installed or modified in order to supply the service to be furnished under the proposed rate schedule or tariff, the filing public utility shall show on an appropriate available map (or sketch) and single line diagram the additions or changes to be made.

(5) In support of the design of the proposed rate, the filing public utility shall submit the same material re-

quired to be furnished pursuant to §35.13(h)(37) Statement BL. In addition to the summary cost analysis required by Statement BL, the public utility shall also submit a complete explanation as to the method used in arriving at the cost of service allocated to the sales and service for which the rate or charge is proposed, and showing the principal determinants used for allocation purposes. In connection therewith, the following data should be submitted:

(i) In the event the filing public utility considers certain special facilities as being devoted entirely to the service involved, it shall show the cost of service related to such special facilities.

(ii) Computations showing the energy responsibility of the service, based upon considerations of energy sales under the proposed rate schedule or tariff and the kWh delivered from the filing public utility's supply system.

(iii) Computations showing the demand responsibility of the service, and explaining the considerations upon which such responsibility was determined (e.g., coincident or non-coincident peak demands, etc.).

(Federal Power Act, 16 U.S.C. 792-828c; Department of Energy Organization Act, 42 U.S.C. 7101-7352; E.O. 12009, 42 FR 46267; Pub. L. 96-511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*))

[Order 271, 28 FR 10573, Oct. 2, 1963, as amended at 28 FR 11404, Oct. 24, 1963; Order 537, 40 FR 48674, Oct. 17, 1975; Order 91, 45 FR 46363, July 10, 1980; Order 741, 73 FR 57532, Oct. 3, 2008]

§ 35.13 Filing of changes in rate schedules, tariffs or service agreements.

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- (a) General rule.
 - (1) Filing for any rate schedule change not otherwise excepted.
 - (2) Abbreviated filing requirements.
 - (3) Cost of service data required by letter.
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thereunder has issued one or more permits for the construction or modification of transmission facilities in a national interest electric transmission corridor designated by the Secretary, such facilities shall be deemed to either ensure reliability or reduce the cost of delivered power by reducing congestion for purposes of section 219(a).

[Order 679, 71 FR 43338, July 31, 2006, as amended by Order 679-A, 72 FR 1172, Jan. 10, 2007, Order 691, 72 FR 5174, Feb. 5, 2007]

Subpart H—Wholesale Sales of Electric Energy, Capacity and Ancillary Services at Market-Based Rates

SOURCE: Order 697, 72 FR 40038, July 20, 2007, unless otherwise noted.

§ 35.36 Generally.

(a) For purposes of this subpart:

(1) *Seller* means any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act.

(2) *Category 1 Sellers* means wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888, FERC Stats. & Regs. ¶ 31,036); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.

(3) *Category 2 Sellers* means any Seller not in Category 1.

(4) *Inputs to electric power production* means intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; sites for generation capacity development; physical coal supply sources and ownership of or

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control over who may access transportation of coal supplies.

(5) *Franchised public utility* means a public utility with a franchised service obligation under State law.

(6) *Captive customers* means any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation.

(7) *Market-regulated power sales affiliate* means any power seller affiliate other than a franchised public utility, including a power marketer, exempt wholesale generator, qualifying facility or other power seller affiliate, whose power sales are regulated in whole or in part on a market-rate basis.

(8) *Market information* means non-public information related to the electric energy and power business including, but not limited to, information regarding sales, cost of production, generator outages, generator heat rates, unconsummated transactions, or historical generator volumes. Market information includes information from either affiliates or non-affiliates.

(9) *Affiliate* of a specified company means:

(i) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company;

(ii) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company;

(iii) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate; and

(iv) Any person that is under common control with the specified company.

(v) For purposes of paragraph (a)(9), owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a

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specified company creates a rebuttable presumption of lack of control.

(b) The provisions of this subpart apply to all Sellers authorized, or seeking authorization, to make sales for resale of electric energy, capacity or ancillary services at market-based rates unless otherwise ordered by the Commission.

[Order 697, 72 FR 40038, July 20, 2007, as amended by Order 697-A, 73 FR 25912, May 7, 2008; Order 697-B, 73 FR 79627, Dec. 30, 2008]

§ 35.37 Market power analysis required.

(a) (1) In addition to other requirements in subparts A and B, a Seller must submit a market power analysis in the following circumstances: when seeking market-based rate authority; for Category 2 Sellers, every three years, according to the schedule contained in Order No. 697, FERC Stats. & Regs. ¶ 31,252; or any other time the Commission directs a Seller to submit one. Failure to timely file an updated market power analysis will constitute a violation of Seller's market-based rate tariff.

(2) When submitting a market power analysis, whether as part of an initial application or an update, a Seller must include an appendix of assets in the form provided in Appendix B of this subpart.

(b) A market power analysis must address whether a Seller has horizontal and vertical market power.

(c) (1) There will be a rebuttable presumption that a Seller lacks horizontal market power if it passes two indicative market power screens: a pivotal supplier analysis based on the annual peak demand of the relevant market, and a market share analysis applied on a seasonal basis. There will be a rebuttable presumption that a Seller possesses horizontal market power if it fails either screen.

(2) Sellers and intervenors may also file alternative evidence to support or rebut the results of the indicative screens. Sellers may file such evidence at the time they file their indicative screens. Intervenors may file such evidence in response to a Seller's submissions.

(3) If a Seller does not pass one or both screens, the Seller may rebut a

presumption of horizontal market power by submitting a Delivered Price Test analysis. A Seller that does not rebut a presumption of horizontal market power or that concedes market power, is subject to mitigation, as described in § 35.38.

(4) When submitting a horizontal market power analysis, a Seller must use the form provided in Appendix A of this subpart and include all supporting materials referenced in the form.

(d) To demonstrate a lack of vertical market power, a Seller that owns, operates or controls transmission facilities, or whose affiliates own, operate or control transmission facilities, must have on file with the Commission an Open Access Transmission Tariff, as described in § 35.28; provided, however, that a Seller whose foreign affiliate(s) own, operate or control transmission facilities outside of the United States that can be used by competitors of the Seller to reach United States markets must demonstrate that such affiliate either has adopted and is implementing an Open Access Transmission Tariff as described in § 35.28, or otherwise offers comparable, non-discriminatory access to such transmission facilities.

(e) To demonstrate a lack of vertical market power in wholesale energy markets through the affiliation, ownership or control of inputs to electric power production, such as the transportation or distribution of the inputs to electric power production, a Seller must provide the following information:

(1) A description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, intrastate natural gas storage or distribution facilities;

(2) Sites for generation capacity development; and

(3) Physical coal supply sources and ownership or control over who may access transportation of coal supplies.

(4) A Seller must ensure that this information is included in the record of each new application for market-based rates and each updated market power analysis. In addition, a Seller is required to make an affirmative statement that it has not erected barriers to entry into the relevant market and

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will not erect barriers to entry into the relevant market.

(f) If the seller seeks to protect any portion of the application, or any attachment thereto, from public disclosure pursuant to §388.112 of this chapter, the seller must include with its request for privileged treatment a proposed protective order under which the parties to the proceeding will be able to review any of the data, information, analysis or other documentation relied upon by the seller for which privileged treatment is sought. A seller must grant access to privileged data to any party that signs a protective order within 5 days from the date that the party executes the protective order.

[Order 697, 72 FR 40038, July 20, 2007, as amended by Order 697-B, 73 FR 79627, Dec. 30, 2008]

§ 35.38 Mitigation.

(a) A Seller that has been found to have market power in generation or that is presumed to have horizontal market power by virtue of failing or foregoing the horizontal market power screens, as described in §35.37(c), may adopt the default mitigation detailed in paragraph (b) of this section or may propose mitigation tailored to its own particular circumstances to eliminate its ability to exercise market power. Mitigation will apply only to the market(s) in which the Seller is found, or presumed, to have market power.

(b) Default mitigation consists of three distinct products:

(1) Sales of power of one week or less priced at the Seller's incremental cost plus a 10 percent adder;

(2) Sales of power of more than one week but less than one year priced at no higher than a cost-based ceiling reflecting the costs of the unit(s) expected to provide the service; and

(3) New contracts filed for review under section 205 of the Federal Power Act for sales of power for one year or more priced at a rate not to exceed embedded cost of service.

§ 35.39 Affiliate restrictions.

(a) *General affiliate provisions.* As a condition of obtaining and retaining market-based rate authority, the conditions provided in this section, including the restriction on affiliate sales of

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electric energy and all other affiliate provisions, must be satisfied on an ongoing basis, unless otherwise authorized by Commission rule or order. Failure to satisfy these conditions will constitute a violation of the Seller's market-based rate tariff.

(b) *Restriction on affiliate sales of electric energy or capacity.* As a condition of obtaining and retaining market-based rate authority, no wholesale sale of electric energy or capacity may be made between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission authorization for the transaction under section 205 of the Federal Power Act. All authorizations to engage in affiliate wholesale sales of electric energy or capacity must be listed in a Seller's market-based rate tariff.

(c) *Separation of functions.* (1) For the purpose of this paragraph, entities acting on behalf of and for the benefit of a franchised public utility with captive customers (such as entities controlling or marketing power from the electrical generation assets of the franchised public utility) are considered part of the franchised public utility. Entities acting on behalf of and for the benefit of the market-regulated power sales affiliates of a franchised public utility with captive customers are considered part of the market-regulated power sales affiliates.

(2) (i) To the maximum extent practical, the employees of a market-regulated power sales affiliate must operate separately from the employees of any affiliated franchised public utility with captive customers.

(ii) Franchised public utilities with captive customers are permitted to share support employees, and field and maintenance employees with their market-regulated power sales affiliates. Franchised public utilities with captive customers are also permitted to share senior officers and boards of directors with their market-regulated power sales affiliates; provided, however, that the shared officers and boards of directors must not participate in directing, organizing or executing generation or market functions.

(iii) Notwithstanding any other restrictions in this section, in emergency

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and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable market. A Seller is not required to bid or supply electric energy or other electricity products unless such requirement is a part of a separate Commission-approved tariff or is a requirement applicable to Seller through Seller's participation in a Commission-approved organized market.

(b) *Communications.* A Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences.

(c) *Price reporting.* To the extent a Seller engages in reporting of transactions to publishers of electric or natural gas price indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the Policy Statement issued by the Commission in Docket No. PL03-3-000 and any clarifications thereto. Unless Seller has previously provided the Commission with a notification of its price reporting status, Seller must notify the Commission within 15 days of the effective date of this regulation or within 15 days of the date it begins making wholesale sales, whichever is earlier, whether it engages in such reporting of its transactions. Seller must update the notification within 15 days of any subsequent change in its transaction reporting status. In addition, Seller must adhere to such other standards and requirements for price reporting as the Commission may order.

(d) *Records retention.* A Seller must retain, for a period of five years, all data and information upon which it billed the prices it charged for the electric energy or electric energy products

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it sold pursuant to Seller's market-based rate tariff, and the prices it reported for use in price indices.

§ 35.42 Change in status reporting requirement.

(a) As a condition of obtaining and retaining market-based rate authority, a Seller must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, the following:

(1) Ownership or control of generation capacity that results in net increases of 100 MW or more, or of inputs to electric power production, or ownership, operation or control of transmission facilities, or

(2) Affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation facilities or inputs to electric power production, affiliation with any entity not disclosed in the application for market-based rate authority that owns, operates or controls transmission facilities, or affiliation with any entity that has a franchised service area.

(b) Any change in status subject to paragraph (a) of this section, other than a change in status submitted to report the acquisition of control of a site or sites for new generation capacity development, must be filed no later than 30 days after the change in status occurs. Power sales contracts with future delivery are reportable 30 days after the physical delivery has begun. Failure to timely file a change in status report constitutes a tariff violation.

(c) When submitting a change in status notification regarding a change that impacts the pertinent assets held by a Seller or its affiliates with market-based rate authorization, a Seller must include an appendix of assets in the form provided in Appendix B of this subpart.

(d) A Seller must report on a quarterly basis the acquisition of control of a site or sites for new generation capacity development for which site control has been demonstrated in the interconnection process and for which

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the potential number of megawatts that are reasonably commercially feasible on the site or sites for new generation capacity development is equal to 100 megawatts or more. If a Seller elects to make a monetary deposit so that it may demonstrate site control at a later time in the interconnection process, the monetary deposit will trigger the quarterly reporting requirement instead of the demonstration of site control. A notification of change in status that is submitted to report the acquisition of control of a site or sites for new generation capacity development must include:

- (1) The number of sites acquired;
- (2) The relevant geographic market in which the sites are located; and
- (3) The maximum potential number of megawatts (MW) that are reasonably commercially feasible on the sites reported.

(e) A Seller must report to the Commission any land it has acquired, taken a leasehold interest in, obtained an option to purchase or lease, or entered into an exclusivity or other arrangement to acquire for new generation capacity development and for which site control has not yet been demonstrated during the prior three years (triggering event), and for which the potential number of megawatts that are reasonably commercially feasible on the land for new generation capacity development is equal to 100 megawatts or more. A Seller must report each such triggering event in a single report by January 1 of the year following the calendar year in which the triggering event occurred. The information that must be provided and the aggregation of the maximum potential number of megawatts by relevant geographic market is the same as required in the quarterly reports, as described in paragraph (d) of this section.

(f) For the purposes of paragraph (d) of this section, “control” shall mean “site control” as it is defined in the Standard Large Generator Interconnection Procedures (LGIP).

[Order 697-C, 74 FR 30934, June 29, 2009]

EFFECTIVE DATE NOTE: At 75 FR 14351, Mar. 25, 2010, §35.42 was revised, effective Apr. 26, 2010. For the convenience of the user, the revised text is set forth as follows:

§ 35.42 Change in status reporting requirement.

(a) As a condition of obtaining and retaining market-based rate authority, a Seller must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, the following:

- (1) Ownership or control of generation capacity that results in net increases of 100 MW or more, or of inputs to electric power production, or ownership, operation or control of transmission facilities, or
- (2) Affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation facilities or inputs to electric power production, affiliation with any entity not disclosed in the application for market-based rate authority that owns, operates or controls transmission facilities, or affiliation with any entity that has a franchised service area.

(b) Any change in status subject to paragraph (a) of this section, other than a change in status submitted to report the acquisition of control of a site or sites for new generation capacity development, must be filed no later than 30 days after the change in status occurs. Power sales contracts with future delivery are reportable 30 days after the physical delivery has begun. Failure to timely file a change in status report constitutes a tariff violation.

(c) When submitting a change in status notification regarding a change that impacts the pertinent assets held by a Seller or its affiliates with market-based rate authorization, a Seller must include an appendix of assets in the form provided in Appendix B of this subpart.

(d) A Seller must report on a quarterly basis the acquisition of control of a site or sites for new generation capacity development for which site control has been demonstrated in the interconnection process and for which the potential number of megawatts that are reasonably commercially feasible on the site or sites for new generation capacity development is equal to 100 megawatts or more. If a Seller elects to make a monetary deposit so that it may demonstrate site control at a later time in the interconnection process, the monetary deposit will trigger the quarterly reporting requirement instead of the demonstration of site control. A notification of change in status that is submitted to report the acquisition of control of a site or sites for new generation capacity development must include:

- (1) The number of sites acquired;
- (2) The relevant geographic market in which the sites are located; and

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 7th day of January 2011, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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