

147 FERC ¶ 61,066  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;  
Philip D. Moeller, John R. Norris,  
and Tony Clark.

San Diego Gas & Electric Company

Docket No. EL00-95-275

v.

Sellers of Energy and Ancillary Services

Investigation of Practices of the California  
Independent System Operator and the California  
Power Exchange Corporation

Docket No. EL00-98-254

ORDER APPROVING CONTESTED SETTLEMENT

(Issued April 24, 2014)

1. In this order, the Commission approves a settlement filed on December 23, 2013 between the Williams Companies, Williams Power Company, Inc., and WPX Energy Inc. (collectively, Williams) and the California Utilities<sup>1</sup> (collectively, the Parties), as discussed below. The settlement consists of a “Joint Offer of Settlement to Implement and Amend the 2004 Williams-California Utilities Settlement Agreement”, a “Joint Explanatory Statement,” and an “Implementation Agreement and First Amendment to the 2004 Williams-California Utilities Settlement Agreement” (Implementation Agreement) (collectively, First Amendment).<sup>2</sup>

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<sup>1</sup> The California Utilities are Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company. For purposes of the Settlement, the California Utilities also include the California Department of Water Resources (acting solely under authority and powers created by California Assembly Bill 1 of the First Extraordinary Session of 2001-2002, codified in Sections 80000 through 80270 of the California Water Code).

<sup>2</sup> On March 11, 2011, then-Commissioner Cheryl A. LaFleur issued a memorandum to the file in sixty dockets, including Docket No. EL00-95-000,

(continued...)

2. The Parties state that the First Amendment benefits customers by resolving issues related to Williams' transactions in the Western energy markets during the period January 1, 2000 through December 31, 2001.<sup>3</sup> The Parties state that approval of the First Amendment will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.<sup>4</sup> According to the Parties, the First Amendment reaches a fair and reasonable resolution of issues between Williams and Settling Participants.<sup>5</sup> Finally, the Parties note that the Commission and the United States Court of Appeals for the Ninth Circuit have encouraged settlements of claims related to transactions in the California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) markets in the 2000 and 2001 time period.<sup>6</sup>

3. As discussed below, the Commission approves the First Amendment.

### **Background and Description of the Settlement**

4. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA)<sup>7</sup> to investigate, among other things, the justness and reasonableness of public utility sellers' rates in the CAISO and CalPX markets in Docket Nos. EL00-95-000 and EL00-98-000.<sup>8</sup> In 2002, the Commission directed its staff to commence a fact-finding investigation into the alleged manipulation of electric and natural gas prices in the West in Docket No. PA02-2-000.<sup>9</sup> In 2003, the Commission directed its staff to

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documenting her decision, based on a memorandum from the Office of General Counsel's General and Administrative Law section, dated February 18, 2011, not to recuse herself from considering matters in those dockets.

<sup>3</sup> Joint Offer of Settlement at 3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 3-4.

<sup>6</sup> *Id.* at 4 (citing *Pub. Utils. Comm'n of the State of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002) and *Pub. Utils. Comm'n of the State of Cal. v. FERC*, No. 01-71051, slip op. at 3 (9th Cir. Oct. 23, 2006)).

<sup>7</sup> 16 U.S.C. § 791, *et seq.* (2012).

<sup>8</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 92 FERC ¶ 61,172 (2000).

<sup>9</sup> *Fact-Finding Investigation of Potential Manipulation of Electric and Natural*

(continued...)

investigate anomalous bidding behavior and practices in Western energy markets in Docket No. IN03-10-000.<sup>10</sup> On the same day, the Commission issued two orders directing named entities to show cause that they had not participated in certain gaming practices<sup>11</sup> or why their arrangements with other entities did not constitute gaming and/or anomalous bidding behavior.<sup>12</sup>

5. In 2004, Williams and the California Utilities entered into a comprehensive settlement (2004 Settlement) relating to Williams' transactions in the California energy markets. The Commission subsequently approved the Settlement.<sup>13</sup> The 2004 Settlement resolved a number of issues between Williams and the California Utilities, resulting in the payment of proceeds from Williams to Settling Participants, as well as providing for certain releases of claims. Under the 2004 Settlement, any party to the Docket No. EL00-95 proceeding could become a Settling Participant along with the California Utilities, and could thus receive payments under the 2004 Settlement. The 2004 Settlement was not binding on any party that chose not to sign onto it. The 2004 Settlement also "carved out" for future resolution several issues that could affect the amount of settlement funds that Williams would ultimately pay to Settling Participants for the period October 2, 2000 through January 17, 2001.<sup>14</sup> The Parties have reached agreement on three of these issues, and thus filed the First Amendment with the Commission.<sup>15</sup>

6. Specifically, the First Amendment proposes to resolve the following three issues: (1) a potential increase in refunds associated with the resolution of a transaction mis-

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*Gas Prices*, 98 FERC ¶ 61,165 (2002).

<sup>10</sup> *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

<sup>11</sup> *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003).

<sup>12</sup> *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003).

<sup>13</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 108 FERC ¶ 61,002 (2004) (2004 Settlement Order), *reh'g denied*, 111 FERC ¶ 61,186 (2005) (2004 Settlement Rehearing Order) (collectively, 2004 Settlement Orders).

<sup>14</sup> Joint Explanatory Statement at 2.

<sup>15</sup> *Id.*

logging dispute between Williams and CAISO;<sup>16</sup> (2) a potential increase in refunds of up to \$6.2 million associated with the mitigation of CAISO Charge Type 485 penalties that CAISO assessed against Williams during the relevant time period;<sup>17</sup> and (3) a potential increase in Williams' receivables of \$14.2 million (with a potential corresponding increase in refunds) associated with the mechanism by which CalPX would implement the \$150 "breakpoint" for January 2001.<sup>18</sup>

7. With respect to the Amendment 51 Adjustment, the Parties propose to resolve this issue by a payment from Williams to the California Utilities in the amount of \$7,922,364.<sup>19</sup> This amount, plus associated interest, will be transferred to a refund escrow and will be allocated to Participants in accordance with an Allocation Matrix that is attached to the First Amendment. With respect to the Charge Type 485 penalties, the Parties explain that the First Amendment acknowledges that Williams and CAISO have previously resolved a dispute as to Charge Type 485 penalties that CAISO had imposed on Williams, resulting in a reversal of the penalties and a credit to Williams' CAISO accounts, through a gross-up of Williams' receivables, of \$4,857,517, plus associated interest.<sup>20</sup> Finally, with respect to the Soft Cap Implementation, the Parties explain that

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<sup>16</sup> This issue was known as the "Amendment 51 Adjustment," which is a reference to CAISO's preparatory rerun process. Joint Explanatory Statement at 8 & n.15.

<sup>17</sup> Charge Type 485 penalties were those assessed by CAISO on market participants that refused to comply with CAISO dispatch instructions. Joint Explanatory Statement at 8.

<sup>18</sup> This issue was known as the Soft Cap Implementation. The Parties explain that CalPX's then-effective tariff required implementation of a \$150/MWh "soft cap," under which no seller could receive a price higher than \$150/MWh for electricity sold into the CalPX unless the seller itself bid a higher price and CalPX accepted that bid. However, the Parties state, CalPX failed to apply the soft cap in its initial invoicing, an error subsequently corrected. The soft cap adjustment resulted from Commission orders under which bidding sellers were compensated up to the level of the "soft cap" (or "break point") for bids into the CalPX real-time market. Joint Explanatory Statement at 9 & n.16 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 95 FERC ¶ 61,115, at 61,359 (2001)).

<sup>19</sup> Implementation Agreement, §§ 3.1.1, 3.1.2, 3.1.3; Joint Explanatory Statement at 8.

<sup>20</sup> Implementation Agreement, § 3.2; Joint Explanatory Statement at 8.

\$14,240,817, plus associated interest, will be transferred by CalPX to the refund escrow for allocation to Participants under the Allocation Matrix.<sup>21</sup>

8. The Parties further explain that the First Amendment provides for adjustments to Williams' accounts with CAISO and CalPX to allow the distribution of certain funds currently held in the CalPX Settlement Clearing Account (including interest) that was not distributed under the 2004 Settlement.<sup>22</sup> The Parties estimate that the unpaid amount of Williams' receivables is \$39,406,771 and that unpaid interest through June 30, 2013 is \$137,186,836.<sup>23</sup> Some of these funds will be distributed to Settling Participants, including the California Utilities, pursuant to an allocation matrix that is included as an attachment to the First Amendment.<sup>24</sup> Some proceeds will be available for payment of Williams' allocated share of liability for fuel cost adjustments.<sup>25</sup> Additionally, CalPX will retain \$17,400,000, which represents Williams' interest shortfall estimate, as well as retain an additional amount for miscellaneous adjustments to Williams' receivables.<sup>26</sup> Finally, Williams will be paid \$23,018,085 (plus interest after June 30, 2013), which is an estimate of its remaining receivables and interest after the distributions noted above.<sup>27</sup> The Parties state that the obligation of any of the California Utilities to make payments on behalf of Williams shall not exceed the total amount allocated and actually paid to such California Party under the terms of the First Amendment.<sup>28</sup>

9. The Parties explain that the First Amendment shall become effective as of the date that: (1) the Commission has issued an order approving the First Amendment in its entirety; and (2) the CPUC has expressly approved the First Amendment in its entirety as to SoCal Edison. The CPUC can also provide a different form of written approval that is satisfactory to each of the California Utilities, or provide written comments to the

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<sup>21</sup> Implementation Agreement, § 3.3; Joint Explanatory Statement at 9.

<sup>22</sup> Implementation Agreement, Article 4; Joint Explanatory Statement at 9.

<sup>23</sup> Implementation Agreement, §§ 4.1.1, 4.1.2; Joint Explanatory Statement at 9.

<sup>24</sup> Implementation Agreement, Ex. A; Joint Explanatory Statement at 11.

<sup>25</sup> Implementation Agreement, § 4.4; Joint Explanatory Statement at 10.

<sup>26</sup> Implementation Agreement, §§ 4.7, 4.8; Joint Explanatory Statement at 10.

<sup>27</sup> Implementation Agreement, § 4.5; Joint Explanatory Statement at 10.

<sup>28</sup> Implementation Agreement, § 6.8; Joint Explanatory Statement at 12.

Commission supporting or not opposing the First Amendment.<sup>29</sup> The Parties state that the First Amendment will terminate on the date of a final Commission order rejecting the First Amendment in whole or in material part or accepting the First Amendment with material conditions or modifications deemed unacceptable to any adversely affected party.<sup>30</sup>

10. The Parties state that they would not object to the Commission assuring CAISO and CalPX that they will be held harmless for their actions to implement the Settlement.<sup>31</sup>

### **Procedural Matters**

11. Pursuant to Rule 602(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f) (2013), initial comments on the First Amendment were to be submitted no later than January 13, 2014, and reply comments were to be submitted no later than January 22, 2014. Initial comments were filed by CAISO and CalPX, either in support of or not opposing the First Amendment. The CPUC also filed initial comments supporting the First Amendment. Californians for Renewable Energy (CARE) filed comments opposing the First Amendment. Reply comments were filed by the Parties (Joint Reply Comments).<sup>32</sup>

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<sup>29</sup> Implementation Agreement, §§ 1.30, 2.1; Joint Explanatory Statement at 7.

<sup>30</sup> Implementation Agreement, § 2.3; Joint Explanatory Statement at 7.

<sup>31</sup> Joint Explanatory Statement at 13.

<sup>32</sup> On January 13, 2014, CAISO sought leave to file initial comments on January 20, 2014. The Commission's Rules of Practice and Procedure require that there be a five-day period to respond to motions for extensions of time. Because of the Federal holiday on January 20, 2014 and because the Commission's headquarters was closed due to inclement weather on January 21, 2014, the time to respond to CAISO's motion would be by 5:00 pm on January 22, 2014. On that day, however, CAISO filed its initial comments and the Parties filed their Joint Reply Comments. To avoid any doubt, we here clarify that we are accepting CAISO's late-filed comments. In so doing, we note that CAISO had moved for an extension of time to file its comments and explained the reasons for why it was requesting that extension.

## Settlement Comments

### Hold Harmless Protection

12. Both CAISO and CalPX note that the circumstances of this Settlement warrant hold harmless treatment for CAISO and CalPX because they, along with their directors, officers, employees, and consultants, will implement a number of the Settlement's provisions.<sup>33</sup> Accordingly, CalPX requests that the following "hold harmless" language be incorporated into any Commission order approving the Settlement:

The Commission recognizes that CalPX will be required to implement this settlement by paying substantial funds from its Settlement Clearing Account at the Commission's direction. Therefore, except to the extent caused by their own gross negligence, neither officers, directors, employees nor professionals shall be liable for implementing the settlement including but not limited to cash payouts and accounting entries on CalPX's books, nor shall they or any of them be liable for any resulting shortfall of funds or resulting change to credit risk as a result of implementing the settlement. In the event of any subsequent order, rule or judgment by the Commission or any court of competent jurisdiction requiring any adjustment to, or repayment or reversion of, amounts paid out of the Settlement Clearing Account or credited to a participant's account balance pursuant to the settlement, CalPX shall not be responsible for recovering or collecting such funds or amounts represented by such credits.<sup>34</sup>

13. CalPX states that this is the same "hold harmless" provision that the Commission has approved in other orders approving settlements.<sup>35</sup> In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of "hold harmless" language in the order approving the Settlement.<sup>36</sup>

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<sup>33</sup> CAISO Comments at 3-6; CalPX Comments at 2-5.

<sup>34</sup> CalPX Comments at 5.

<sup>35</sup> *Id.* at 2-5.

<sup>36</sup> Joint Reply Comments at 3-4.

### **Interpretation of Section 3.2 of the First Amendment**

14. CAISO's comments address the treatment of section 3.2 of the First Amendment, which governs adjustments for Charge Type 485 penalties. As discussed above, section 3.2 states that CAISO and Williams had previously resolved a dispute as to CAISO's assessment of Charge Type 485 penalties on Williams, resulting in a reversal of penalties and an increase in Williams receivables of \$4,857,517, plus associated interest. In its comments, CAISO states that it understands that the amounts set forth in section 3.2 are derived from the application of the mitigated market clearing prices to the adjustments resulting from the resolution of the Charge Type 485 dispute, and that these calculations are already reflected in the refund rerun calculations that CAISO has provided to parties in this proceeding.<sup>37</sup> CAISO thus interprets section 3.2 as not requiring CAISO to make any adjustments to its preparatory rerun calculations or refund rerun calculations.<sup>38</sup> CAISO understands that the credit referred to in section 3.2 can be accounted for through payment to Williams by CalPX using funds held in the CalPX Settlement Clearing Account, with appropriate adjustments to the CAISO and CalPX accounts to be made as part of the process to reflect the impact of various global settlements in these proceedings in the CAISO and CalPX markets.

15. Finally, CAISO states that it has discussed these issues with the California Utilities, and that they have confirmed that CAISO's interpretation of section 3.2 is correct.

### **CARE's Comments in Opposition**

16. CARE states in its comments that it opposes the First Amendment. In support, CARE avers that it has sought judicial review of the 2004 Settlement in the United States Court of Appeals for the Ninth Circuit, and that the First Amendment is prejudicial to CARE's right to judicial review that is currently pending before the court.<sup>39</sup> CARE also

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<sup>37</sup> CAISO Comments at 6-8.

<sup>38</sup> CAISO argues that this is no different from the treatment of other adjustments dictated by the global settlements in these proceedings, explaining that it has not reflected those adjustments on its books because it will first file the calculations reflecting Commission directives regarding refunds and offsets. Following Commission approval of these calculations, CAISO states, CAISO and CalPX books will be adjusted to reflect the impact of the global settlements in preparation for a combined cash clearing. CAISO Comments at 8, n.8.

<sup>39</sup> CARE Comments at 1-2.

states that its counsel did not receive service of the First Amendment.<sup>40</sup> CARE appends to its comments a Petition for Review to the Ninth Circuit dated January 2, 2008, which lists a number of Commission orders in Docket No. EL00-95 and related dockets.

### **Joint Reply Comments**

17. In their Joint Reply Comments, the Parties confirm that they do not oppose a “hold harmless” provision that is similar to the provisions in other Commission orders approving similar settlements involving the California Parties.<sup>41</sup> In addition, the Parties state that they agree with CAISO’s interpretation of section 3.2 of the First Amendment.

18. In response to CARE, the Parties argue that CARE’s arguments are without merit and thus can be disposed of under the first prong of the Commission’s *Trailblazer* analysis for contested settlements. The Parties note that CARE did not raise any issue of material fact or provide any supporting argument in opposing the First Amendment. The Parties further argue that, although CARE contends that it has appealed the 2004 Settlement Orders to the Ninth Circuit, CARE actually did not seek rehearing of the 2004 Settlement Rehearing Order and thus has no grounds for seeking appeal under section 313 of the FPA.<sup>42</sup> The Parties then assert that, even if CARE had a valid appeal, it would still provide no basis for the Commission to reject the First Amendment, noting that the Parties are not seeking action with respect to the 2004 Settlement Orders, and that the Commission retains jurisdiction over the 2004 Settlement Orders notwithstanding any valid appeals of the orders.

### **Commission Determination**

19. Consistent with the Commission’s precedent,<sup>43</sup> the Commission determines that CalPX and CAISO will be held harmless for actions taken to implement this Settlement.

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<sup>40</sup> *Id.* at 2.

<sup>41</sup> Joint Reply Comments at 3.

<sup>42</sup> *Id.* at 6-7 (citing 16 U.S.C. § 825l(a) (2012)). In addition, the Parties point out that, even if CARE was excused from the requirement to request rehearing, its “so-called” appeal of the orders was untimely under section 313(b) of the FPA, which requires parties to seek judicial review within 60 days of the date of the rehearing order. *Id.* at 8 (citing 16 U.S.C. § 825l(b) (2012)).

<sup>43</sup> See, e.g., *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 145 FERC ¶ 61,015, at P 25 (2013) (incorporating “hold harmless” language from earlier settlements); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 133

(continued...)

Accordingly, this order incorporates the “hold harmless” language set out above, with one modification. Specifically, as incorporated by this order, the language shall be read to apply to both CAISO and CalPX. We further find that CAISO’s interpretation of section 3.2 of the First Amendment, with which the Parties concur, is reasonable.

20. We reject CARE’s comments on the First Amendment. Under the Commission’s *Trailblazer* approach for considering contested settlements, we may approve a contested settlement under one or more of the following four approaches: (1) the Commission may make a decision on the merits of each contested issue; (2) the Commission may determine that the settlement provides an overall just and reasonable result; (3) the Commission may determine that the benefits of the settlement outweigh the nature of the objections, and the contesting parties’ interests are too attenuated; or (4) the Commission may determine that the contesting parties can be severed.<sup>44</sup> Here, we find that CARE’s argument lacks merit.

21. The Commission may decide the merits of a contested settlement if there is substantial evidence in the record or if there is no genuine issue of material fact.<sup>45</sup> CARE’s arguments raise no genuine issues of material fact with respect to the First Amendment. CARE’s sole argument is that the First Amendment is prejudicial to CARE’s right to seek judicial review of the 2004 Settlement. Indeed, CARE does not contest any specific aspect of the First Amendment itself.

22. Contrary to CARE’s argument that the First Amendment is prejudicial to its right to seek judicial review of the 2004 Settlement, the Parties correctly note that CARE failed to seek rehearing of the 2004 Settlement Order and, consequently, does not have a valid appeal upon which its rights could somehow be prejudiced.<sup>46</sup> Section 313(a) of the

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FERC ¶ 61,249, at P 17 (2010) (same); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 128 FERC ¶ 61,242, at P 19 (2009) (same); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 128 FERC ¶ 61,002, at P 17 (2009) (same); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 128 FERC ¶ 61,004, at P 21 (2009) (same); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 126 FERC ¶ 61,007, at P 38 (2009) (same).

<sup>44</sup> *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,342-44 (1998), *order on reh’g*, 87 FERC ¶ 61,110, *reh’g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

<sup>45</sup> See 18 C.F.R. § 385.602(h)(1)(i) (2013); *Trailblazer*, 85 FERC at 62,342.

<sup>46</sup> We note that the 2004 Settlement Rehearing Order also addressed requests for rehearing of similar settlements involving certain Dynegy entities and Duke Energy entities. CARE sought rehearing of only the settlement involving Dynegy.

FPA is clear that an aggrieved party may seek rehearing of an order within 30 days of the date of the issuance of that order.<sup>47</sup> Similarly, section 313(b) of the FPA requires that a party seeking judicial review of Commission orders file a petition for review of those orders within 60 days of the date of the order on rehearing.<sup>48</sup> Thus, we find that CARE did not have a valid appeal because it did not seek rehearing of the 2004 Settlement Order. Moreover, CARE does not explain, even assuming that it did have such a valid appeal, how the First Amendment prejudices its right to seek judicial review of the 2004 Settlement. CARE provides only a general statement to that effect without pointing to any provision of the First Amendment that purportedly causes such prejudice. Such a bare statement without any points of fact or law to support it is without merit. Accordingly, we reject CARE's argument in its entirety as meritless and dispose of it under *Trailblazer's* first prong.

23. Finally, we note that the Commission has long encouraged the settlement of disputes in general and in these proceedings in particular. We find that the First Amendment will help resolve certain longstanding issues between the California utilities and Williams. For these reasons, we find that the First Amendment is just and reasonable and we therefore approve it.

The Commission orders:

The First Amendment is hereby approved, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>47</sup> 16 U.S.C. § 825l(a) (2012). The courts have recognized that the time period within which a party may file an application for rehearing of a Commission order is statutorily established at 30 days by section 313(a) of the FPA and that the Commission has no discretion to extend that deadline. *See, e.g., City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985); *Boston Gas Co. v. FERC*, 575 F.2d 975, 977-79 (1<sup>st</sup> Cir. 1978).

<sup>48</sup> 16 U.S.C. § 825l(b) (2012).