

**ORAL ARGUMENT HAS NOT BEEN SCHEDULED**

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

No. 13-1155

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**LOUISIANA PUBLIC SERVICE COMMISSION,  
*Petitioner,***

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.***

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

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**OCTOBER 15, 2013  
FINAL BRIEF: DECEMBER 20, 2013**

## CIRCUIT RULE 28(a)(1) CERTIFICATE

### A. Parties and *Amici*

The parties before this Court are identified in the brief of Petitioner Louisiana Public Service Commission.

### B. Rulings Under Review

1. *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 120 FERC ¶ 61,241 (2007), R.629, JA 1;
2. *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 124 FERC ¶ 61,275 (2008), R.663, JA 4;
3. *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,133 (2010), R.689, JA 15;
4. *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 135 FERC ¶ 61,218 (2011), R.719, JA 26; and
5. *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 142 FERC ¶ 61,211 (2013), R.741, JA 34.

### C. Related Cases

As more fully described in this brief (at pp. 9-11), this is the third case arising from Petitioner Louisiana Public Service Commission's 1995 complaint, before the Federal Energy Regulatory Commission ("Commission"), initiating this proceeding. In 1999, this Court remanded the matter for the Commission to further consider the complaint on its merits. *Louisiana Pub. Serv. Comm'n v. FERC*, No. 97-1661, 184 F.3d 892 (1999). Following the Commission's decision on remand, this Court again remanded the case for further consideration, after finding that the

Commission has statutory authority to order refunds in this case. *Louisiana Pub. Serv. Comm'n v. FERC*, 482 F.3d 510 (D.C. Cir. 2007). Entergy Services, Inc., along with the Arkansas Public Service Commission, appealed those orders to this Court (Case Nos. 08-1330, 08-1363), but the Commission sought, and this Court granted, a voluntary remand to further address the issues. Petitioner Louisiana Commission now appeals from all five Commission orders following this Court's 2007 decision.

/s/ Holly E. Cafer  
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October 15, 2013

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## GLOSSARY

Br.	Petitioner Louisiana’s opening brief
Commission or FERC	Federal Energy Regulatory Commission
Entergy	Entergy Corporation (corporate parent of the Operating Companies) or Entergy Services, Inc. (acting on behalf of Operating Companies)
Entergy System or System	Generation and transmission facilities owned and operated by Entergy Operating Companies in Arkansas, Louisiana, Mississippi, and Texas
Fifth Order	<i>Louisiana Pub. Serv. Comm’n v. Entergy Corp.</i> , 142 FERC ¶ 61,211 (2013), R.741, JA 34
Fourth Order	<i>Louisiana Pub. Serv. Comm’n v. Entergy Corp.</i> , 135 FERC ¶ 61,218 (2011), R.719, JA 26
FPA	Federal Power Act
JA	Joint Appendix
Louisiana or Louisiana Commission	Petitioner Louisiana Public Service Commission
<i>Louisiana 2007</i>	<i>Louisiana Public Service Commission v. FERC</i> , 482 F.3d 510 (D.C. Cir. 2007)
<i>Louisiana 2008</i>	<i>Louisiana Public Service Commission v. FERC</i> , 522 F.3d 378 (D.C. Cir. 2008)
Operating Company/ies	Individually or collectively, Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Gulf States Louisiana, LLC and Entergy Texas, Inc. (which, prior to 2008, operated as a single entity, Entergy Gulf States, Inc.)
P	Denotes a paragraph number in a Commission order
R.	Indicates an item in the certified index to the record
Remand Order	<i>Louisiana Pub. Serv. Comm’n v. Entergy Corp.</i> , 120 FERC ¶ 61,241 (2007), R.629, JA 1

Second Order	<i>Louisiana Pub. Serv. Comm'n v. Entergy Corp.</i> , 124 FERC ¶ 61,275 (2008), R.663, JA 4
System Agreement	A FERC-jurisdictional tariff that acts as an interconnection and pooling agreement for the Entergy System and provides for the joint planning, construction, and operation of new generating capacity
Third Order	<i>Louisiana Pub. Serv. Comm'n v. Entergy Corp.</i> , 132 FERC ¶ 61,133 (2010), R.689, JA 15
Voluntary Remand Order	<i>Louisiana Pub. Serv. Comm'n v. Entergy Corp.</i> , 129 FERC ¶ 61,237 (2009), R.674

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

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**STATEMENT OF THE ISSUE**

In *Louisiana Public Service Commission v. FERC*, 482 F.3d 510 (D.C. Cir. 2007) (“*Louisiana 2007*”), this Court found that the Federal Energy Regulatory Commission (“FERC” or “Commission”) may, consistent with its statutory authority under Federal Power Act section 206, 16 U.S.C. § 824e, order refunds in this case involving allocation of certain costs among a holding company’s subsidiary operating companies. Following this Court’s remand, the Commission twice solicited additional briefing and ultimately declined to require refunds. The question presented for this Court’s review is:

Whether the Commission adequately explained its reliance on agency precedent and policy and underlying equitable factors when exercising its remedial discretion to deny refunds where the holding company system itself did not over-recover costs or otherwise violate the rate on file with the Commission.

### **STATEMENT REGARDING JURISDICTION**

Petitioner invokes this Court’s jurisdiction under section 313(b) of the Federal Power Act, 16 U.S.C. § 825l(b).

### **STATUTORY AND REGULATORY PROVISIONS**

The pertinent statutes and regulations are contained in the Addendum.

### **INTRODUCTION**

This case comes before this Court for the third time. With Petitioner Louisiana Public Service Commission (“Louisiana” or “Louisiana Commission”) having prevailed on the merits on its 1995 complaint, assuring prospective relief, the only issue remaining is whether the Commission appropriately declined to issue refunds for the 15-month period authorized here by the Federal Power Act. The Commission and the parties agree that there is no absolute right to such refunds. The record of this case demonstrates that the Commission carefully considered whether to grant refunds in light of long-standing precedent applicable to this case and properly exercised its remedial discretion to deny them.

This case arises from the Louisiana Commission’s 1995 complaint seeking to exclude certain load from the allocation of fixed capacity costs among Entergy’s

subsidiaries under the Entergy System Agreement. Following direction from this Court in 1999 to further consider Louisiana's complaint, *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999), the Commission granted the complaint, but phased-in the change in cost allocation, and held that it lacked the statutory authority to order refunds. In 2007, this Court required FERC to eliminate the phase-in, and held that the Federal Power Act did not preclude refunds here. *Louisiana 2007*, 482 F.3d 510.

On remand, the Commission eliminated the phase-in, and at first directed Entergy to implement refunds among its subsidiaries, explaining that the Court, in *Louisiana 2007*, had found unpersuasive the reasons the Commission offered there in support of denying refunds. *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 120 FERC ¶ 61,241 (2007) (Remand Order), R.629, JA 1, *reh'g denied*, 124 FERC ¶ 61,275, P 28 (2008) (Second Order), R.663, JA 4. Entergy, along with the Arkansas Public Service Commission, appealed these decisions to this Court (Case Nos. 08-1330, 08-1363), and the Commission sought a voluntary remand to further address the issues. *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 129 FERC ¶ 61,237 (2009) (Voluntary Remand Order), R.674. Acting on voluntary remand, the Commission solicited additional argument from the parties on the refund issue, and subsequently affirmed, in greater detail, its decision to grant

refunds. *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 132 FERC ¶ 61,133 (2010) (Third Order), R.689, JA 15.

On petitions for agency rehearing, however, the Commission was presented with persuasive reasons to deny refunds, based on long-standing precedent and policy. Facing a likelihood of appeal regardless of the outcome in the case, the Commission found no basis to distinguish precedent supporting denial of refunds, and ultimately determined that “while [it has] authority to grant refunds in this case, the better course is to invoke [its] equitable discretion to deny them.”

*Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 135 FERC ¶ 61,218 (2011) (Fourth Order), R.719, JA 26, *reh'g denied*, 142 FERC ¶ 61,211 (2013) (Fifth Order), R.741, JA 34. Louisiana Public Service Commission once again appeals to this Court.

## STATEMENT OF THE FACTS

### I. STATUTORY AND REGULATORY FRAMEWORK

Section 201(b) of the Federal Power Act (“FPA”) confers upon the Commission jurisdiction over all rates, terms and conditions of electric transmission service and sales of electric energy at wholesale by public utilities in interstate commerce. 16 U.S.C. § 824(b); *see generally New York v. FERC*, 535 U.S. 1 (2002). Under section 205 of the Act, 16 U.S.C. §§ 824d(a)-(b), the

Commission must assure that jurisdictional rates and services are just and reasonable and not unduly discriminatory.

Section 206 of the FPA, 16 U.S.C. § 824e, authorizes the Commission to investigate whether existing rates and practices remain appropriate. Under this section, the Commission may act either on its own initiative or on a third-party complaint to determine whether an existing rate or practice is “unjust, unreasonable, unduly discriminatory or preferential.” FPA § 206(a), 16 U.S.C. § 824e(a). A third-party complainant bears a dual burden: it first must show that the existing rate or practice is unjust, unreasonable, unduly discriminatory or preferential, and then must demonstrate that its own proposal is a just and reasonable replacement. *See Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (affirming FERC’s denial of complaint challenging the lawfulness of New England’s wholesale electricity market).

The Commission’s authority to remedy an unlawful rate under FPA section 206, 16 U.S.C. § 824e(a), is mainly prospective. Upon making necessary findings, the Commission can determine a revised rate “to be thereafter observed and in force.” 16 U.S.C. § 824e(a). As revised by the Regulatory Fairness Act of 1988, Pub. L. No. 100-473, 102 Stat. 2299 (1988), however, FPA section 206 allows the Commission to provide for refunds for the 15-month period following a refund effective date established under FPA section 206(b) upon the filing of a complaint.

16 U.S.C. § 824e(b). FPA section 206(c), which applies in the case of a holding company (like Entergy) with “two or more electric utility companies,” permits the Commission to authorize refunds only “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.” 16 U.S.C. § 824e(c).

## **II. BACKGROUND**

### **A. The Entergy System and System Agreement**

The instant case stands against a backdrop of several decades of litigation over the allocation of costs under the Entergy System Agreement (“System Agreement”). This Court most recently detailed this unusual arrangement in *Louisiana Pub. Serv. Comm’n v. FERC*, 522 F.3d 378, 383-85 (D.C. Cir. 2008) (“*Louisiana 2008*”) (affirming FERC’s bandwidth remedy to ensure roughly equal production costs among the Operating Companies). The Entergy System comprises six Operating Companies selling electricity in Arkansas, Louisiana, Mississippi, and Texas.<sup>1</sup> *See Louisiana 2008*, 522 F.3d at 383; *see also Council of*

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<sup>1</sup> Those Operating Companies are: Entergy Arkansas, Inc.; Entergy Mississippi, Inc.; Entergy Gulf States Louisiana, LLC; Entergy Louisiana, LLC; Entergy New Orleans, Inc.; and Entergy Texas, Inc. Previously, an Operating Company named Entergy Gulf States, Inc. sold electricity in both Louisiana and Texas. In 2007, that company separated into Entergy Gulf States Louisiana and Entergy Texas. *See Entergy Gulf States, Inc.*, 120 FERC ¶ 61,079 (2007) (authorizing separation plan).

*the City of New Orleans v. FERC*, 692 F.3d 172 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 2382 (2013) (addressing future departure of Arkansas and Mississippi Operating Companies from System). The Operating Companies are owned by a multistate holding company, Entergy Corporation.<sup>2</sup> *Id.* (What is now the Entergy System originated under Middle South Utilities, Inc., which owned most of the Operating Companies’ predecessors.) Transactions among the Entergy Operating Companies are governed by the System Agreement. *See Mississippi Indus. v. FERC*, 808 F.2d 1525, 1529 (D.C. Cir.), *vacated and remanded in part*, 822 F.2d 1103 (D.C. Cir. 1987); *Louisiana 2008*, 522 F.3d at 383.

The Entergy System is highly integrated, with the Operating Companies’ transmission and generation facilities operated as a single electric system. *See Louisiana 2008*, 522 F.3d at 383; *Louisiana Pub. Serv. Comm’n v. Entergy Servs., Inc.*, 113 FERC ¶ 61,282 at P 8 (2005), *aff’d in part by Louisiana 2008*; *see generally Louisiana 2008*, 522 F.3d at 394 (“the operating companies are collaborators in the Entergy System functioning for their *mutual* benefit”).

Because the Entergy System spans four states and involves a number of retail regulators and other interested parties — and, in particular, because the

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<sup>2</sup> For purposes of this Brief, “Entergy” refers either to Entergy Corporation, the corporate parent of the Entergy Operating Companies and their affiliates, or to Entergy Services, Inc., a service affiliate that has acted on behalf of the Operating Companies in various FERC proceedings.

allocation of costs and resources among the Operating Companies affects retail rates in several jurisdictions — that arrangement has given rise to many federal appeals over the past three decades. *See, e.g., Middle S. Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984) (filing of 1982 System Agreement); *Mississippi Indus.*, 808 F.2d 1525 (allocation of nuclear investment costs); *City of New Orleans v. FERC*, 875 F.2d 903 (D.C. Cir. 1989) (same, after remand); *City of New Orleans v. FERC*, 67 F.3d 947 (D.C. Cir. 1995) (costs of future replacement capacity after spin-off of generation plants); *Louisiana Pub. Serv. Comm’n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999) (determination of Operating Companies’ available capability for purposes of cost equalization); *Louisiana 2008*, 522 F.3d 378 (reallocation of production costs through bandwidth remedy); *Louisiana Pub. Serv. Comm’n v. FERC*, 551 F.3d 1042 (D.C. Cir. 2008) (allocation of generation resources); *Louisiana Pub. Serv. Comm’n v. FERC*, 341 F. App’x 649 (D.C. Cir. July 6, 2009) (methodology for bandwidth calculations). Additional cases are currently pending before this Court, in *Louisiana Pub. Serv. Comm’n v. FERC*, Nos. 12-1282, *et al.* (D.C. Cir. filed July 5, 2012) (first annual bandwidth proceeding), and the Fifth Circuit Court of Appeals, *Louisiana Pub. Serv. Comm’n v. FERC*, No. 13-60140 (5th Cir. filed Mar. 4, 2013) (implementation of Entergy bandwidth formula). The multistate nature of the Entergy System also has brought cost allocation disputes to the U.S. Supreme Court. *See Entergy La. v. La. Pub. Serv. Comm’n*, 539 U.S. 39

(2003) (preemption of state regulatory jurisdiction as to cost allocation);

*Mississippi Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988) (same).

The System Agreement consists of several Service Schedules, which allocate costs among the Operating Companies. At issue in this case are the cost allocations for Service Schedule MSS-1 (Reserve Equalization) and MSS-5 (Distribution of Revenue from Sales Made for the Joint Account of all Companies). In general, these schedules allocate costs among the Operating Companies according to their responsibility ratio. The responsibility ratio is an Operating Company's load placed on the system at the time of system peak, as a proportion of the total load responsibility for the combined Operating Companies.

#### **B. The Cost Allocation Dispute**

In 1995, the Louisiana Commission and the Council of the City of New Orleans filed a complaint with FERC, under FPA section 206, 16 U.S.C. § 824e(a), asserting that the formula for determining load responsibility in the System Agreement was unjust and unreasonable because it included interruptible load, in addition to firm load, in the calculation of peak load responsibility. The Commission dismissed the complaint, but on review this Court directed the Commission to reconsider its decision in light of Commission precedent. *See Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 76 FERC ¶ 61,168, (1996),

*reh'g denied*, 80 FERC ¶ 61,282 (1997), *remanded*, *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999).

On remand, the Commission granted Louisiana's complaint on the merits, holding that it was unjust and unreasonable for Entergy to include interruptible load in its calculation of peak load responsibility, and directed Entergy to phase the change in over a twelve-month period. *Louisiana Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 106 FERC ¶ 61,228 (2004), *on reh'g*, 111 FERC ¶ 61,080 (2005). The Commission also held that it lacked authority to order refunds in cases where the refund would be funded from a reallocation of costs among the Operating Companies. 111 FERC ¶ 61,080 at P 21. Louisiana again appealed to this Court.

In 2007, this Court remanded this case back to the Commission for further proceedings. *Louisiana 2007*, 482 F.3d 510. As to the exclusion of interruptible load from the calculation of peak load responsibility, the Court directed the Commission to require that the change be made immediately, and not phased-in over twelve months. *Id.* at 518. As to refunds, the Court found that section 206(c) of the FPA, 16 U.S.C. § 824e(c), as amended in 1988 by the Regulatory Fairness Act, Pub. L. No. 100-473 § 2, 102 Stat. at 2299-300, does not bar refunds in these circumstances. 482 F.3d at 520. Specifically, the Court found that "all parties were on notice as of the filing of Louisiana's complaint in 1995 that Entergy's calculation of peak load responsibility might be held unjust or unreasonable." *Id.*

at 520. Surcharges therefore would not violate the filed rate doctrine, and the Court questioned the Commission's finding that such surcharges may not be recovered through retail rates. *Id.* (citing *Mississippi Power & Light*, 487 U.S. at 369-72).

### **III. THE COMMISSION'S PROCEEDINGS ON REVIEW**

Now on review before this Court are five Commission orders acting on remand from *Louisiana 2007*. In the Remand Order, the Commission first carried out the Court's mandate by requiring Entergy to remove all interruptible load from the cost allocation at issue, effective April 1, 2004. Remand Order P 7, JA 2. Second, acting pursuant to the Court's finding that the Commission "may order refunds," the Commission ordered Entergy to make refunds among its Operating Companies reflecting the immediate removal of interruptible load from the cost allocation calculation, for the 15-month refund period of May 1995 through August 1996. *Id.* PP 2, 8, JA 1, 2; *see also* Third Order P 23 n.46 (describing refund period), JA 23. In support, the Commission adopted the findings of the administrative law judge in earlier proceedings as providing a rational basis for refunds. *Id.* P 8, JA 2. (The Commission had previously reversed the judge's call for refunds based upon its view that FPA section 206(c) bars refunds here.)

Entergy, the Arkansas and Mississippi Public Service Commissions, and the Council of the City of New Orleans sought agency rehearing, challenging the

Commission's authority for ordering refunds under FPA section 206(c) and the adequacy of the Commission's support for such refunds here. Second Order P 13, JA 6. The Commission denied rehearing, explaining that while *Louisiana 2007* did not compel refunds, the Court's opinion "eliminated the factors that . . . had led the Commission to conclude that refunds were unwarranted." *Id.* P 28, JA 8. The Commission, in particular, relied upon the Court's finding that the filed rate doctrine does not bar refunds here, where the Court found that "all parties were on notice that the rates at issue might be unjust and unreasonable." *Id.* P 29, JA 9.

The Arkansas Commission and Entergy petitioned this Court for review of the Remand Order and Second Order (Case Nos. 08-1330, 08-1363). Upon consideration of petitioners' opening briefs, the Commission sought a voluntary remand to more fully consider the parties' arguments. This Court granted the Commission's motion on June 24, 2009. On voluntary remand, the Commission set two issues for a paper hearing: (1) whether FPA section 206(c) permits refunds here; and (2) whether, if refunds are legally permissible, they are equitable in this case as a matter of discretion. Voluntary Remand Order P 5. In particular, the Commission explained that its "'general policy' is one of 'granting full refunds,'" but directed the parties to address "whether there are special circumstances militating against applying this general policy here." *Id.* P 15.

Upon consideration of the parties' additional briefing, the Commission found that in the specific circumstances of this case, FPA section 206(c) does not bar refunds, and refunds would be appropriate. Third Order P 3, JA 15. Having found the prior rate unlawful, the Commission found that Arkansas, Mississippi and Entergy failed to present any reason to prevent the Commission from "applying its general policy and ordering refunds in the face of rates found to be unjust and unreasonable." *Id.* P 31 n.63, JA 25; *see also id.* ("our general policy provides for refunds and so we have ordered refunds; no further and more specific justification is required"). In support, the Commission explained, in response to Arkansas and Mississippi, that "this is not a rate design case where customer usage patterns are relevant," but rather it "involves a misallocation of costs." *Id.* P 32, JA 20.

The Arkansas and Mississippi Commissions, together, and Entergy, individually, once again sought rehearing, and this time their arguments prevailed before the Commission, which ultimately concluded that while it "has the authority to grant refunds in this case, the better course is to invoke our equitable discretion to deny them." Fourth Order P 2, JA 26. Arkansas, Mississippi and Entergy's arguments on rehearing squarely aimed at the Commission's distinction, in the Third Order (at P 32, JA 20), between rate design and cost allocation cases. Responding to those arguments for the first time in this lengthy proceeding, the

Commission “disavow[ed] the distinction [it] attempted to draw . . . between the treatment of refunds in rate design and cost allocation cases.” Fourth Order P 23, JA 30. Following long-standing precedent, the Commission explained that “in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds.” *Id.* (citing cases). (Entergy implemented the refunds among the Operating Companies on October 15, 2008, and, in compliance with the Fourth Order, reversed them on July 5, 2011. Fifth Order PP 7, 12, JA 35, 36.)

The Louisiana Commission sought rehearing, and on October 6, 2011, the Commission established a paper hearing, once again soliciting additional briefing on the issue of whether Commission precedent supports refunds here. *Louisiana Pub. Serv. Comm’n v. Entergy Corp.*, 137 FERC ¶ 61,018 (2011) (ordering a paper hearing), R.728, JA 255. Entergy and Arkansas filed briefs opposing refunds and Louisiana filed a reply brief supporting refunds. Fifth Order P 14, JA 36.

Upon consideration of the parties’ briefs on this last remaining issue, the Commission, on March 21, 2013, denied Louisiana’s request for rehearing, in the final order now on review before this Court. Fifth Order P 3, JA 34. The Commission explained that its “general policy to award refunds [applies] in cases that involve cost over-recovery, which is not the case here.” *Id.* P 65, JA 47. The

Commission again found “it appropriate under the circumstances presented in the instant proceeding to follow our general rule that new cost allocations or rate designs that do not reflect over-recoveries or other special circumstances will run prospectively . . . and that refunds will not lie.” *Id.* P 51, JA 44.

### **SUMMARY OF ARGUMENT**

In this case, the Commission ultimately did nothing more than rely on long-standing precedent to inform the exercise of its remedial discretion in determining whether refunds are warranted under the Federal Power Act. Yes, the Commission arrived at the correct reasoning relatively late in the proceeding, but the Louisiana Commission’s characterization of the Commission’s decision as an absolute “new no-refund rule” is inaccurate. The Commission examined its precedent and policies concerning refunds in detail and determined that this case most closely aligns with those reflecting its general policy to decline refunds in cost allocation cases where there is no over-recovery or violation of the filed rate.

The Louisiana Commission acknowledges the Commission’s broad remedial discretion, but is unable to come to terms with the fact that the Commission is not obligated to order refunds in every case. The orders on review rely on two general rules concerning refunds. One typically grants refunds in a classic case involving an over-recovery or a violation of the filed rate. The second typically denies refunds in cases involving a change in rate design or cost allocation, where there is

no over-recovery or violation of the filed rate. While Louisiana is understandably disappointed, the Commission ultimately found, following supplemental briefing and confronting the likelihood of an appeal of any outcome, no persuasive reason to avoid application of the second rule. Looking to the Entergy System as a whole, as both the Commission and the Court have repeatedly done, the Commission found no over-recovery justifying refunds. Nor did Entergy violate the filed rate. Thus, the second rule applies.

Equitable considerations underlie the general rule against refunds in cost allocation cases, and here the Commission adequately applied those considerations as it has in prior cases involving holding companies in similar circumstances. If the Commission orders refunds, Entergy and the Operating Companies cannot, as this Court has acknowledged, go back in time to change their operational decisions. In crafting remedies, this Court has long held that the Commission's discretion is substantial, and application of that standard here warrants deference to the Commission's reasoned decision.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

The Court “will set aside FERC’s remedial decision only if it constitutes an abuse of discretion.” *Louisiana Pub. Serv. Comm’n*, 174 F.3d at 225 (affirming Commission orders denying refunds despite violation of filed rate, based upon

equitable factors). “In general, [this Court] defer[s] to FERC’s decisions in remedial matters, respecting that the difficult problem of balancing competing equities and interests has been given by Congress to the FERC with full knowledge that this judgment requires a great deal of discretion.” *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998) (internal quotation marks omitted); *see also, e.g., Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044-45 (D.C. Cir. 2000) (“the Commission ordinarily has remedial discretion, even in the face of an undoubted statutory violation”). This Court affords “FERC great deference in reviewing its selection of a remedy, for ‘the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions.’” *Louisiana 2008*, 522 F.3d at 393 (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)); *see also Towns of Concord v. FERC*, 955 F.2d 67, 75-76 (D.C. Cir. 1992) (affirming FERC’s exercise of discretion not to require refunds despite violation of the filed rate; noting that “the general rule is that agencies should order restitution only when ‘money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it’”) (quoting *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301, 309 (1935)).

The Commission’s factual findings, if supported by substantial evidence, are conclusive. *See* 16 U.S.C. § 825l(b). Further, the Commission’s ratemaking

decisions are entitled to “great deference” as “the statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition.”

*Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008).

## **II. THE COMMISSION APPROPRIATELY EXERCISED ITS DISCRETION IN DENYING REFUNDS**

### **A. The Commission Followed Applicable Precedent and Policy to Make Cost Allocation Changes Prospective Only in the Absence of Over-Recovery**

In this case, two general, long-standing lines of precedent guide the Commission’s exercise of its remedial discretion in determining whether refunds are warranted. The first, more familiar standard calls for refunds of unjust or unreasonable rates and charges where there is an over-recovery or a violation of the filed rate. *See* Fifth Order P 65, JA 47. The second guideline, which applies to a smaller subset of cases, generally declines refunds in cases involving a rate design or cost allocation change, as long as there is no over-recovery or other special circumstance. *Id.* P 51, JA 44. This Court has, from time to time, addressed and endorsed both policies. *See, e.g., Consol. Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003) (noting that FERC “has a general policy of granting full refunds for overcharges”) (citation omitted); *Second Taxing District of City of Norwalk v. FERC*, 683 F.2d 477, 490 (D.C. Cir. 1982) (affirming FERC order implementing rate design changes prospectively); *Cities of Batavia v. FERC*, 672 F.2d 64, 85 (D.C. Cir. 1982) (same). Louisiana understandably would

prefer that the Commission apply the first rule, but the Commission found no basis to distinguish the second rule applicable to cases, like this one, involving cost allocation.

The Louisiana Commission does not dispute that this is a cost allocation case. It instead claims that here, in a case under FPA section 206, 16 U.S.C. § 824e, in the holding company context, the Commission should apply the general rule in favor of refunds applicable in cases involving over-recovery or a violation of the filed rate. The Commission reasonably – albeit belatedly – decided otherwise.

**1. The Commission’s general rule against refunds in cost allocation cases appropriately applies in the holding company context**

The Louisiana Commission errs in claiming that the Commission’s policy may not be applied in the context of cases involving holding companies. Br. 36-38. Louisiana has failed adequately to distinguish (Br. 58-59) other holding company cases in which the Commission has applied this very policy and presents no reason why the Commission should deviate from its precedent of treating the Entergy System “effectively as a single utility, with the operating companies as its customer groups.” Fifth Order P 66, JA 47.

The Commission acknowledges that it has arrived relatively late at this realization. *See* Fifth Order P 75 (noting “that our policy in this area was still

under consideration and evolving, as evidence by the fact that we sought further input from the parties”), JA 49. While “[t]he cost allocation/rate design versus over-recovery distinction . . . has acquired greater prominence in recent decisions . . . it is not novel.” *Id.* P 56, JA 45. As the Commission has observed, this Court “has expressly upheld the Commission’s determination to implement changes in rate design prospectively and not to order refunds.” *Union Elec. Co.*, 64 FERC ¶ 61,355, at 63,468 (1993) (citing 1982 *Second Taxing District* and *Cities of Batavia* court decisions). In *Union Electric*, a leading case in the development of this general policy that Louisiana fails to acknowledge on brief, the Commission specifically explained that refunds were inappropriate because “the charges at issue did not affect the costs to serve customers, but rather the sharing of costs among the customers, and Union had not charged rates that recovered in excess of its revenue requirement.” Fifth Order P 56, JA 45.

In the same year, 1993, the Commission applied this same policy in the holding company context. Fifth Order P 58 (citing *Southern Co. Servs., Inc.*, 64 FERC ¶ 61,075 (1992), *on reh’g*, 64 FERC ¶ 61,033 (1993)), JA 45. In *Southern*, as here, there was “no issue . . . as to the legitimacy of these . . . expenses or as to the appropriate total level of . . . expenses; the sole issue is their classification, and thus their apportionment among the operating companies.” 64 FERC ¶ 61,033, at 61,332. In denying refunds in *Southern*, the Commission explained that “the

amounts involved do not, overall, represent excess revenues to the Southern System.” Fifth Order P 59 (quoting *Southern*, 64 FERC ¶ 61,033, at 61,332), JA 46. More recently, in a 2006 case involving another holding company, American Electric Power, the Commission followed the same approach, ordering a prospective change in cost allocation among subsidiaries, but declining to order refunds among the subsidiaries. Fifth Order P 60 (citing *American Elec. Power, Inc.*, 114 FERC ¶ 61,288 (2006)), JA 46.

The Commission was presented with no persuasive reason to diverge from that approach in this case. *Id.* P 61, JA 46. Here, “[t]here is no dispute as to the appropriate level of production capacity costs and revenues subject to the demand allocator at issue . . . only their apportionment among the Operating Companies.” *Id.* Facing the same circumstances in *Southern* and *American Electric Power*, the Commission “treated coordinated holding company systems (like that of Entergy) effectively as a single utility, with the operating companies as its customer groups.” *Id.* P 66, JA 47.

The Commission reasonably followed this precedent in relying upon the absence of an over-recovery by the Entergy System as a whole. Rather, it found that this case involves only a change in the allocation of the costs of the System among the individual Operating Companies, not a change in the level of the System costs being allocated. The courts and the Commission have long

recognized the coordinated nature of Entergy’s integrated operating system. *See* Fifth Order P 66 (citing *Mississippi Indus.*, 808 F.2d 1525), JA 47. The System Agreement governs Commission-jurisdictional wholesale rates among the Operating Companies, and “excessive recoveries may logically accrue to an individual Operating Company or the system as a whole, making it a legitimate target of Commission scrutiny.” Fifth Order P 66, JA 47. Indeed, the Louisiana Commission, where convenient, has supported reliance on that characterization of the Entergy System. *See Louisiana Pub. Serv. Comm’n*, 174 F.3d at 226 (“The only incentives that matter, petitioners [in support of refunds] submit, are those faced by the System as a whole.”). Further, the Commission has treated multi-utility coordinated regional markets similarly, and Louisiana “presented no reason why – in this context – a multi-utility system like Entergy’s should be treated differently than multi-utility coordinated” regional markets. Fifth Order P 66, JA 47. Moreover, this Court has previously endorsed the Commission’s reliance on the nature of the System in crafting a remedy. *Louisiana 2008*, 522 F.3d at 394 (affirming FERC’s choice of remedy “because the operating companies are collaborators in the Entergy System functioning for their mutual benefit” and where another “result would be inconsistent with the nature of the System”).

Contrary to Louisiana’s claims, the Commission has not proclaimed a general rule to deny refunds in all cost allocation cases, or all such cases involving

holding companies. Br. 43. As explained above, the Commission’s precedent supports denying refunds in cost allocation only where there is no over-recovery, no violation of the filed rate, and no “other special circumstances.” Fifth Order P 51, JA 44. While the Commission relies upon this precedent as a guide, it has also emphasized that the particular facts of a case will ultimately govern each refund decision. *Id.* (the Commission “will continue to allow for . . . discretion in a particular case to determine whether refunds are appropriate”), JA 44. Here, the Commission found no over-recovery, no violation of the filed rate and no other special circumstances, and accordingly declined to require refunds.

**2. The Commission appropriately applies the general rule against refunds in cost allocation cases regardless of whether it acts under Federal Power Act section 205 or 206**

Louisiana fails to demonstrate that the Commission’s general rule to deny refunds in cost allocation cases of this type should not apply to the Commission’s Federal Power Act section 206 review of an existing rate. *See* Fifth Order PP 67-68, JA 47-48. To be sure, the Commission has applied the policy “more often in section 205 cases” involving changed rates. *Id.* P 67, JA 47. After all, “the vast majority of cases filed with the Commission are section 205 cases.” *Id.* But Louisiana offers no persuasive reason “why the policy should differ as between section 205 and section 206 cases.” *Id.* P 68, JA 48. In the Commission’s view, “the analysis as to whether to order refunds should be the same.” *Id.*

Indeed, the Commission referenced three recent FPA section 206 cost allocation and rate design cases where the Commission denied refunds in reliance upon the same policy applied here. *See* Fifth Order P 67, JA 47. Those three cases are: (1) *Occidental Chem. Corp.*, 110 FERC ¶ 61,378 (2005) (acting on voluntary remand to deny refunds in light of this policy); (2) *Ameren Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,121, P 157 (2009) (denying refunds, on rehearing, where ordering refunds would require re-running the market, refunds would necessarily be inaccurate, and computation would be complex and prompt “needless litigation”); and (3) *Black Oak Energy, L.L.C.*, 136 FERC ¶ 61,040 (2011) (following *Occidental* and *Ameren*, disallowing refunds where total amount of credits remained unchanged, and refunds would require multi-utility coordinated system to suffer a loss of revenue in the absence of surcharges), *reh’g denied*, 139 FERC ¶ 61,111 (2012), *aff’d in part and remanded in part*, *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (remanding for FERC to address whether already paid refunds should be recouped under this policy, without questioning whether refunds should be denied under this policy). In each case, the Commission relied on “essentially the same rationale employed here,” Fifth Order P 67, JA 47, although the facts of the cases varied and the Commission highlighted different equitable considerations in each.

In this regard, Louisiana errs in suggesting that the Commission may not decline refunds in the absence of a finding that refunds would result in an undercollection. Br. 52. The Commission acknowledged here that refunds would not result in an undercollection, Fifth Order P 63, JA 46, but also emphasized that it “will continue to allow for . . . discretion in a particular case to determine whether refunds are appropriate.” Fifth Order P 51, JA 44; *see Southern*, 64 FERC ¶ 61,033 (denying refunds without potential for undercollection); *American Electric Power*, 114 FERC ¶ 61, 288 (same). The prior FPA section 206 cases referenced by the Commission may have involved the potential for undercollection, but that was not the sole factor involved in any of those cases. And Louisiana offers no argument that precludes the Commission, particularly in light of its broad discretion in crafting remedies, from extending application of the policy to FPA section 206 cases that do not involve a potential for undercollection.

**3. Louisiana errs in relying on cases involving an over-recovery or a violation of the filed rate**

Louisiana fails to acknowledge that the Commission’s general policy in favor of refunds is limited to cases that involve cost over-recovery or a violation of the filed rate. *See* Fifth Order PP 65, 69, JA 47, 48. Several of the cases on which Louisiana significantly relies reflect just this standard: the Commission generally grants refunds in cases of over-recovery or a violation of the filed rate. *Nantahala Power & Light Co*, 19 FERC ¶ 61,152, at 61,280 (1982), *aff’d*,

*Nantahala Power & Light Co. v. FERC*, 727 F.2d 1342, 1350 (4th Cir. 1984), for instance, is a complex over-recovery case, where the utility “had charged its customers an excessive amount under its filed purchase power adjustment clause.” Fifth Order P 65 (citing *Nantahala*, 727 F.2d at 1349-50), JA 47. Moreover, here the Commission expressly relied upon its consistent treatment of the Entergy System as a coordinated holding company system, *see, e.g.*, Fifth Order P 66, JA 47, while the Commission in *Nantahala* could not find that the two subsidiary companies “operate as an integrated system.” 19 FERC ¶ 61,152, at 61,276-77.

In particular, the Commission’s orders on review are generally consistent with its treatment of the Entergy System in other cases. In the proceedings concerning Entergy’s annual filing to implement the bandwidth formula remedy in place under the System Agreement, the Commission has ordered refunds where necessary to adhere to the filed rate. *See* Fifth Order P 73 (citing *Entergy Servs., Inc.*, 130 FERC ¶ 61,170, P 20 (2010)), JA 48. The Commission properly rejected Louisiana’s reliance on *Middle South Servs., Inc.*, 16 FERC ¶ 61,101 (1981), on the basis that the order granting refunds there contains no statement to explain the Commission’s reasoning. Fifth Order P 70, JA 48. While the Commission has granted refunds in certain recent FPA section 206 cases involving Entergy, those cases were pending while the Commission clarified its policy here after seeking

and receiving additional argument from the parties on this difficult matter. *Id.* P 75, JA 49. The Commission’s prior decisions in *Southern* and *American Electric Power* demonstrate that the Commission is not treating the Entergy System differently based upon its holding company status.

**B. The Commission Adequately Addressed The Relevant Equitable Factors**

The five substantive Commission orders issued in this proceeding since this Court’s decision in *Louisiana 2007* demonstrate that the Commission adequately considered and grappled with the relevant equitable considerations. *See Towns of Concord*, 95 F.2d at 75-76 (FERC must show that it considered and “struck a reasonable accommodation” among relevant factors) (quoting *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981)). The Commission acknowledged that the inclusion of interruptible load in calculating peak load led to an overcharge to Entergy Louisiana ratepayers, Third Order P 32, JA 20, and initially thought that this supported the need for refunds. After further consideration, however, the Commission realized that this case is properly characterized as a cost allocation case. Accordingly, the equitable factors underlying the Commission’s policy and precedent applying cost allocation changes prospectively in the absence of an over-recovery by the System as a whole ultimately prevailed.

Louisiana essentially advances the argument, Br. 29-33, that any unjust and unreasonable rate must be remedied, but this Court has repeatedly rejected such claims. *See, e.g., Towns of Concord*, 955 F.2d at 73 (holding that there is no right to refunds under the FPA); *cf.* Br. 28, 34 (citing *Exxon Co. U.S.A. v. FERC.*, 182 F.3d 30 (D.C. Cir. 1999) (noting a “strong equitable presumption in favor of retroactivity” where the agency commits legal error)). Indeed, in *Towns of Concord*, this Court “refused to constrain agency discretion by imposing a presumption in favor of refunds” notwithstanding a violation of the filed rate. 955 F.2d at 76; *see also id.* at 73-74 (distinguishing *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131-32 (1990), on which Louisiana chiefly relies, where a different statute constrained the agency’s discretion to remedy a violation of the filed rate). Contrary to Louisiana’s claims, *see, e.g.,* Br. 45, FPA section 206 remains a viable mechanism for relief, and indeed Louisiana received prospective relief from April 1, 2004 forward here, *see supra* p. 11, even if refunds are not granted in all cases.

In the Fifth Order, the Commission highlighted a variety of equitable factors that support its general rule declining refunds in these cases. Fifth Order P 55 & n.127, JA 45, 55. The potential for under-recovery is one such factor that the Commission has invoked in other cases, but the Commission acknowledged that factor is not present here. *Id.*; *see also id.* P 63, JA 46. The Commission

appropriately relied upon other factors, including the effect of re-running markets, the associated complications and costs, and the fact that both the ratepayers facing a surcharge and those facing a refund are not within the same “generation” of ratepayers. *Id.* P 55 n.127 (citing cases), JA 55; *see also* Entergy Request for Rehearing at 20-21 (describing equitable issues), R.692, JA 176-77. In this regard, Louisiana’s claim that the Court has restricted the Commission’s consideration to only detrimental reliance is inapposite here where the Commission has offered a justification based in sound precedent and equitable factors. *Public Serv. Co. of Colorado v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996) (requiring retroactive refunds upon a finding where doing otherwise “allows the producers to keep some unlawful overcharges without any justification at all”).

In addition, the Commission more specifically relied on the “independent consideration . . . that a different cost allocation would have resulted in a different decision by consumers or the utility had it been instituted at the time of the facts at issue, but it is simply too late to alter the result.” Fifth Order P 55, JA 45. Here, the Commission focused on the wholesale sales and operations actually governed by the System Agreement, implicating the operational decisions of the Operating Companies, as opposed to retail consumer decisions. As the Commission explained, “an equitable ground disfavoring refunds in this context is the fact that Entergy cannot review and revisit past decisions were we to order a refund.” *Id.*

P 63 & n.142, JA 46, 56. The Commission has relied upon this factor elsewhere, and in particular has applied it to the decisions of subsidiary operating companies in the holding company context. *Id.* (citing *Southern*, 64 FERC ¶ 61,033), JA 46.

In this regard, Louisiana's efforts to distinguish *Southern* fail. As here, in *Southern* the Commission at first granted refunds, and then reversed on rehearing in light of precedent making rate design and cost allocation decisions prospective only. *See* 64 FERC ¶ 61,033, at 61,332. As explained above, *supra* p. 20, both the instant case and *Southern* involved cost allocation among subsidiaries of a holding company, without an over-recovery. Here, the Commission appropriately invoked the explanation in *Southern* that "operational decisions made while the operating companies' proposed cost classification was in effect, and thus made in reliance on that classification, cannot be undone." Fifth Order P 63 (quoting *Southern*, 64 FERC at 61,332), JA 47. This Court affirmed the Commission's reliance upon similar reasoning in *Second Taxing Dist. of Norwalk*, 683 F.3d at 490. In the underlying orders affirmed there, FERC explained that "[a] rate design affects, to some degree, customers' consumption patterns. A change in that design by Commission order cannot affect that pattern retroactively since the customers' energy usage was based on the rate design in effect during the period." Fifth Order P 63 n.142 (quoting *Connecticut Light & Power, Co.*, 15 FERC ¶ 61,056, at 61,123 (1981)), JA 56.

Likewise here, it suffices to say that had the Entergy Operating Companies known that refunds would be owed, they may have made different operational decisions. Fifth Order P 55, JA 45; *see also id.* P 63 (citing cases relying on same principle), JA 46. Even should the Court take the view that Louisiana “cast[s] doubt on the strength of this factor,” under the applicable, deferential standard of review, the Commission’s reasoning still “passes muster.” *Louisiana Pub. Serv. Comm’n*, 174 F.3d at 230. The Commission need not itemize the possible operational decisions implicated by a change in cost allocation. The Louisiana Commission acknowledges that the System Agreement governs wholesale rates between the Operating Companies, Br. 42, and that explains the Commission’s focus on whether the Companies, as a group, collected the proper level of revenues and how the change in allocation affects the Companies.

\* \* \*

At bottom, the Commission provided the explanation that was lacking in earlier orders and that earned a remand. As to refunds, the Court in 2007 found that the Commission had failed to offer “even a hint of discretion being exercised” in earlier orders. *Louisiana 2007*, 482 F.3d at 520. That failure was fully rectified here, when the Commission explained the basis of its decision (no over-recovery, no tariff violation, no special circumstances deserving of a departure from standard practice) not to order refunds in cost allocation cases. *See Process Gas Consumers*

*Group v. FERC*, 292 F.3d 831, 840 (D.C. Cir. 2002) (agency’s task on remand is to respond to the court’s mandate – satisfied here by complying with the court’s instruction to explain itself better). Louisiana understandably is frustrated as to the course of events on remand – when it first won, and then lost, the refunds it was seeking. But the fact that the Commission’s ultimate decision was delayed, and ultimately rested on additional presentations from the parties in support of a different outcome, is hardly reason to withhold the deference that the Commission enjoys in making remedial decisions. *See, e.g., Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (very purpose of rehearing is to “enable the Commission to correct its own errors”).

## CONCLUSION

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

Respectfully submitted,

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December 20, 2013

**Louisiana Public Service Commission v. FERC Docket No. EL00-66, et al.  
D.C. Cir. No. 13-1155**

**CERTIFICATE OF COMPLIANCE**

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 7,399 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum.

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October 15, 2013

***ADDENDUM***  
***Statutes***

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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 condition 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 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 respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 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),<sup>1</sup> 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),

whenever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

(June 10, 1920, ch. 285, pt. II, §201, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 847; amended Pub. L. 95-617, title II, §204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102-486, title VII, §714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109-58, title XII, §§1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985.)

REFERENCES IN TEXT

The Rural Electrification Act of 1936, referred to in subsec. (f), is act May 20, 1936, ch. 432, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (§901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Public Utility Holding Company Act of 2005, referred to in subsec. (g)(5), is subtitle F of title XII of Pub. L. 109-58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (§16451 et seq.) of subchapter XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

AMENDMENTS

2005—Subsec. (b)(2). Pub. L. 109-58, §1295(a)(1), substituted "Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 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".

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

previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

**(c) Compliance with order of Commission**

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed 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 delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

fication 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.<sup>1</sup>

**(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

<sup>1</sup> See References in Text note below.

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

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

CODIFICATION

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

**§ 825I. Review of orders**

**(a) Application for rehearing; time periods; modification of order**

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

**(b) Judicial review**

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall

be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

**(c) Stay of Commission's order**

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85-791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109-58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), “section 1254 of title 28” substituted for “sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)” on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109-58 inserted “electric utility,” after “Any person,” and “to which such person,” and substituted “brought by any entity unless such entity” for “brought by any person unless such person”.

1958—Subsec. (a). Pub. L. 85-791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85-791, §16(b), in second sentence, substituted “transmitted by the clerk of the court to” for “served upon”, substituted “file with the court” for “certify and file with the court a transcript of”, and inserted “as provided in section 2112 of title 28”, and in third sentence, substituted “jurisdiction, which upon

**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 20th day of December 2013, 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:

Gregory W. Camet  
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