

14-1786(L)

14-1830 (Con), 14-2130 (Con), 14-2248 (Con)

In The United States Court of Appeals for the Second Circuit

Central Hudson Gas & Electric Corp., People of the State of New York, Public
Service Commission of the State of New York, New York Power Authority, New
York State Electric and Gas Corp., Rochester Gas & Electric Corp.

Petitioners,

v.

Federal Energy Regulatory Commission,

Respondent.

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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COMMISSION
WASHINGTON, D.C. 20426**

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GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
Demand Curve Order	<i>New York Independent System Operator, Inc.</i> , “Order Accepting Tariff Filing Subject to Condition and Denying Waiver,” 146 FERC ¶ 61,043 (2014), R. 95, JA2780
Demand Curve Rehearing Order	<i>New York Independent System Operator, Inc.</i> , “Order Denying Clarification and Rehearing,” 147 FERC ¶ 61,148 (2014), R. 378, JA3014
JA	Joint Appendix
New York	Petitioners Public Service Commission of the State of New York and People of the State of New York
P	Denotes a paragraph number in a Commission order
R.	Indicates an item in the certified index to the record
Utilities	Petitioners Central Hudson Gas & Electric Corp., New York Power Authority, New York State Electric & Gas Corp., and Rochester Gas and Electric Corp.
Zone Order	<i>New York Independent System Operator, Inc.</i> , “Order Accepting Proposed Tariff Revisions and Establishing a Technical Conference,” 144 FERC ¶ 61,126 (2013), R. 40, JA969
Zone Rehearing Order	<i>New York Independent System Operator, Inc.</i> , “Order on Rehearing,” 147 FERC ¶ 61,152 (2014), R. 377, JA2988

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CENTRAL HUDSON GAS & ELECTRIC CORP., PEOPLE OF THE STATE OF
NEW YORK, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW
YORK, NEW YORK POWER AUTHORITY, NEW YORK STATE ELECTRIC
& GAS CORP., AND ROCHESTER GAS AND ELECTRIC CORP.,
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v.

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

BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

Following a lengthy stakeholder process, the New York Independent System Operator (“New York Operator” or “Operator”) proposed, and the Federal Energy Regulatory Commission (“Commission” or “FERC”) approved, a new pricing zone for electric capacity (“New Capacity Zone”) in the lower Hudson Valley, to address dwindling electric generation and long-term reliability concerns. The questions presented on appeal are whether:

(1) The Commission reasonably determined, based on substantial record evidence, that the creation of the New Capacity Zone was just and reasonable and in the public interest;

(2) The Commission reasonably determined to implement the New Capacity Zone immediately, consistent with the New York Operator's tariff; and

(3) The Commission reasonably deferred to a future proceeding the issue of what circumstances would trigger elimination of a capacity zone.

STATUTES AND REGULATIONS

Pertinent sections of the Federal Power Act, and the Commission's implementing regulations, are set out in the Addendum to this brief.

STATEMENT OF THE CASE

I. INTRODUCTION

This case concerns the Commission's approval of the New York Operator's creation of a New Capacity Zone, the need for which has been recognized by stakeholders for many years to address dwindling electric generation capacity in the transmission-constrained, downstate region of New York State. In 2009, the Commission acknowledged the need for creation of a new capacity zone in the lower Hudson Valley, and accepted the New York Operator's proposal to work with stakeholders to develop criteria for determining circumstances that would warrant creation of additional capacity zones. In 2011, the Commission accepted

in part and rejected in part, after a lengthy stakeholder process, the New York Operator's proposed criteria that would govern the evaluation and potential creation of new capacity zones. In 2012, the Commission accepted tariff revisions that implement Commission-approved criteria and timeframes for conducting a new capacity zone analysis.

In the challenged orders, the Commission, after considering and balancing the concerns of over two dozen intervenors, accepted the New York Operator's proposal to create a New Capacity Zone in the lower Hudson Valley as consistent with the New York Operator's tariff provisions governing the formation of new capacity zones. *See New York Independent System Operator, Inc.*, "Order Accepting Proposed Tariff Revisions and Establishing a Technical Conference," 144 FERC ¶ 61,126 (2013), R. 40, JA969 ("Zone Order"), and "Order on Rehearing," 147 FERC ¶ 61,152 (2014), R. 377, JA2988 ("Zone Rehearing Order"). Also consistent with the timeframe set forth in the New York Operator's tariff, the Commission accepted the New York Operator's proposed demand curves (which affect capacity prices) for the new capacity zone. *See New York Independent System Operator, Inc.*, "Order Accepting Tariff Filing Subject to Condition and Denying Waiver," 146 FERC ¶ 61,043 (2014), R. 95, JA2780 ("Demand Curve Order"), and "Order Denying Clarification and Rehearing," 147 FERC ¶ 61,148 (2014), R. 378, JA3014 ("Demand Curve Rehearing Order").

The Commission agreed with the New York Operator and others that the creation of the New Capacity Zone is consistent with the New York Operator's tariff and is necessary to support needed generation resources in the transmission-constrained zone. The Commission explained that, because the cost to build new generation in the New Capacity Zone is higher than in the regions of New York north of the transmission constraint, the new capacity zone needs its own price curve in order to send more accurate price signals to attract and maintain generation capacity. Although the price signals are intended to encourage the construction of new generation capacity, the Commission observed that immediate signals should encourage shorter term capacity responses, such as demand response and repowering options, and discourage premature retirements to meet immediate capacity needs.

II. STATEMENT OF FACTS

A. Statutory And Regulatory Background

1. The Federal Power Act

Section 201(b) of the Federal Power Act ("FPA") confers upon the Commission jurisdiction over all rates, terms and conditions for electric transmission service by public utilities in interstate commerce and for 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).

Section 205(c) of the FPA, 16 U.S.C. § 824d(c), requires public utilities to file tariffs with the Commission providing their jurisdictional rates, terms and conditions of service, and related contracts for service. When those tariffs are filed, sections 205(a)-(b) of the FPA, 16 U.S.C. §§ 824d(a)-(b), direct the Commission to assure that the rates and services described in the tariff are just and reasonable and not unduly discriminatory. *See Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 254 (D.C. Cir. 2007) (“FPA section 205 allows utilities to file changes to their rates at any time and requires FERC to approve them as long as the new rates are ‘just and reasonable.’”); *see also* 18 C.F.R. § 35.1 (obligation to file rates and tariffs).

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.” 16 U.S.C. § 824e(a). A third-party complainant bears the burden to show that the existing rate or practice is unjust, unreasonable, unduly discriminatory or preferential. *See Md. Pub. Serv. Comm’n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011).

2. New York Capacity Markets

The New York Operator is an independent, regional, non-profit transmission operator. *Simon v. KeySpan Corp.*, 694 F.3d 196, 199 n.2 (2d Cir. 2012) (describing the New York Operator). As such, the New York Operator operates (but does not own) the transmission grid and provides access for all “at rates established in a single, unbundled, grid-wide tariff.” *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 558 U.S. 165, 168 (2010) (explaining responsibilities of an independent system operator). The New York Operator runs the regional energy capacity market,¹ ensuring that an adequate supply of electric generation capacity is available to meet projected need, taking into account reliability contingencies. The New York Operator determines how much capacity is needed throughout its footprint (all of New York State), but also sets location-specific capacity requirements in areas where transmission lines are constrained.

In multiple opinions over the past decade, the U.S. Court of Appeals for the District of Columbia Circuit has addressed the New York Operator’s capacity market, as well as administratively-determined demand curves. *See KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1054 (D.C. Cir. 2003) (addressing recalculation of price cap for New York Operator’s capacity market with a new

¹ “In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself.” *NRG Power Mktg.*, 558 U.S. at 168.

pricing method); *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1234 (D.C. Cir. 2005) (upholding New York Operator’s new capacity market rate design); *KeySpan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 810 (D.C. Cir. 2007) (addressing the amount of capacity that entities are required to purchase in the capacity auctions); *TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 118 (D.C. Cir. 2013) (rejecting challenges to FERC-approved demand curves).

As the D.C. Circuit has explained, the New York Operator strives to maintain adequate generation resources to meet consumer demand by “work[ing] to ensure that power generators have sufficient incentives to build new power plants when the grid needs additional supply.” *TC Ravenswood*, 741 F.3d at 114. The New York Operator uses capacity markets to “encourage[] infrastructure investment by linking the price of capacity to the price needed to recoup the cost of building a hypothetical new “peaker” power plant, i.e., a plant that operates only in times of high demand.” *Id.* Historically, the New York Operator managed three capacity zones: (1) New York City; (2) Long Island; and (3) the Rest-of-State. Zone Order, P 2, JA969.²

The price a generator receives for capacity is based upon an administratively determined demand curve. *See Elec. Consumers Res. Council*, 407 F.3d at 1235-36. Each capacity zone within the New York Control Area has its own demand

² “P” refers to the internal paragraph number within a FERC order.

curve which estimates the “cost of new entry” for a hypothetical new peaker plant in that zone. *TC Ravenswood*, 741 F.3d at 115. Every three years, the New York Operator reassesses factors used to determine the demand curves. *See* New York Operator Market Administration and Control Area Services Tariff (“Tariff”), section 5.14.1.2 (filed Nov. 30, 2010), JA202-06. It follows a lengthy process set forth in its Tariff for expert, independent review and many iterations of stakeholder input. *See id.*, §§ 5.14.1.2.1 to 5.14.1.2.11, JA205-06. At the conclusion of that review process, the New York Operator proposes new demand curves for the next three years and submits them to the Commission for its review. *See id.*, § 5.14.1.2.11, JA206; *see also* Demand Curve Order at PP 4-5, JA2781-82 (describing requisite assessments and review process).

The New York Operator has a Commission-approved Market Monitoring Plan. As part of that plan, an independent Market Monitoring Unit and Independent Market Advisor identify market design flaws, market power potential, and opportunities for efficiency improvement. *See New York Indep. Sys. Operator, Inc.*, 96 FERC ¶ 61,059, at 61,199 (2001).

3. Tariff Provision Governing New Capacity Zones

The Commission addressed the potential need for a new capacity zone in downstate New York back in 2009. *New York Indep. Sys. Operator, Inc.*, 127 FERC ¶ 61,318, at P 49-53 (2009) (“2009 Order”). The Commission accepted the

New York Operator’s proposal to work with stakeholders “to address dynamic changes to the New York Control Area that may warrant the creation of additional capacity zones within the [New York Operator] market.” *Id.* P 53. The Commission directed the New York Operator, using a stakeholder process, to develop criteria for identifying and forming new capacity zones and the requisite tariff revisions. *Id.*

As directed, on January 4, 2011, the New York Operator and New York transmission owners filed proposed criteria and considerations to identify a new load zone or zones using an extensive stakeholder process. One of the considerations was the requirement to file a consumer impacts test using a preliminary demand curve that would quantify price impacts of a potential new capacity zone. *See New York Indep. Sys. Operator, Inc.*, 136 FERC ¶ 61,165, at PP 14, 18, 24, 34 (2011) (“2011 Order”). The Commission rejected the proposed criteria as too subjective and directed the New York Operator instead to use the method contained in the New York Operator’s tariff. *Id.* P 52. Specifically, the Commission rejected: (1) use of a consumer impact analysis in deciding whether to create a new zone (*id.* PP 61-63); (2) the use of reliability criteria to determine whether to create a new zone (*id.* PP 59-60); and (3) a request to require the New York Operator to define criteria for the potential elimination of capacity zones in this proceeding. *Id.* P 70. In addition, the Commission addressed the timeline for

studying whether a new capacity zone is needed, and agreed with the New York Operator and utility commenters that the study be conducted in conjunction with the triennial process for resetting the capacity demand curve. *See id.* PP 28, 68.

In a 2012 order, the Commission accepted the New York Operator's tariff revisions that implement the directives in the 2011 Order. *New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,160 (2012) ("2012 Order"). Specifically, the Commission approved the addition of section 5.16 to the New York Operator's Tariff. Under section 5.16.4, the New York Operator must conduct a new capacity zone study using the "deliverability methodology" as set forth in the Operator's Tariff. Tariff, § 5.16.4, JA216-17. If the study identifies a constrained transmission highway interface into one or more load zones, the New York Operator must file with the Commission, on or before March 31 of a Demand Curve reset year, tariff revisions necessary to implement the new capacity zone(s). *See id.* The Commission affirmed that any new capacity zone identified as a result of the tariff study would be implemented effective May 1 of the reset year. 2012 Order, P 15.

The Commission also addressed multiple arguments concerning how a new capacity study would be conducted. *See* 2012 Order, PP 32-37 (addressing the process timeline); *id.* PP 50-53 (addressing clarity of proposed Deliverability Test

methodology); *id.* PP 70-73 (addressing treatment of new resources); and *id.* PP 78-79 (addressing market power mitigation provisions).

B. The Challenged Orders

1. The Zone Orders

The first of the challenged orders, dated August 13, 2013, accepted the New York Operator's proposal to create a New Capacity Zone in the lower Hudson Valley, based on a deliverability study the New York Operator conducted in accordance with its tariff. The New York Operator found that the new zone was necessary "to send more efficient price signals, enhance reliability, mitigate potential transmission security issues, and serve the long-term interest of all consumers in New York State." Zone Order, P 6, JA971. Balancing the concerns of the commenting parties, the Commission concluded that the New York Operator properly identified a constrained area and approved the establishment of the New Capacity Zone. *Id.* PP 1, 20, JA969, 976. The Commission considered the impact of potential future transmission upgrades on the need for the New Capacity Zone (*id.* P 23, JA977) and the impact of the New Capacity Zone on rates (*id.* PP 24-26, JA977-78). The Commission also rejected a proposal by certain electric utilities to phase-in the New Capacity Zone. *Id.* P 31, JA980.

The Commission rejected arguments by Central Hudson Gas & Electric Corp. ("Central Hudson") challenging the New York Operator's development of

Indicative Locational Capacity Requirements.³ The Commission explained that Central Hudson's proposal to use an alternative method to calculate the Locational Capacity Requirement was beyond the scope of the proceeding because the New York Operator was not proposing to change its process for developing Locational Capacity Requirements – a process used in all capacity regions. Zone Order, P 66, JA993. Rather, the Commission noted that the Indicative Locational Capacity Requirement included in the filing is used solely for establishing a demand curve – not for determining whether a new capacity zone should be created or to establish a capacity zone boundary. *Id.*

Finally, the Commission declined to require tariff revisions that would govern the elimination of a capacity zone. *Id.* P 82, JA998. The Commission reasoned that it was not necessary, in this proceeding, to require a mechanism for determining whether a new capacity zone is no longer needed. *Id.*, JA998-99. Nevertheless, the Commission directed the New York Operator to work with its stakeholders on whether a mechanism for zone elimination was appropriate. *Id.* The Commission observed that a capacity zone elimination proceeding would apply broadly to all capacity zones, and because the New York Operator had not proposed such a mechanism, the record in this proceeding would be insufficient in any event. *Id.*, JA999.

³ The Locational Capacity Requirement is the amount of capacity that must be located within a zone in order to ensure that appropriate reliability criteria are met.

On May 27, 2014, the Commission denied rehearing, in relevant part, of the Zone Order. *See* Zone Rehearing Order, PP 1, 13-20, JA2988, 2993-99 (denying rehearing on phase-in); *id.* P 27, JA3001 (denying rehearing on Central Hudson Locational Capacity Requirement methodology); and *id.* PP 44-45, JA3011-12 (denying rehearing on need for tariff mechanism to eliminate a new zone).

2. The Demand Curve Orders

In accordance with section 5.14.1.2.11 of its Tariff, the New York Operator filed demand curves⁴ for the New Capacity Zone approved in the Zone Order for the 2014/2015, 2015/2016, and 2016/2017 capability years. Demand Curve Order, PP 1, 4, JA2780, 2781. The New York Operator proposed to phase-in the new demand curve parameters for the New Capacity Zone and sought waivers of its tariff in order to do so. *See N.Y. Indep. Sys. Operator, Inc.*, Application at 36-46, FERC Docket No. ER14-500-000 (Nov. 27, 2013), JA1254-64. The Commission accepted the New York Operator's demand curve but rejected the phase-in and associated requests for waiver, for similar reasons advanced in the Zone Order. Demand Curve Order, PP 162-65, JA2834-35. On May 27, 2014, the Commission denied rehearing of the Demand Curve Order. *See* Demand Curve Rehearing

⁴ “Utilizing administratively determined ‘demand curves,’ the [New York Operator] holds monthly auctions to set the price of [] capacity” in each of the New York capacity zones. *TC Ravenswood*, 741 F.3d at 114 (describing the New York Operator's monthly capacity auctions).

Order, P 1, PP 59-65, JA3014, JA3037-41 (addressing phase-in of the demand curve).

3. Motions For Stay

On May 12, 2014, Central Hudson and the Public Service Commission of the State of New York separately petitioned this Court for an emergency stay of the Zone Order and Demand Curve Order. They also sought a writ of mandamus compelling the Commission to rule immediately on their requests for agency rehearing.

Upon consideration of the pleadings, and after oral argument, this Court denied the motions for emergency stay. *In re Public Service Commission of the State of New York*, No. 14-1482, and *In re Central Hudson Gas & Elec. Corp.*, No. 14-1502 (2d Cir. June 4, 2014) (denying motions for stay consistent with *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007)). The Court also denied the mandamus petitions as moot because the Commission issued rehearing orders on May 27, 2014. These appeals followed.

SUMMARY OF ARGUMENT

This Court should reject further attempts to hinder the implementation of necessary and long-awaited changes to the New York Operator's capacity market. The long history of this case shows that all market participants have been aware of the necessity of these revisions – and of the impacts. In each proceeding, certain

parties (primarily certain New York utilities) have sought to delay the formation of the new zone, while other parties (primarily New York generators) and the independent market monitor have sought immediate implementation of the new zone. The Commission appropriately allowed for significant stakeholder discussions on the criteria for the development and timing of a new zone and, ultimately, reached a decision that is attentive to and respects all perspectives.

Two groups of petitioners seeking judicial review – (1) Central Hudson, the New York Power Authority, New York State Electric & Gas Corp., and Rochester Gas & Electric Corp. (collectively, “Utilities”); and (2) the Public Service Commission of the State of New York and the People of the State of New York (collectively, “New York”) – would cast aside the long history supporting the development of the zone. Not once do they argue that the creation of the zone is inconsistent with the Operator’s Commission-approved tariff. Rather, they argue that the Commission erred by not rejecting the tariff in favor of their suggestions aimed at keeping costs artificially low at the expense of efficient, competitive supply to reliably serve electricity needs.

Unable to refute the mounting evidence of a potential supply crisis in the lower Hudson Valley, Utilities and New York claim that the Commission did not provide sufficient support for its findings (or, rather, that such support came too late), made inconsistent statements, or acted inconsistently with precedent. In

doing so, Utilities and New York fail to respect the standard of review applied to ratemaking decisions of this nature. Ultimately, the Commission's orders thoughtfully consider all of the arguments and are supported by substantial record evidence. These orders involve policy judgments to determine where the public interest lies – a determination Congress entrusted to FERC. Because this balancing of competing interests is entrusted to FERC's expert judgment, and because the agency developed a reasonable, record-based solution to a difficult problem, this Court should affirm.

ARGUMENT

I. THIS COURT SHOULD DEFER TO THE COMMISSION'S REASONED JUDGMENT ON RATEMAKING DECISIONS THAT LIE AT THE CORE OF FERC'S REGULATORY MISSION

Judicial review of Commission orders proceeds under the arbitrary and capricious standard. *See* 5 U.S.C. § 706(2)(A). Under the highly deferential arbitrary and capricious standard, a court will affirm the Commission's orders if FERC has “examined the relevant data and articulated a rational connection between the facts found and the choice made.” *See Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citation omitted)). A reviewing court determines whether the agency “has met the minimum standards set forth in

the statute,” and does not “substitute its own judgment for that of the [agency].”
U.S. Postal Serv. v. Gregory, 534 U.S. 1, 11 (2001).

Review of the Commission’s ratemaking determinations, as long as they are explained, is particularly deferential. Courts afford the Commission great deference on ratemaking decisions because of the multiple, and sometimes conflicting, policy considerations inherent in those judgments. *See Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) (reviewing court must “afford great deference to the Commission in its rate decisions”). “Because [i]ssues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, [the Court’s] review of whether a particular rate design is just and reasonable is highly deferential.” *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999) (quoting *N. States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994)).

The Commission’s factual findings, if supported by substantial record evidence, are conclusive. *See* 16 U.S.C. § 825l(b). Because substantial evidence is more than a scintilla, but something less than a preponderance of the evidence, the possibility that different conclusions may be drawn from the same evidence does not render the Commission’s conclusions unreasonable. *See Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (2d Cir. 2008); *see also Allegheny Elec. Coop. Inc.*

v. FERC, 922 F.2d 73, 80 (2d Cir. 1990) (FERC’s findings of facts, if supported by substantial evidence, are conclusive). Where the evidence might support more than one rational interpretation, “the question [the Court] must answer . . . is not whether record evidence supports [the petitioner’s] version of events, but whether it supports FERC’s.” *Cogeneration Ass’n v. FERC*, 525 F.3d 1279, 1283 (D.C. Cir. 2008) (citations omitted); *see also FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002) (that different conclusions can be drawn from the same evidence does not render the Commission’s findings unreasonable).

II. THE COMMISSION REASONABLY BALANCED COMPETING CONCERNS IN ACCEPTING THE CREATION OF THE NEW CAPACITY ZONE ON AN IMMEDIATE BASIS

A. The Commission Reasonably Balanced Competing Goals And Perspectives

For many years, market participants in the New York Operator’s capacity market have discussed the need for creation of a new, additional capacity zone. *See* 2009 Order, PP 49-53 (discussing the need for potential formation of an additional capacity zone in the lower Hudson Valley and accepting the New York Operator’s proposal to work with stakeholders to develop criteria for creation of a new zone). The Commission rejected calls to immediately direct the New York Operator to create a new zone, and referred the issue to a stakeholder process. *Id.* P 53. As a result of that process, the New York Operator proposed tariff provisions that detail specific criteria and considerations for establishing a new

capacity zone, including requiring New York Operator to conduct a detailed capacity zone study. *See* 2011 Order, PP 51-58 (accepting in part formula governing evaluation and potential creation of new capacity zones), and 2012 Order, PP 32-37, 50-53 (accepting tariff revisions implementing formula)). In accordance with section 5.16.4 of the Tariff, if a new capacity zone study identifies a transmission constrained area, the New York Operator must file tariff revisions to establish the new capacity zone and the supporting study identifying the need for the new zone.

Against the backdrop of an extensive stakeholder process over several years, the Commission weighed the competing goals in this case – reliability and cost. The Federal Power Act charges FERC with regulating wholesale energy markets in the public interest. 16 U.S.C. § 824(a). Although there are public interest considerations on both sides of this complicated issue, this Court should defer to FERC’s balancing of those interests. *See Consol. Edison Co. of New York v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) (“[T]he F[ederal] P[ower] A[ct] has multiple purposes in addition to preventing ‘excessive rates’ including protecting against ‘inadequate service’ and promoting the ‘orderly development of plentiful supplies of electricity’” (quoting *Cities of Anaheim v. FERC*, 723 F.2d 656, 663 (9th Cir. 1984), and *Pub. Utils. Comm’n of Cal. v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004))).

The Commission carefully addressed each of the issues and found that the reliability interests of sending appropriate price signals outweighed the short-term interest of keeping prices artificially low. *See, e.g.*, Demand Curve Order, P 59, JA3037 (“The Commission has considered the extent to which rates in the Lower Hudson Valley will increase as a result of the implementation of a new [capacity] demand curve, but the Commission concludes that the phased-in rates do not represent a balanced approach that will benefit both consumers and investors.”). *See also New England Power Generators Ass’n v. FERC*, No. 12-1060, 2014 WL 3056488, at *13 (D.C. Cir. Jul. 8, 2014) (upholding Commission price mitigation policy in New England capacity market because “[t]he Commission was aware of, and considered, the effect such a decision would have on capacity prices. Such a balancing function is precisely the role of expert agencies, and the record provides no basis on which FERC’s decision should be disturbed.”).

Here, the Commission was faced with mounting evidence of a long-term reliability need resulting from dynamic changes in the New York Control Area. *See, e.g.*, Zone Order, P 31, JA980 (citing the 2006 State of the Market Report identifying a potential need for a new capacity zone, and capacity deliverability tests performed in 2008 identifying transmission constraints between the Upper Hudson Valley and Lower Hudson Valley). The Commission explained its concern over a potential reliability need (as distinguished from an existing

reliability need) when, over time, the failure to create a new capacity zone results in a capacity deficiency due to both the lack of resources within the constrained area and the inability to import resources into the constrained area. *See Zone Rehearing Order*, P 14, JA2994-95. The Commission detailed why the failure to create a new zone creates this potential reliability problem, and why creating the new capacity zone solves it. *See id.* PP 15-16, JA2995. The Commission also observed the 2012 State of the Market Report’s finding that the total amount of unforced capacity sold in the lower Hudson Valley had fallen by 21 percent (or 1 gigawatt) since the summer of 2006. *See id.* P 16, JA2995. As the Commission explained, the “[f]ailure to create a new capacity zone that reflects accurate price signals discourages construction of new capacity and encourages premature capacity retirements in the import-constrained area because of the area’s inefficiently low prices.” *Id.*

The Commission balanced this growing reliability concern against record evidence addressing the potential costs to consumers from a new zone. The Commission did not “ignore” or “disregard” consumer economic impacts. NY Br. at 17, 18. To the contrary, the orders consider and respect consumer impacts. *See Demand Curve Rehearing Order*, P 59, JA3037 (“[t]he Commission has considered the extent to which rates in the Lower Hudson Valley will increase as a result of the implementation of a new [capacity] demand curve”); *id.* P 62, JA3038

("[T]here is no simple solution The reality is that, in the short run, consumers may pay more but doing so is necessary"); Zone Rehearing Order, P 17, JA2996 (weighing the increased capacity costs against the possibility of consumer energy needs having not been met due to a capacity shortage).

That the Commission did not provide its own precise quantification of consumer impacts does not mean that it did not consider them. The Commission was not required to "articulate [an] estimate of the amount of the increase." NY Br. at 18; *see also* Util. Br. at 47 (suggesting the FERC was required to compare expected costs with anticipated benefits). New York cites *Maine Pub. Utils. Comm'n v. FERC* for the proposition that FERC must quantify and review the extent of possible price impacts to ensure they fall within a range of reasonable rates. 520 F.3d 464, 472 (D.C. Cir. 2008), *rev'd, in part, on other grounds, NRG Power Mktg.*, 558 U.S. 165. Yet the *Maine* court held no such thing. To the contrary, the court found that the Commission's rate determination was based on substantial evidence because the rates were founded on two things: 1) projected prices under demand curves; and 2) the estimated cost of new entry of a new peaker plant. *Id.* That is exactly the nature of evidence that determined the capacity rates in this case.

Although the record includes many different estimates of the impacts (*see, e.g.*, Zone Order, n. 27, JA978 (\$168 million increase per year); Demand Curve

Order, P 158, JA2833 (potential 25% retail rate increase to consumers)), the ultimate impact will be determined by supply and demand conditions. *See* Zone Rehearing Order, P 17, JA2996-97 (“As more capacity locates in the new capacity zone in response to the appropriate price signal in the Lower Hudson Valley, capacity prices should decrease because the price determination is directly dependent on the supply of available capacity.”). To the extent other facilities are repowered or demand response resources materialize, the increased costs may lower. Contrary to general claims that the projects identified by the Commission are “speculative” or “hypothetical” (NY Br. at 4; Util. Br. at 47), and more specific claims that these shorter-term generation projects “are unlikely to materialize before the transmission upgrades planned by the [New York regulators] come sufficiently close to fruition” (NY Br. at 9), New York recently approved repowering of the 540 megawatt Danskammer generating project. *See* Helios Power Capital, LLC, “Order Approving Transfer and Making Other Findings,” New York Pub. Serv. Comm’n Case 13-E-0012, at 24 (June 27, 2014) (New York explains that “Danskammer’s return to service will clearly alleviate the magnitude of those [capacity] price increases, by reducing prices paid in the [New York Operator capacity] auctions conducted within the new [capacity] zone.”); *see also id.* at 37 (“resuming operations at Danskammer would retain in the new Hudson Valley Zone a resource currently in place -- the Danskammer facility -- so long as

the price signals in the new zone are sufficient to support the resumption of operation at the facility, just as FERC intended it.” (emphasis original)).

The Commission weighed all this evidence and concluded that “there is no simple solution to address the problems caused by the constraint between upstate New York and the Lower Hudson Valley.” Zone Rehearing Order, P 17, JA2996. Nevertheless, the Commission emphasized that “decision-making based only on avoiding price increases in the short-term could threaten reliability and price stability in the long-term.” *Id.* This is a judgment entitled to judicial respect. *See In re Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) (in ratemaking, Commission expected to “balance . . . the investor and the consumer interests”) (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)); *see also New England Power Generators*, at *13 (“defer[ring] to FERC’s expertise, as the agency is best equipped to manage competing policy rationales”).

The Commission also explained why its decisions are consistent with precedent. The Commission noted its long-standing concern that inefficient outcomes may result from artificially reduced rates. *See Demand Curve Rehearing Order*, P 59, JA3037 (citing *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 103 (2008) (explaining that while suppressed prices may appear beneficial to consumers in the short term, they will only serve to inhibit new entry, raise prices and harm reliability in the long run)); *see also Zone Rehearing Order*,

P 14 n.26, JA2994 (citing *ISO New England, Inc.*, 142 FERC ¶ 61,107, at P 118 (2013) (explaining that one of the goals of capacity markets “is to reveal those locations where capacity is required, and to allow prices to rise to the levels necessary to induce resources to locate and to remain in those locations”)).

Although the Commission recognized that, “[i]n the past, it has allowed variations of phase-ins to protect consumers from substantial rate increases,” it reasonably decided here that “phased-in rates do not represent a balanced approach that will benefit both consumers and investors.” Demand Curve Rehearing Order, P 59, JA3037. As discussed *infra* section III.C., based on the years of notice of these impending changes to the capacity market, the Commission reasonably accepted the changes without additional delay.

In assessing the justness and reasonableness of rates, “courts must determine whether or not the end result of that order constitutes a reasonable balancing, based on factual findings, of the investor interest in maintaining financial integrity and access to capacity markets and the consumer interest in being charged non-exploitative rates.” *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177-78 (D.C. Cir. 1987) (en banc). Here, the Commission explained that higher capacity prices in the new capacity zone will help encourage the development of new generation and/or transmission capacity to help alleviate existing constraints and that such price changes promote efficient decisions. *See* Zone Order, P 24,

JA977; *see also Md. Pub. Serv. Comm'n*, 632 F.2d at 1285-86 (concluding that FERC had a substantial basis to approve a capacity pricing model that would increase rates in the short term “to encourage much needed long-term investment in energy capacity,” and that the “price hikes . . . were attributable to legitimate causes”). Based on all of the evidence in the record, the Court should affirm the Commission’s findings here.

B. The Commission’s Findings Are Based On Substantial Evidence

The Commission considered a range of information from a range of sources, balanced competing interests, and reached conclusions that were supported by substantial evidence. *See supra* pp. 18-26 (discussing reliability concerns and consumer impacts), *infra* pp. 34-37 (addressing impact of future transmission projects), *infra* pp. 38-45 (addressing evidence supporting immediate implementation of the new zone). In support, the Commission approved the immediate implementation of the new capacity zone and associated demand curves based on the following record items available when the initial orders issued:

- 2006 State of the Market Report, JA601-02 (*see* Zone Order, P 31, JA980);
- New York Year 2008 Facilities Study Part 2: Deliverability – Round 1, JA603 (*see* Zone Order, P 31, JA980);
- 2012 State of the Market Report, JA508-09 and JA842-43 (*see* Zone Order, PP 29, 31, JA979-80; Zone Rehearing Order, P 16, JA2995; Demand Curve Rehearing Order, P 61, JA3038);

- Entergy Nuclear Power Marketing, LLC (“Entergy Nuclear”), May 21, 2013 Comments, Affidavit of Mark D. Younger (President of Hudson Energy Economics, LLC), JA598-613 (*see* Zone Order, P 31, JA980);
- Entergy Nuclear Dec. 20, 2013 Protest at 13, 26-30, JA 1706, 1719-1723 (*see* Demand Curve Order, PP 163, 164, JA2834-35); and
- New York Operator Apr. 30, 2013 Application, Attachment XI, Affidavit of David B. Patton (the Market Monitoring Unit for the New York Operator) at ¶ 11, JA508-09 (*see* Zone Rehearing Order, P 16 n.28, JA2995; Demand Curve Rehearing Order, P 61 n.48, JA3038).

In addition to substantial record support in the form of historical capacity studies and expert testimony, the Commission also relied upon its own expert predictive judgment. *See Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 531 (D.C. Cir. 2010) (FERC is not prohibited from “making findings based on ‘generic factual predictions’ derived from economic research and theory” (citing and quoting *Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1518 (D.C. Cir. 1984), and *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 688 (D.C. Cir. 2000)); *see also Assoc. Gas Distribs. v. FERC*, 824 F.2d 981, 1008-09 (D.C. Cir. 1987) (“Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall; nor need they do so for predictions that competition will normally lead to lower prices.”). Provided the Commission explains and applies the relevant economic principles in a reasonable manner, the Commission’s predictive judgments can support its conclusions. *See*

Wis. Pub. Power Inc., 493 F.3d at 260-61 (upholding FERC’s determination that a certain fixed cost adder was a sufficient incentive for investment as a reasonable “judgment about the behavior of entities FERC regulates”).

Utilities and New York now argue that new evidence was introduced at the rehearing stage which invalidates those determinations. *See* Util. Br. at 28. That argument is unconvincing. To the contrary, evidence introduced into the record at the rehearing stage supports the Commission’s predictive judgment (that increased prices would increase supply and promote reliability and ultimately reduce prices). *See, e.g.*, Zone Rehearing Order, P 17, JA2996, Demand Curve Rehearing Order, P 62, JA3038-39 (citing publicly available documents in New York proceedings regarding the prospects for restoration of the Danskammer and Bowline 2 generator facilities). New York argues that the Commission should have obtained assurances from generators that they would respond to higher prices (Br. at 6), but then disputes these assurances as “extra-record evidence.” The Commission also cited the most recent capacity assessment supporting the Commission’s findings of a growing reliability need for the New Capacity Zone. *See* Zone Rehearing Order, P 17 n.29, JA2996; Demand Curve Rehearing Order, P 62 n.49, JA3038 (citing New York Operator’s 2014 Summer Capacity Assessment).

To the extent the new evidence further demonstrates the reasonableness of the Commission’s actions, the Commission was free to acknowledge its existence.

See Wis. Power & Light Co. v. FERC, 363 F.3d 453, 463 (D.C. Cir. 2004) (holding that an agency may “cite relevant, publicly available studies, which need not have been introduced into the record.”). *Utilities and New York* cite no precedent barring the Commission from supplementing its own orders with publicly available information on rehearing, and they proffer no compelling reason why information further supporting the Commission’s determinations should be ignored. Indeed, one of the primary purposes of rehearing is to provide an opportunity for the Commission to supplement its orders. *See Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (rehearing allows the Commission to “explain why in its expert judgment the party’s objection is not well taken, which facilitates judicial review”); *see also Cal. Dep’t of Water Res. v. FERC*, 306 F.3d 1121, 1125-26 (D.C. Cir. 2002) (on rehearing the Commission may reverse the outcome of an earlier order or may retain the outcome but supply a “new improved rationale”).

The Commission, having considered all of the record evidence, reached determinations regarding lower rates in the short term versus system reliability and efficient market operation in the long term. That petitioners would have reached a different judgment, or would have struck a different balance, hardly means that the Commission was inattentive to the parties’ arguments or, generally, its public interest responsibilities. *See NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 961-

62 (D.C. Cir. 2013) (rejecting arguments that FERC was being “dismissive” but rather “it was balancing different problems in the case of uncertainty”). It is the Commission – not petitioners – that has the responsibility to perform that balancing and make these policy determinations. *See Cal. Pub. Utils. Comm’n v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) (“issues of rate design are fairly technical and . . . involve policy judgments that lie at the core of the regulatory mission”).

III. UTILITIES AND NEW YORK MISCONSTRUE THE BURDENS APPLICABLE TO FERC RATE PROCEEDINGS

Neither group of petitioners contends that the New York Operator failed to comply with Tariff section 5.16.1 (detailing the method for performing a new capacity zone study) or section 5.16.3 (directing the New York Operator to establish an Indicative Locational Capacity Requirement on or before March 1 of each demand curve reset year). *See, e.g.*, Util. Br. at 9 (agreeing that their appeal is not about the mechanics of the capacity auctions, the “intricacies” of the New York Operator test for setting up new capacity zones, or “second-guessing the economic theory behind FERC’s regulation of wholesale power markets”). Rather, both Utilities and New York contend that the New York Operator’s filing is not just and reasonable, based on considerations outside the Tariff. *See* Util. Br. at 33-34; NY Br. at 33. As described below, the Commission reasonably weighed the evidence

and concluded that the New York Operator justified the creation of a new pricing zone.

As explained *supra* page 5, two related but distinct sections of the Federal Power Act govern the Commission’s adjudication of just and reasonable rates: section 205, 16 U.S.C. § 824d, and section 206, 16 U.S.C. § 824e. *See FirstEnergy Serv. Co. v. FERC*, No. 12-1461, 2014 WL 3538062, at *1 (D.C. Cir. Jul. 18, 2014). Under section 205 of the Federal Power Act, public utilities must file with the Commission tariffs outlining their rates and terms of service for the Commission’s approval if found to be “just and reasonable.” *Id.* In a section 205 filing, the filing party bears the burden to demonstrate that its proposal is just and reasonable. *See So. Cal. Edison Co. v. FERC*, 717 F.3d 177, 181 (D.C. Cir. 2013). In contrast, where a third party challenges existing rates, its claim must be brought pursuant to section 206, rather than section 205, of the Federal Power Act. *FirstEnergy*, at *6. In a section 206 proceeding, the moving party bears the burden to demonstrate that the existing rate is unjust and unreasonable. *See* 16 U.S.C. § 824e(b); *see also FirstEnergy*, at *6.

A. Utilities’ Locational Capacity Requirement Arguments Are Beyond The Scope Of The New York Operator’s Filing

As set forth above, the Commission considered a range of information from a range of stakeholders over a series of Commission orders to determine the process for determining electric capacity needs in the lower Hudson Valley.

Nevertheless, Utilities argue (at 33-34) that the Commission “refused to hear evidence addressing the capacity needs in the lower Hudson Valley.” Their “evidence,” however, is actually just an alternative method for determining the Indicative Locational Capacity Requirement for the New Capacity Zone that they assert shows that the New Capacity Zone is not needed. *See* Util. Br. at 19 (“Petitioners presented an alternative to [the New York Operator’s] analysis . . .”). As the Commission explained, Utilities’ alternative method was beyond the scope of the proceeding because the New York Operator was not “proposing to change its methodology for calculating Locational Capacity Requirements in this proceeding and [because] the Indicative Locational Capacity Requirement for the new capacity zone is not used to determine whether a new capacity zone should be created or to establish the new capacity zone boundary.” Zone Rehearing Order, P 27, JA3001. The Commission explained that section 5.16.3 of the New York Operator’s tariff provides that the Indicative Locational Capacity Requirement calculation “is used *solely* for establishing [a Capacity] Demand Curve.” *Id.* (emphasis added). Essentially, Utilities seek to change section 5.16.3 of the Commission-approved Tariff, which limits the application of the Indicative Locational Capacity Requirement to establishing the demand curve. Utilities’ argument is in fact a proposal to modify the Tariff to use Indicative Locational Capacity Requirement (calculated using their new alternative method) as a criteria

to identify needed new capacity zones. This can only happen in the context of a proceeding under Federal Power Act section 206 – not in a protest of a filing made pursuant to section 205.

Moreover, the proposed method is irrelevant to the factors used to determine when a new capacity zone is needed. Consistent with precedent, price impact in the new capacity zone is “not a factor” in determining whether to create a new zone. Zone Rehearing Order, P 27, JA3001 (citing 2011 Order, P 63, stating “we are not opposed to [the New York Operator] conducting any consumer impact studies, but we do not find them necessary as part of the Attachment S Deliverability Test we are directing [the New York Operator] to use herein”).

Utilities argue (at 27) that the Commission in its 2012 Order invited “review and comment” on the New York Operator’s method for calculating the capacity requirements for the New Capacity Zone. To the contrary, the 2012 Order describes exactly what process the New York Operator would use for that calculation (the existing process for developing locational capacity requirements for New York City and Long Island), and that stakeholder review would be solely for the purpose of ensuring that the New York Operator complied with this method. *See* 2012 Order, at P 50 (explaining that the tariff specifies how the New York Operator will conduct the new zone study and locational capacity requirement calculation and that the “inclusion of stakeholders provides for

sufficient transparency . . . to confirm if [the New York Operator] has properly conducted its [] study”). In the 2012 Order, capacity suppliers (not Utilities) challenged whether there was sufficient clarity as to how the Indicative Locational Capacity Requirement would be calculated for a new capacity zone. *See* 2012 Order, P 44. The New York Operator responded that capacity suppliers should not be concerned “because the requirement will be determined through the existing process used for developing the New York City and Long Island Locational Minimum [Capacity] Requirements.” 2012 Order, P 48. The New York Operator observed “that no party has questioned [the New York Operator’s] existing process or the application of that process to any potential new capacity zone.” *Id.*

Therefore, all parties (including Utilities) had advance notice of exactly how the Indicative Locational Capacity Requirement would be calculated. Additionally, the New York Operator provided sufficient opportunity for stakeholder review and comment. *See* Operator Application at 5, JA127 (describing stakeholder process on the Indicative Locational Capacity Requirement development). Accordingly, the Commission properly concluded that, for purposes of this proceeding, “the Commission does not need to determine whether [the New York Operator’s] method for calculating the Indicative Locational Capacity Requirement is appropriate,” but only whether the New York Operator has complied with the tariff. Zone Rehearing Order, P 27, JA3001. The

Commission also pointed to the demand curve proceeding, where the actual Locational Minimum Capacity Requirement for the new zone was being addressed. Zone Order, P 66, n.71, JA993; *see also id.* P 64 & n.68, JA992-93 (describing the New York Operator’s comments suggesting that the demand curve proceeding is the proper forum to discuss the Indicative Locational Capacity Requirement).

B. New York Failed To Demonstrate Why Prospective Transmission Projects Eliminate The Need For The New Capacity Zone

The Commission accepted the New York Operator’s filing to create a new zone based on consistency with the tariff formula and record evidence supporting a need to send appropriate price signals to influence efficient capacity investment decisions. *See* Zone Order, PP 20-22, 31, JA 976-77, 980. New York does not challenge those findings, but argues that the new capacity zone is “irrational[] . . . in light of the State-led transmission proceedings.” NY Br. at 35. Although New York would like the New York Operator to take into account future transmission projects in proposing a new capacity zone, the Commission explained that the previously-approved method in the tariff requires the creation of a zone if a transmission constraint exists at the time of the study. *See* Zone Order, P 23, JA977.

Specifically, the Commission observed that the anticipated transmission upgrades had not been built, despite the fact that the constraint had been “binding” – i.e., had been observed and had been affecting reliability projections – for several

years. *Id.* Additionally, the Commission noted that “no one argues that the [transmission] upgrades would eliminate the reliability need for some capacity to be located within the new capacity zone.” *Id.* P 26, JA978.

On rehearing, the Commission recognized ongoing New York proceedings that could result in the construction of transmission to help alleviate the transmission constraint into the lower Hudson Valley. Zone Rehearing Order, P 18, JA2997. Those plans notwithstanding, the Commission observed that no major transmission project had cleared the State’s certification review process, and that there was no assurance that the projects would be completed during the 2016-2018 timeframe. *Id.*

Additionally, the Commission explained that the New Capacity Zone and transmission upgrades are not mutually exclusive. The Commission noted that the creation of the New Capacity Zone should provide an incentive to alleviate the constraint, such as by completing the transmission upgrades. Zone Order, P 23, JA977. New York calls this conclusion “illogical.” NY Br. at 35, n. 22. To the contrary, it was reasonable for the Commission to conclude that the creation of the New Capacity Zone, and the corresponding price differential it would create, should increase the value of the transmission because it would allow capacity sellers in an unconstrained zone to sell in a higher-priced constrained zone, thereby increasing the value of the transmission. *See, e.g., Sacramento Mun. Util. Dist.,*

616 F.3d at 538 (explaining why more accurate price signals reveal where new investments in transmission, generation, or demand response should be made); *see also* 2012 Order, PP 63, 65 (describing comments explaining that market price differentials support the development of economically efficient transmission investment). The Commission also noted that “to the extent the state’s transmission construction initiatives relieve the transmission constraint, prices in the new [lower Hudson Valley] capacity zone should decrease, because, as noted above for generation, the more supply that is available to the capacity zone, the lower the capacity prices that will result.” Zone Rehearing Order, P 19, JA2998.⁵

Finally, New York suggests that the Commission orders are inconsistent because the Demand Curve Order notes that price mitigation “could increase the likelihood of regulatory actions to meet capacity needs.” NY Br. at 35, n.22. The Commission, by citing Entergy Nuclear’s Dec. 20, 2013 Protest at 26-30, JA1719-23, establishes that the “regulatory actions” the Commission was concerned about were not state-sponsored transmission projects, but non-competitively selected capacity resources. *See* Entergy Nuclear’s Dec. 20, 2013 Protest at 30, JA1723 (explaining how NRG’s failure to proceed with restoring Bowline generator as a

⁵ Although there is disagreement over Commission statements about whether this price differential should continue after the transmission constraint is relieved (Util. Br. 35-38), this issue should be addressed in a potential future proceeding over the process for elimination of a capacity zone. *See infra* pp. 48-51 (discussing the Commission’s reasonable deferring of zone elimination issues to a future proceeding).

result of a phase-in could result in New York’s issuance of “out of market” contracts to induce new entry). These uneconomic contracts subvert market development and performance. *Id.* (citing, *e.g.*, *Bridgeport Energy, LLC*, 118 FERC ¶ 61,243, at P 41 (2007) (non-market mechanisms would be a “last resort” because they “broadly hinder[] market development and performance”)).

C. The Commission Reasonably Determined That A Phase-In Of The New Capacity Zone Was Not Appropriate

The Commission addressed a phase-in of the capacity zone in both the zone creation proceeding and the demand curve proceeding. As described above, in accepting the formation and implementation of the New Capacity Zone on an immediate basis, the Commission balanced the need for accurate price signals, price impacts to consumers, and the significant process leading up to these orders. No party in either proceeding was able to demonstrate that implementation of the New Capacity Zone, or the benefits of that zone, should be delayed.

1. Parties Did Not Demonstrate That Creation Of The New Capacity Zone Should Be Phased-In

In the zone creation proceeding, the phase-in was proposed by Utilities and New York – not the New York Operator.⁶ In its filing, the New York Operator,

⁶ Months after the Zone Order issued (and after the time for rehearing had lapsed), the New York Operator belatedly sought rehearing and advocated for a phase-in of the New Capacity Zone. The Commission rejected this request as statutorily time-barred. *See* Zone Rehearing Order, P 7, JA2990-91 (citing Federal Power Act section 313(a), 16 U.S.C. § 825l(a), requiring that any petition for agency

after “carefully examin[ing] and consider[ing] the transmission system, capacity market and economic consequences of the [new capacity zone] proposal” (Operator Application at 1, JA123), urged the Commission to accept the implementation of the new zone by May 1, 2014 as “a corrective response to the longstanding absence of a needed locational price signal.” Operator Application at 8, JA130. New York Operator’s filing was supported by multiple expert witness affidavits, including that of the market monitoring unit. *See* Operator Application, Att. XI, Affidavit of David B. Patton, JA504-15 (explaining why the New Capacity Zone is needed in the near term to facilitate more efficient investment and retirement decisions). Additionally, the New York Operator’s proposal was consistent with the Operator’s tariff. *See* Zone Order, P 27, JA978 (“[The New York Operator] did not propose tariff revisions that would provide for the phase-in of a new capacity zone.”); *see also id.* P 3, JA970 (explaining that section 5.16.4 of the tariff requires the New York Operator to file with the Commission, on or before March 31 of a demand curve reset year, tariff revisions to establish and recognize any new capacity zone to go into effect on May 1 of that year); *see also* Operator Application at 4, JA126 (“section 5.14.1.2 describes . . . the timing and sequence of the steps needed to create a [New Capacity Zone]”).

rehearing be filed within 30 days of the aggrieving agency order, and various court and agency cases). No party appeals that decision.

In response to arguments by Utilities and New York advocating an alternative phased-in approach to the New Capacity Zone, the New York Operator (although remaining neutral on timing) noted the independent market monitor's opposition to a phase-in, based particularly on the 2012 State of the Market Report. *See* Zone Order, P 29 & n.28, JA979 (citing Potomac Economics, 2012 State of the Market Report (April 2013)) (“[T]he creation of a [Southeast New York] capacity zone before 2014 would have facilitated more efficient investment in both new and existing resources where the Reliability Needs Assessment has identified resources are necessary for resource adequacy over the next ten years. Nonetheless, it should remain a high priority for [the New York Operator] to move forward expeditiously to create and price the [Southeast New York] zone.”). Entergy Nuclear also submitted expert testimony detailing the growing reliability concern in the lower Hudson Valley. *See* Entergy Nuclear's May 21, 2013 Comments, Affidavit of Mark D. Younger, JA598-613.

Based on substantial record evidence, and the proposal's inconsistency with the tariff, the Commission rejected the phase-in. The Commission explained that stakeholders have been aware of the transmission constraints and long-term reliability concerns in the lower Hudson Valley for years through reports of the independent market monitor dating back to 2006. *See* Zone Order, P 31, JA980 (citing 2006 State of the Market Report). The Commission also cited New York

Operator capacity deliverability tests beginning in 2008 showing a transmission overload between the upper Hudson Valley and lower Hudson Valley. *Id.* On that basis, the Commission determined that it has long emphasized the need for creation of new capacity zones to send efficient price signals to influence investment decisions, and over the time period that the Commission has addressed this issue, the need for capacity in the lower Hudson Valley has only become more pronounced. *Id.* Based on the foregoing, the Commission accepted the New York Operator's proposal to implement the New Capacity Zone on May 1, 2014.

New York parties sought rehearing. *See* Zone Rehearing Order, PP 10-12, JA 2992-93. Although the Commission considered statements that the New Capacity Zone would cause an "immediate and substantial capacity price increase to consumers," the Commission nevertheless found that efficient investment signals were necessary to ensure both reliability needs in the region and economic efficiency. Zone Rehearing Order, P 20, JA2998. The Commission stressed the importance of sending efficient investment price signals, to address "economic as well as existing or potential reliability concerns." *See* Zone Rehearing Order, PP 14-16, JA 2294-95 (citing, among other sources, the 2012 State of the Market Report, describing the effects of not having a separate capacity zone as reducing the total amount of capacity in Zones G, H, and I by 1 gigawatt, or 21 percent, since the summer of 2006). The Commission found that "a further delay or phase-

in would artificially reduce the appropriately determined prices resulting from the new capacity zone for two years based not on supply and demand, but rather on a desire to continue to shield consumers from costs that are reflective of actual system conditions.” Zone Rehearing Order, P 18, JA2997; *see also* Affidavit of David B. Patton ¶ 11, JA508 (“The lack of a capacity zone that reflects the reliability needs of [Southeast New York] has already diminished the efficiency of investment signals in the capacity market by: a) under-valuing capacity in the Lower Hudson Valley and b) inflating prices in other areas of the state.”).

2. The New York Operator Did Not Demonstrate That A Phase-In Of The Demand Curve Was Just And Reasonable

In contrast with the zone creation proceeding, in the demand curve proceeding (which started three and a half months after the Commission issued its Zone Order), the New York Operator proposed a phase-in of the demand curves. The New York Operator proposed to phase-in the impacts of the new demand curve by discounting the Lower Hudson Valley demand curve to 76.06 percent of the Cost of New Entry for the first year, and 88.08 percent for the second year. Demand Curve Filing at 36-44, JA1254-62. The New York Operator also sought associated waivers of its tariff in order to implement the phase-in. *Id.* at 43-44, JA1261-62.

In a proceeding under Federal Power Act section 205, the filing party has the burden to show that its filing is just and reasonable. 16 U.S.C. § 824d(e). Here,

the New York Operator's filing, to the limited extent it sought to delay implementation of demand curves, was inconsistent with its Tariff and notably required waivers to be implemented. Additionally, the Commission found that the proposal to phase-in the demand curve was not just and reasonable for all the reasons given in the Zone Order, particularly that "a phase in will not ensure that market-clearing prices will guide efficient investment decisions to add or retire capacity resources and meet reliability needs in this region." Demand Curve Order, P 162, JA2834. The Commission stated that stakeholder discussions about the need for a new capacity zone in the lower Hudson Valley had been ongoing for several years and have provided notice to stakeholders of the need for a new zone. *Id.* P 163, JA2834. Further, arguments for a phase-in based upon the timeline for new power plant construction fails to take into account the potential for shorter term supply resources, i.e., demand response and repower options, to meet capacity needs. *Id.* P 164, JA2835. The Commission also noted that suppressing prices would discourage competitive supply and could increase the likelihood of uneconomic regulatory actions to meet capacity needs. *Id.* (citing Entergy December 20, 2013 Protest at 26-30, JA1719-1723). Finally, the Commission explained that prices had been "artificially suppressed in the Lower Hudson Valley." Demand Curve Rehearing Order, P 65, JA3040; *see also id.* P 64, JA3040 ("because the need for a capacity zone has been apparent for at least seven

years, consumers have already been shielded from price increases during that time”).

Far from being a “windfall” to existing generators (NY Br. at 5, 6), the Commission found that immediate price signals were necessary to avoid premature retirements. Demand Curve Rehearing Order, P 61, JA3037 (“Failure to create a new capacity zone . . . encourages premature capacity retirements . . . because of the area’s inefficiently low prices.”). In sum, “the Commission ha[d] considered the extent to which rates in the Lower Hudson Valley will increase as a result of the implementation of a new [capacity] demand curve, but the Commission conclude[d] that the phased-in rates do not represent a balanced approach that benefit both consumers and investors.” *Id.* P 59, JA3037.

Utilities argue (at 44) that rejection of a phase-in was not supported by substantial evidence and was inconsistent with FERC precedent. To the contrary, the Commission’s determination was fully supported by record evidence. *See* Demand Curve Order, PP 162, 164, JA 2834-35 (incorporating the findings in the Zone Order and citing Entergy Nuclear Dec. 20, 2013 Protest at 26-30); *see also* Zone Rehearing Order, P 17, JA 2996 (citing development activities at the Danskammer and Bowline 2 generating units as a result of the new capacity zone; Demand Curve Rehearing Order, P 62, JA3038 (same); *see also* Demand Curve Rehearing Order, P 62, n.49, JA3038 (citing New York Operator’s 2014 Summer

Capacity Assessment anticipating a 1431 megawatt operating reserve shortage during extreme weather conditions; under such weather conditions, the need for capacity in Southeast New York would be greater than what could be supplied from upstate generation due to transmission constraints). Because the New York Operator's proposed phase-in viewed too narrowly the kinds of generation resources that the New Capacity Zone was designed to incentivize, and did not adequately value the need for accurate signals to avoid premature retirements, the Commission reasonably determined that a phase-in did not represent a balanced approach that will benefit both consumers and investors.

Rather, Utilities would impose on the Commission the burden to show that "a two-year phase in would imperil the investment plans of these repowering generators." Util. Br. at 46-47. New York similarly would require FERC to have obtained "assurances from generation owners that there will be [] generation response to the high prices brought on by the [New Capacity Zone]." Br. at 6. Here, the Commission found that the New York Operator did not satisfy its burden to show that a phase-in was just and reasonable. On that basis, the Commission accepted the New York Operator's demand curves, but rejected the phase-in. It based that determination on substantial record evidence. That is all that is required. *See So. Cal. Edison Co.*, 717 F.3d at 181-82 (recognizing the ability of the Commission to modify a proposal under section 205 of the Federal Power Act).

3. The Commission Acted Within Its Discretion To Deny Necessary Waivers To Implement A Phase-In

Additionally, the Commission reasonably rejected the New York Operator's requests for waiver of certain tariff provisions to implement the phase-in. *See* Demand Curve Order, P 164, JA2835 (denying request for waiver); *see also id.* PP 146-47, JA2829 (explaining that the phase-in could conflict with section 5.14.1.2(i) of the Tariff and would affect the evaluations that the New York Operator conducts under its Tariff's buyer-side capacity market power mitigation rules); *see also* Demand Curve Rehearing Order, P 65, JA3040 ("the Commission is enforcing the [New York Operator] Services Tariff and finds insufficient reason to depart from it. . . . The tariff does not grant [the New York Operator] discretion to discount the demand curves."). The Commission acted within its considerable discretion to reject the New York Operator's request for waiver of its tariff, which would have been required in order to phase-in (or discount) the demand curves. *Id.*

As the Commission explained, "[i]t is the discretion of the Commission to grant a waiver from the directives of the [] Tariff if the Commission finds that waiver is necessary." *Id.* The Commission's interpretation of what the New York Operator's tariff requires is due substantial deference. *See Idaho Power Co. v. FERC*, 312 F.3d 454, 461 (D.C. Cir. 2002) ("In general, this court "gives substantial deference to [FERC's] interpretation of filed tariffs, 'even where the

issue simply involves the proper construction of language.’’) (quoting *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998)).

Utilities argue for the first time on appeal (at 48) that waiver is not required. Courts have allowed petitioners to raise objections to arguments that were first raised by the Commission on rehearing. *See, e.g., Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 742 (D.C. Cir. 2007) (where Commission simply marshals new arguments to support an old outcome, a petitioner may have “reasonable ground” for not having earlier raised its objections); 16 U.S.C. § 825l(b) (general obligation to present an argument to the agency first before proceeding to judicial review). But here, the Commission’s Demand Curve Order plainly noted that waiver was denied. *See Demand Curve Order*, PP 2, 164, JA2780, 2835. Yet Utilities never sought rehearing on whether waiver should have been required.

In any event, finding that waiver of the tariff was required, the Commission acted within its discretion to deny it. The Commission found that a waiver to allow the phase-in “would not appropriately address the long standing problem of artificially suppressed prices in the Lower Hudson Valley” and that “delayed price signals could result in a continuation of the transmission constraint and a lack of incentive for a competitive solution.” *Id.* Deference is due to the Commission on its denial of a tariff waiver, which results in holding parties to the terms and

conditions of the filed tariff. *See, e.g., NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007) (holding review of FERC waiver decisions is “quite limited”) (quoting *City of Girard v. FERC*, 790 F.2d 919, 925 (D.C. Cir.1986)).

Finally, contrary to Utilities’ assertions (at 44), denying the waiver requests was not inconsistent with Commission precedent. The circumstances of this proceeding, where the need for a new capacity zone and the May 1, 2014 implementation date have been known for years, are distinguishable from the circumstances surrounding the earliest implementation of demand curves into the capacity market. *See New York Indep. Sys. Operator, Inc.*, 103 FERC ¶ 61,201, at PP 6, 15 (2003) (allowing a three-year phase in of the initial incorporation of the demand curve into the capacity market where the parties had less than one year to develop the proposal). Additionally, Commission decisions to delay the effectiveness of a tariff proposal using its rate suspension authority are likewise distinguishable from proposals to include a phase-in in the tariff itself. *See TC Ravenswood, LLC v. FERC*, 741 F.3d at 116 (explaining the Commission’s statutory suspension authority under section 205(e) of the Federal Power Act, 16 U.S.C. § 824d(e), and Commission precedent on the implementation of that authority).

D. The Commission Acted Within Its Discretion To Defer Implementing A Process To Eliminate The New Capacity Zone

Back in 2011, a utility asked the Commission to order the New York Operator to file tariff sheets addressing the elimination of capacity zones. 2011 Order, PP 16, 70. In that proceeding, the Commission held that it did not want to further delay (beyond the significant delay already experienced) the process for creation of a zone, given that the “impact of the failure to create a zone where one is needed is much more significant than the impact of a failure to eliminate an existing unneeded zone because an unneeded zone should not experience price separation from the neighboring zones.” *Id.*

In the Zone Order, the Commission again addressed arguments to direct the New York Operator to file tariff sheets governing when and how to eliminate a zone. This time, the Commission acknowledged that price separation (i.e., differences in costs for capacity) may well continue after the constraint leading to a new capacity zone has been eliminated, but that such potential distinction between prices is appropriate. *Id.* P 83, JA999 (citing affidavit of Dr. Patton, the New York market monitor, explaining that as long as the cost of new entry is higher in the new capacity zone than in the surrounding area, eliminating a new capacity zone and its associated higher price once the transmission constraint is temporarily eliminated jeopardizes the market’s ability to continue to attract and maintain adequate resources for market reliability in the new capacity zone).

Utilities contend that it was legal error to note the lack of price separation as a basis for not requiring elimination of a zone, then to acknowledge that price separation may continue. Util. Br. at 35-37. On rehearing, the Commission did not reaffirm its earlier statements supporting continued price separation. Rather, the Commission noted that this proceeding would not have provided an adequate record for an issue that would apply potentially to all capacity zones. Therefore, the Commission directed the New York Operator, as it had in the Zone Order (PP 82, 84, JA998-99), to work with stakeholders on development of a method to eliminate a capacity zone, to the extent necessary. *See* Zone Rehearing Order, PP 44-45, JA3011-12.

In other words, the Commission had before it neither a proposal nor a record on which to address the zone elimination issue. As with zone creation, the Commission deferred the issue to a stakeholder process for vetting prior to filing with the Commission. Accordingly, the Commission's decision to defer resolution of this issue as outside the scope of the instant proceeding was both reasonable and well within its discretion. *See City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989) (“[s]ince agencies have great discretion to treat a problem partially, [the Court] would not strike down the [agency’s decision] if it were a first step toward a complete solution, even if [the Court] thought [the agency] ‘should’ have covered both” issues in the same order) (footnote omitted)).

The Commission has considerable discretion in deciding the scope of its proceedings. “An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures, and priorities.” *Mobil Oil Exploration & Producing Se. Inc. v. United Dist. Cos.*, 498 U.S. 211, 230 (1991) (“[t]he [lower] court clearly overshot the mark” if it required the agency – there, the FERC – to resolve a particular issue in a particular proceeding in a particular way) (citations omitted)); *see also Kan. Power and Light Co. v. FERC*, 851 F.2d 1479, 1484 (D.C. Cir. 1988) (FERC has “broad ‘discretion to order its business as it [sees] fit and to leave petitioners to their remedies in another proceeding’”) (quoting *So. Union Gas Co. v. FERC*, 840 F.2d 964, 971 (D.C. Cir. 1988) (affirming FERC’s deferral of issues from one proceeding to another)). To the extent the stakeholder process does not result in a filing by the New York Operator of a method to eliminate a capacity zone, stakeholders are free to file a complaint pursuant to section 206 of the Federal Power Act, 16 U.S.C. § 824e, alleging that the New York Operator’s tariff is not just and reasonable.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied and the challenged orders should be affirmed in all respects.

Respectfully submitted,

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August 1, 2014

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a), I certify that the Brief of Respondent Federal Energy Regulatory Commission uses a proportionally spaced typeface, Times New Roman, in 14 point font, and contains 11,945 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Lisa B. Luftig

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Regulatory Commission

August 1, 2014

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2014, I electronically filed the forgoing Brief For Respondent with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Lisa B. Luftig
Attorney

Dated: August 1, 2014

**ADDENDUM
STATUTES AND REGULATIONS**

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 703. Form and venue of proceeding

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judi-

cial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

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801.	Congressional review.
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§ 801. Congressional review

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

- (i) a copy of the rule;
- (ii) a concise general statement relating to the rule, including whether it is a major rule; and
- (iii) the proposed effective date of the rule.

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

- (i) a complete copy of the cost-benefit analysis of the rule, if any;
- (ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;
- (iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and
- (iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

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

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

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

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

- (A) the later of the date occurring 60 days after the date on which—
 - (i) the Congress receives the report submitted under paragraph (1); or
 - (ii) the rule is published in the Federal Register, if so published;

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

- (i) on which either House of Congress votes and fails to override the veto of the President; or
- (ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

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

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

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

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

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

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

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),¹ 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

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

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

(g) Books and records

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

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

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

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

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

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate,

charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; “electric utility companies” and “registered holding company” defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies

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.

§ 825l. 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 proceed-

ings 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 the filing of the record with it shall be exclusive” for “exclusive jurisdiction”.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted “court of appeals” for “circuit court of appeals”.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this

Federal Energy Regulatory Commission

§ 35.1

Subpart G—Transmission Infrastructure Investment Procedures

35.35 Transmission infrastructure investment.

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

35.36 Generally.
35.37 Market power analysis required.
35.38 Mitigation.
35.39 Affiliate restrictions.
35.40 Ancillary services.
35.41 Market behavior rules.
35.42 Change in status reporting requirement.

APPENDIX A TO SUBPART H STANDARD SCREEN FORMAT

APPENDIX B TO SUBPART H CORPORATE ENTITIES AND ASSETS

Subpart I—Cross-Subsidization Restrictions on Affiliate Transactions

35.43 Generally.
35.44 Protections against affiliate cross-subsidization.

Subpart J—Credit Practices in Organized Wholesale Electric Markets

35.45 Applicability.
35.46 Definitions.
35.47 Tariff provisions governing credit practices in organized wholesale electric markets.

AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

SOURCE: Order 271, 28 FR 10573, Oct. 2, 1963, unless otherwise noted.

Subpart A—Application

§ 35.1 Application; obligation to file rate schedules, tariffs and certain service agreements.

(a) Every public utility shall file with the Commission and post, in conformity with the requirements of this part, full and complete rate schedules and tariffs and those service agreements not meeting the requirements of § 35.1(g), clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy subject to the jurisdiction of this Commission, the classifications, practices, rules and regulations affecting such rates, charges, classifications, services, rules, regulations or practices, as required by section 205(c) of the Federal

Power Act (49 Stat. 851; 16 U.S.C. 824d(c)). Where two or more public utilities are parties to the same rate schedule or tariff, each public utility transmitting or selling electric energy subject to the jurisdiction of this Commission shall post and file such rate schedule, or the rate schedule may be filed by one such public utility and all other parties having an obligation to file may post and file a certificate of concurrence on the form indicated in § 131.52 of this chapter: *Provided, however*, In cases where two or more public utilities are required to file rate schedules or certificates of concurrence such public utilities may authorize a designated representative to file upon behalf of all parties if upon written request such parties have been granted Commission authorization therefor.

(b) A rate schedule, tariff, or service agreement applicable to a transmission or sale of electric energy, other than that which proposes to supersede, cancel or otherwise change the provisions of a rate schedule, tariff, or service agreement required to be on file with this Commission, shall be filed as an initial rate in accordance with § 35.12.

(c) A rate schedule, tariff, or service agreement applicable to a transmission or sale of electric energy which proposes to supersede, cancel or otherwise change any of the provisions of a rate schedule, tariff, or service agreement required to be on file with this Commission (such as providing for other or additional rates, charges, classifications or services, or rules, regulations, practices or contracts for a particular customer or customers) shall be filed as a change in rate in accordance with § 35.13, except cancellation or termination which shall be filed as a change in accordance with § 35.15.

(d)(1) The provisions of this paragraph (d) shall apply to rate schedules, tariffs or service agreements tendered for filing on or after August 1, 1976, which are applicable to the transmission or sale of firm power for resale to an all-requirements customer, whether tendered pursuant to § 35.12 as an initial rate schedule or tendered pursuant to § 35.13 as a change in an existing rate schedule whose term has expired or whose term is to be extended.

§ 35.2

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(2) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to give the party furnishing service the unrestricted right to file unilateral rate changes under section 205 of the Federal Power Act:

Nothing contained herein shall be construed as affecting in any way the right of the party furnishing service under this rate schedule to unilaterally make application to the Federal Energy Regulatory Commission for a change in rates under section 205 of the Federal Power Act and pursuant to the Commission's Rules and Regulations promulgated thereunder.

(3) Rate schedules covered by the terms of paragraph (d)(1) of this section shall contain the following provision when it is the intent of the contracting parties to withhold from the party furnishing service the right to file any unilateral rate changes under section 205 of the Federal Power Act:

The rates for service specified herein shall remain in effect for the term of _____ or until _____, and shall not be subject to change through application to the Federal Energy Regulatory Commission pursuant to the provisions of Section 205 of the Federal Power Act absent the agreement of all parties thereto.

(4) Rate schedules covered by the terms of paragraph (d)(1) of this section, but which are not covered by paragraphs (d)(2) or (d)(3) of this section, are not required to contain either of the boilerplate provisions set forth in paragraph (d)(2) or (d)(3) of this section.

(e) No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge or compensation for or in connection with electric service subject to the jurisdiction of the Commission, or impose any classification, practice, rule, regulation or contract with respect thereto, which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise specifically provided by order of the Commission for good cause shown.

(f) A rate schedule applicable to the sale of electric power by a public utility to the Bonneville Power Administration under section 5(c) of the Pacific Northwest Electric Power Planning

and Conservation Act (Pub. L. No. 96–501 (1980)) shall be filed in accordance with subpart D of this part.

(g) For the purposes of paragraph (a) of this section, any service agreement that conforms to the form of service agreement that is part of the public utility's approved tariff pursuant to § 35.10a of this chapter and any market-based rate agreement pursuant to a tariff shall not be filed with the Commission. All agreements must, however, be retained and be made available for public inspection and copying at the public utility's business office during regular business hours and provided to the Commission or members of the public upon request. Any individually executed service agreement for transmission, cost-based power sales, or other generally applicable services that deviates in any material respect from the applicable form of service agreement contained in the public utility's tariff and all unexecuted agreements under which service will commence at the request of the customer, are subject to the filing requirements of this part.

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

§ 35.2 Definitions.

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