

ORAL ARGUMENT NOT YET SCHEDULED

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

Nos. 12-1224 and 14-1020 (consolidated)

MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

To counsel's knowledge, the parties before this Court and before the Federal Energy Regulatory Commission in the underlying agency proceedings are as listed in Petitioner's brief.

B. Rulings Under Review:

1. Order Denying Rehearing and Granting Clarification, *Midwest Indep. Transmission Sys. Operator, Inc.*, 146 FERC ¶ 61,008 (Jan. 8, 2014) ("Omnibus Rehearing Order"), R.64, JA 47;
2. Order on Rehearing, *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,204 (Mar. 20, 2012) ("Facilities Agreement Rehearing Order"), R.48, JA 30;
3. Order Granting in Part and Denying in Part Petition for Declaratory Order, *Mich. Elec. Transmission Co.*, 138 FERC ¶ 61,202 (Mar. 20, 2012) ("Declaratory Order"), R.46, JA 7;
4. Order on Rehearing, *Mich. Elec. Transmission Co.*, 138 FERC ¶ 61,203 (Mar. 20, 2012) ("Agency Agreement Rehearing Order"), R.47, JA 20; and
5. Letter Order, *Mich. Elec. Transmission Co.*, 133 FERC ¶ 61,238 (Dec. 17, 2010) ("Agency Agreement Order"), R.41, JA 1.

C. Related Cases:

Counsel is not aware of any related cases pending before this Court or any other court, except for the federal district court case listed in Petitioner's brief.

/s/ Karin L. Larson

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October 27, 2014

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GLOSSARY

Agency Agreement	Agency Agreement between Michigan Electric and Consumers related to the Facilities Agreement, dated as of April 1, 2001
Agency Agreement Order	<i>Mich. Elec. Transmission Co.</i> , 133 FERC ¶ 61,238 (2010), R.41, JA 1
Agency Agreement Rehearing Order	<i>Mich. Elec. Transmission Co.</i> , 138 FERC ¶ 61,203 (2012), R.47, JA 20
Commission or FERC	Federal Energy Regulatory Commission
Consumers	Intervenor, Consumers Energy Company
Declaratory Order	<i>Mich. Elec. Transmission Co.</i> , 138 FERC ¶ 61,202 (2012), R.46, JA 7
Facilities Agreement	Facilities Agreement between Consumers and Midland, dated as of July 8, 1988, as amended and restated in 2008 and 2009
Facilities Agreement Order	<i>Midwest Indep. Transmission Sys. Operator, Inc.</i> , 132 FERC ¶ 61,241 (2010), R.21, JA 198
Facilities Agreement Rehearing Order	<i>Midwest Indep. Transmission Sys. Operator, Inc.</i> , 138 FERC ¶ 61,204 (2012), R.48, JA 30
JA	Joint Appendix
Michigan Electric	Intervenor, Michigan Electric Transmission Company
Midland	Petitioner, Midland Cogeneration Venture Limited Partnership
Omnibus Rehearing Order	<i>Midwest Indep. Transmission Sys. Operator, Inc.</i> , 146 FERC ¶ 61,008 (2014), R.64, JA 47

GLOSSARY

P	Paragraph number in a FERC order
R.	Record citation
Regional Operator	Midcontinent Independent System Operator, Inc.

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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 ISSUE

This case concerns the validity of a bilateral contract between Consumers Energy Company (“Consumers”) and petitioner, Midland Cogeneration Venture Limited Partnership (“Midland”), that is subject to the jurisdiction of the Federal Energy Regulatory Commission (“FERC” or “Commission”) under the Federal Power Act.

In 1988, Consumers and Midland entered into an agreement governing the interconnection of Midland’s electric generator facility to Consumers’ transmission grid (the “Facilities Agreement”). In 2001, Consumers entered into an Agency

Agreement with Michigan Electric Transmission Company (“Michigan Electric”) for Michigan Electric to serve as Consumers’ agent in providing the interconnection services to Midland under the Facilities Agreement. In 2004, Midland ceased paying the invoices that Michigan Electric submitted to Midland for the services it provided as Consumers’ agent. Notwithstanding Midland’s non-payment, Consumers, through its agent, continued to perform under the Facilities Agreement until the Agreement was terminated in 2012.

The issues presented are:

1. Whether the court has jurisdiction to hear Midland’s challenges to: (i) the level of the rates under the Facilities Agreement; (ii) Michigan Electric’s qualifications as an agent under state law; and (iii) the validity of the Agency Agreement; and

2. Whether the Commission reasonably determined that Midland is obligated to pay Consumers for the service it received under the Facilities Agreement prior to the date the contract was filed with the Commission under section 205 of the Federal Power Act.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are set out in the Addendum.

COUNTER-STATEMENT REGARDING JURISDICTION

Petitioner invokes this Court's jurisdiction under section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*. Section 313(a) requires any person aggrieved by a Commission order to seek rehearing within 30 days and to "set forth specifically" the ground(s) upon which rehearing is being sought. *Id.* § 825*l*(a). If that person remains aggrieved, it may petition for judicial review within 60 days. *Id.* § 825*l*(b). Section 313(b) limits the Court's jurisdiction to consider only objections that petitioner "urged before the Commission in [an] application for rehearing" unless there is reasonable grounds for petitioner's failure to do so. *Id.* As discussed *infra* at section I.A of the Argument, petitioner's challenge to the reasonableness of the Facilities Agreement's rates is an impermissible collateral attack on the earlier Facilities Agreement Order that petitioner accepted. Therefore, the petitions for review with respect to that issue should be dismissed for lack of jurisdiction.

For the reasons explained *infra* at section I.B of the Argument, this Court lacks jurisdiction to review petitioner's challenges to the validity of the Agency Agreement, because petitioner did not raise those objections to the Commission in its request for rehearing of the Commission order approving the Agency Agreement. Indeed, petitioner did not raise those specific objections to the Commission at any time in the Agency Agreement proceeding.

In contrast, with respect to petitioner’s challenge to the enforceability of the Facilities Agreement against Midland, the challenged orders are final and reviewable as to that issue. The ongoing refund proceeding pending at the agency will not revisit the Commission’s conclusion that Midland is obligated to reimburse Consumers for the costs incurred to provide service under the Facilities Agreement. Rather, the refund proceeding will set the specific amount Midland owes Consumers under the Facilities Agreement and determine the amount Consumers collected that will be subject to time value refunds. *See Consumers Energy Co.*, 142 FERC ¶ 61,193, PP 37-38 (2013) (setting refund report for hearing), and *Consumers Energy Co.*, 148 FERC ¶ 63,012 (2014) (Initial Decision setting refund amounts).¹ Accordingly, the Commission’s conclusion regarding the validity and enforceability of the Facilities Agreement is a reviewable final agency action. *See Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 265-66 (D.C. Cir. 2007) (issue ripe where FERC will not revisit conclusion that carries immediate legal consequences for petitioner).

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

The Federal Power Act gives the Commission exclusive jurisdiction over the rates, terms and conditions of service for wholesale sales of electric energy in

¹ “R.” refers to a record item. “JA” refers to the Joint Appendix page number. “P” refers to the internal paragraph number within a FERC order.

interstate commerce. 16 U.S.C. § 824; *see generally New York v. FERC*, 535 U.S. 1 (2002). Section 205 of the Act provides that “[a]ll 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 . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is . . . unlawful.” 16 U.S.C. § 824d(a). To enforce these requirements, section 205 requires utilities to file their rates and service terms with the Commission, which must in turn ensure that those rates and terms are just and reasonable and not unduly discriminatory. *Id.* § 824d(c); *see also* 18 C.F.R. § 35.1(a) (filing requirements) and *Wis. Pub. Power*, 493 F.3d at 246 (explaining the filing requirements under section 205 of the Act).

In a series of cases in the early 1990s, culminating with the *Prior Notice Order*, the Commission addressed the notice and filing obligations of public utilities under section 205 of the Federal Power Act. *See Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,979 (“*Prior Notice Order*”), *reh’g granted in part & denied in part*, 65 FERC ¶ 61,081 (1993). In the *Prior Notice Order*, the Commission implemented a refund remedy for late filings. Specifically, for late-filed contracts that contain a just and reasonable rate, the utility must “refund to its customers the time value of the revenues collected . . . for the entire period that the rate was collected without

Commission authorization.” *Xcel Energy Servs. Inc. v. FERC*, 510 F.3d 314, 318-19 (D.C. Cir. 2007) (quoting *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,979).

The “time value” refund is interest at the average prime rate for each calendar quarter. *See* 18 C.F.R. § 35.19a (regulation governing refund requirements); *see also Xcel Energy Servs.*, 510 F.3d at 318-19 (explaining time value refunds).

Under section 206 of the Federal Power Act, 16 U.S.C. § 824e, the Commission may, after hearing upon its own motion or upon complaint, find an existing rate or charge for jurisdictional transmission service or sale to be unjust or unreasonable. *See id.* § 824e(a). In that case, the Commission shall establish a refund effective date. *See id.* § 824e(b).

II. EVENTS LEADING UP TO THE CHALLENGED ORDERS

The dispute involves a 1988 interconnection agreement – the Facilities Agreement – governing the interconnection of Midland’s electrical and steam cogeneration facility located in Midland, Michigan to the transmission facilities then owned by Consumers. Midland’s generator produces electric power for sale to Consumers and industrial steam for sale to Dow Chemical.² Consumers purchases capacity and energy from the Midland generator under the terms of a 1986 Power Purchase Agreement between itself and Midland.

² Dow Chemical also has a contractual right to designated amounts of back-up energy from Midland’s generator per a separate contract. Midland’s arrangement with Dow Chemical is not at issue.

In 2001, Consumers transferred ownership of its transmission assets, including the interconnection facilities that are the subject of the Facilities Agreement, to a predecessor of Michigan Electric. To effectuate the transfer of the interconnection facilities, Consumers and Michigan Electric entered into an Agency Agreement, pursuant to which Michigan Electric performs for Consumers the operation and maintenance obligations under the Facilities Agreement.

From April 2001 until October 2004, Midland paid the operating and maintenance costs (including property taxes) incurred by Michigan Electric, acting as agent, in carrying out Consumers' duties under the Facilities Agreement.

Midland stopped paying Michigan Electric's invoices in November 2004, even though Michigan Electric continued to provide service. Midland received and accepted service under the Facilities Agreement and Michigan Electric continued to bill Midland for such service until the Facilities Agreement was cancelled in 2012.

In January 2010, Michigan Electric filed suit against Midland in state court for the unpaid charges incurred under the Facilities Agreement. That lawsuit is now pending in the U.S. District Court for the Eastern District of Michigan. *See Mich. Elec. Transmission Co. v. Midland Cogeneration Venture Ltd. P'ship*, 737 F.Supp.2d 715, 733 (E.D. Mich. 2010) (noting that FERC may be in the better position to interpret its prior orders and rulings as they apply to the Facilities

Agreement). The District Court litigation has been held in abeyance pending the Commission's resolution of the administrative proceedings regarding the Facilities Agreement, which are now the subject of this appeal. *See Mich. Elec. v. Midland*, Case No. 10-10661, Order Holding Proceedings in Abeyance (E.D. Mich. May 23, 2011).

A. Facilities Agreement

On July 8, 1988, Midland and Consumers executed the Facilities Agreement, which governs the construction, ownership, and operation of the transmission facilities necessary to interconnect the Midland generator to the transmission grid. Under the Facilities Agreement, Midland is to pay “all direct and indirect costs and expenses (including property taxes) incurred by Consumers in owning and operating” and “maintaining” the interconnection facilities. Consumers Petition at 3, Docket No. ER10-2156 (Aug. 6, 2010), R.4; *see also* Facilities Agreement §§ 3.1, 3.4, R.4, Att. A, JA 86-87, 90-91. Section 4 of the Facilities Agreement provides that “Consumers, its agents and employees, shall have full right” and access for purposes of operating and maintaining the interconnection facilities. *Id.* § 4, JA 93.

In August 2010, pursuant to section 205 of the Federal Power Act, Consumers filed the Facilities Agreement for Commission approval. Consumers requested an effective date 60 days after the date of filing. *See* Consumers Petition

at 1. Midland filed comments “not opposing” the late filing of the Facilities Agreement, but requested that “acceptance of the Facilities Agreement . . . operate prospectively only.” Midland Comments at 2, 13, Docket No. ER10-2156 (Aug. 27, 2010), R.13, JA 120, 131 (citing *Prior Notice Order*, 64 FERC ¶ 61,139 (1993)). Midland’s comments focused on the triggering event for the Facilities Agreement becoming a FERC-jurisdictional contract, arguing that it became jurisdictional when executed in 1988. *See* Midland Comments at 11, JA 129.

The Facilities Agreement continued in full force and effect until 2012, when Midland opted to terminate it to pursue a new interconnection agreement.

B. Agency Agreement

In 2001, Consumers transferred to Michigan Electric substantially all of Consumers’ transmission facilities, including the interconnection facilities subject to the Facilities Agreement. *See Consumers Energy Co.*, 94 FERC ¶ 61,142 (2001) (order approving transfer). Section 10 of the Facilities Agreement prohibited the assignment of the Facilities Agreement unless the 1986 Power Purchase Agreement was also assigned “in the same manner at the same time.” Facilities Agreement at § 10, JA 99. In lieu of an assignment, Consumers and Michigan Electric entered into an Agency Agreement dated April 1, 2001. The Facilities Agreement remained undisturbed.

Under the Agency Agreement, Michigan Electric carries out Consumers’ obligations under the Facilities Agreements including operation and maintenance and billing, except with regard to two billing meters that were not transferred to Michigan Electric, and which are not at issue in this dispute.³ *See* Agency Agreement § II, R.4, Att. C, JA 111-115. Michigan Electric’s sole compensation from Consumers is indemnity payments and a \$500 monthly “agency fee.” *Id.* §§ III and IV, JA 115-16. Michigan Electric also is “entitled to the payments from [Midland] pursuant to the [Facilities Agreement]” *Id.* § III, JA 115.

C. New Generator Interconnection Agreement

FERC Docket No. ER10-1814 addresses a new, unexecuted⁴ generator interconnection agreement for Midland’s generator facility. *See generally* Midwest Independent Transmission System Operator, Inc. Petition, Docket No. ER10-1814 (July 19, 2010), R.1, JA 63-68. The new interconnection agreement is among Midland, Michigan Electric (as owner of the transmission facilities), and

³ The two billing meters that remained with Consumers are for energy provided to Dow Chemical. Consumers continued to operate and maintain those meters and continued to bill and receive payment from Midland for that work.

⁴ Parties file with FERC an unexecuted generator interconnection agreement if there is disagreement regarding specific terms of the proposed contract. The Commission will resolve the disputed terms.

the Midcontinent Independent System Operator, Inc.⁵ (“Regional Operator”) (as the operator of the transmission facilities). The new agreement resulted from Midland’s request to increase the electrical output of its generator facility. The new interconnection agreement, as filed with the Commission, required the Facilities Agreement to be terminated or amended to avoid conflicting agreements governing interconnection service and maintenance obligations. *Id.* at 2, JA 64. Midland disputed the need to terminate or amend the Facilities Agreement. *Id.* at 2-3, JA 64-65. Per the parties’ request,⁶ the Commission addressed both the Facilities Agreement and the new interconnection agreement together in a single order: the Facilities Agreement Order.

D. Facilities Agreement Order (FERC Docket No. ER10-2156)

On September 17, 2010, the Commission issued an order accepting both the late-filed Facilities Agreement and the new interconnection agreement, subject to the termination or amendment of the Facilities Agreement. *See Midwest Indep.*

⁵ The Midcontinent Independent System Operator, Inc., formerly named Midwest Independent Transmission System Operator, Inc., is an independent system operator and FERC-approved regional transmission organization that operates, but does not own, the transmission system throughout the Midwest and Manitoba, Canada. *See, e.g., Wis. Pub. Power*, 493 F.3d at 245-48 (giving history of the Regional Operator).

⁶ Midland, Michigan Electric, Consumers and the Regional Operator are the only parties in both the Facilities Agreement proceeding (Docket No. ER10-2156) and the new interconnection agreement proceeding (Docket No. ER10-1814).

Transmission Sys. Operator, Inc., 132 FERC ¶ 61,241, PP 1-2 (2010), R.21, JA 198-99 (“Facilities Agreement Order”). Relevant to this case, the Commission accepted the Facilities Agreement with an October 5, 2010 effective date. *Id.* P 2, JA 199. The Commission determined that the Facilities Agreement became jurisdictional when it was executed in 1988. *See id.* P 26, JA 209. Accordingly, the Commission applied its *Prior Notice Order* policy and directed Consumers to refund the time value of the revenues it (or Michigan Electric as its agent) collected between 1988 and 2010. *Id.* PP 8 n.17, 26, JA 202, 209.

Midland did not seek rehearing of this order. Michigan Electric requested clarification and Consumers petitioned for rehearing on the issue of when the Facilities Agreement became subject to FERC’s jurisdiction.

III. THE CHALLENGED ORDERS

A. Agency Agreement Order (FERC Docket No. ER11-136)

Pursuant to a Commission directive in the Facilities Agreement Order, on October 18, 2010, Michigan Electric filed the 2001 Agency Agreement for the Commission’s review and approval under section 205 of the Federal Power Act. Midland protested the filing, asserting that the charges Michigan Electric invoiced were unlawful.

In the order approving the Agency Agreement, the Commission noted that the scope of the docket was limited to review of the terms of the Agency

Agreement, “not with the rates in the Facilities Agreement.” *Mich. Elec. Transmission Co.*, 133 FERC ¶ 61,238, at P 8 (2010), R.41, JA 4 (“Agency Agreement Order”). The Commission rejected Midland’s objections as challenges to the charges under the Facilities Agreement, not to the rates in the Agency Agreement. *Id.* P 9, JA 4. The Commission held that because the Facilities Agreement rates were found to be just and reasonable in the Facilities Agreement Order, and because Midland did not seek rehearing of that order, Midland’s challenge in the Agency Agreement proceeding “represents an impermissible collateral attack” on Commission-approved rates. *Id.*

With respect to the Agency Agreement, the Commission found that the only rate specified in the Agency Agreement is the \$500 monthly fee payable by Consumers to Michigan Electric, and found the monthly fee “not unjust and unreasonable nor unduly discriminatory.” *Id.* P 8, JA 4. The Commission accepted the late-filed Agency Agreement, setting a December 17, 2010 effective date. *Id.*

B. March 20, 2012 Orders

1. Agency Agreement Rehearing Order (FERC Docket No. ER11-136)

Midland requested rehearing of the Agency Agreement Order, arguing that the Commission erred in finding that: (i) the Agency Agreement proceeding is not the proper proceeding to object to the charges invoiced by Michigan Electric, and

(ii) the only rate in the Agency Agreement is the \$500 monthly agency fee. *See Mich. Elec. Transmission Co.*, 138 FERC ¶ 61,203, at P 10 (2012), R.47, JA 24 (“Agency Agreement Rehearing Order”).

The Commission denied rehearing. The Commission held that the Agency Agreement is “an agreement by which Consumers Energy has engaged Michigan Electric, as its agent, to perform certain of the operations and maintenance duties that would otherwise be performed by Consumers Energy under the Facilities Agreement.” *Id.* P 11, JA 25. The Commission rejected Midland’s claim that the Agency Agreement incorporated by reference rates that are chargeable under the Facilities Agreement. *Id.* P 16, JA 26. The Commission also affirmed its prior finding that Midland’s objections raised in the Agency Agreement proceeding are a collateral attack on the rates accepted in the Facilities Agreement Order. *Id.* P 18, JA 27. Last, the Commission reiterated that its “acceptance of the Agency Agreement is not a determination that Michigan Electric itself, as distinct from Consumers Energy, has any rights against Midland under the Facilities Agreement.” *Id.* P 19, JA 27.

2. Facilities Agreement Rehearing Order (FERC Docket No. ER10-2156)

The Facilities Agreement Rehearing Order denied Consumers’ request for rehearing and granted the clarification Michigan Electric requested. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,204, at P 2, R.48, JA 31

(“Facilities Agreement Rehearing Order”). In response to Michigan Electric’s request, the Commission clarified that its acceptance of the late-filed Facilities Agreement, with an effective date of December 17, 2010, did not affect the validity or enforceability of that agreement prior to its filing. *Id.* P 26, JA 42. The Commission explained that under its *Prior Notice Order* policy, “if a utility files an otherwise just and reasonable rate after new service has commenced, the rate is collectible, but the Commission will require the utility to refund the time value of the revenues collected for the entire period that the rate was collected without Commission authorization.” *Id.* P 28, JA 42-43 (citing *Prior Notice Order*, 64 FERC at 61,979-80).

Accordingly, the Commission affirmed that “Consumers Energy is entitled to collect the rates authorized by the Facilities Agreement for the entire period that the Facilities Agreement was jurisdictional.” *Id.* P 30, JA 43. The Commission further clarified that Midland must “pay the charges provided for in the Facilities Agreement, which, in the Facilities Agreement Order, we have already determined to be a just and reasonable rate.” *Id.*

3. Declaratory Order (FERC Docket No. EL11-2)

On October 18, 2010, Michigan Electric requested the Commission’s determination regarding the respective rights and obligations of Michigan Electric and Midland under the Facilities Agreement and Agency Agreement. *See Mich.*

Elec. Transmission Co., 138 FERC ¶ 61,202, at P 1 (2012), R.46, JA 7

(“Declaratory Order”). Michigan Electric also asked the Commission to order Midland to pay the invoices outstanding since late 2004.

The Commission affirmed that failure of a party to timely file a jurisdictional contract “does not affect” the contract’s “validity and enforceability during the period before” it is filed. *Id.* P 20, JA 16; *see also id.* P 22, JA 17 (noting that under the *Prior Notice Order* policy, late-filed agreements are effective from the time they were jurisdictional). Thus, the Commission held that “Consumers Energy is entitled to recover [from Midland] the rates authorized in the Facilities Agreement for the entire period that the Facilities Agreement has been jurisdictional,” i.e., since 1988. *Id.* P 20, JA 16. The Commission denied Michigan Electric’s request that the Commission direct Midland to pay Michigan Electric directly because the two companies have no contractual relationship. *Id.* P 21, JA 16-17. Last, the Commission rejected Midland’s objections to the Facilities Agreement rates. *Id.* PP 18 n.39, 24, 25, JA 16, 18.

C. Omnibus Rehearing Order (FERC Docket Nos. ER10-2156 and EL11-2)

In a January 2014 order, the Commission denied Midland’s requests for rehearing of the Facilities Agreement Rehearing Order and the Declaratory Order. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 146 FERC ¶ 61,008, at PP 1-2, 17 (2014), R.64, JA 47-48, 54 (“Omnibus Rehearing Order”). The four

arguments Midland raised in its two rehearing requests were substantively identical. The Commission denied rehearing and: (1) addressed the enforceability date of a jurisdictional contract (*id.* PP 19-22, JA 55-57); (2) distinguished *Xcel Energy Servs.*, 510 F.3d 314, and *BP West Coast Prods., LLC v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004) (*id.* PP 23-24, JA 57-58); (3) affirmed Midland’s obligation to pay Consumers for services provided by Michigan Electric as agent (*id.* P 26, JA 59); and (4) addressed the argument that FERC implicitly found that Midland waived its rights under the assignment clause in section 10 of the Facilities Agreement (*id.* P 28, JA 59-60).

IV. CANCELLATION OF THE FACILITIES AGREEMENT

In 2011, the Regional Operator filed, and the Commission accepted, a revised interconnection agreement to govern the expanded interconnection services for Midland’s generator. *See Midwest Indep. Transmission Sys. Operator, Inc.*, Letter Order, Docket ER11-3764-000 (July 20, 2011). Pursuant to the terms of the new interconnection agreement, Consumers and Midland terminated the Facilities Agreement. *See Consumers Energy Co.*, Notice of Cancellation, Docket No. ER12-420-000 (Nov. 15, 2011). By order dated April 6, 2012, the Commission accepted cancellation of the Facilities Agreement and clarified that the order “in no way affects Midland’s monetary obligations for costs incurred by Michigan Electric, as Consumers Energy’s agent, in providing services under the Facilities

Agreement prior to the effective date of its termination.” *Consumers Energy Co.*, 139 FERC ¶ 61,014, at PP 20, 22 (2012), *on reh’g*, 142 FERC ¶ 61,193 (2013).

SUMMARY OF ARGUMENT

The court lacks jurisdiction to hear several of the claims Midland raises on appeal. First, Midland’s objections to the Facilities Agreement rates constitute an impermissible and untimely collateral attack on the earlier Facilities Agreement Order, in which the Commission accepted the rates in the Facilities Agreement as just and reasonable. No party sought rehearing regarding the Facilities Agreement rates; thus the Facilities Agreement Order is the Commission’s final order on that issue.

Second, Midland never challenged Michigan Electric’s qualifications as an agent under state law in the Commission’s proceeding on the Agency Agreement. Consequently, Midland is now barred from belatedly challenging on appeal the validity of the Agency Agreement.

On the merits, the Commission appropriately preserved the integrity of the long-standing contract between Midland and Consumers, by holding Midland to the bargain it struck with Consumers. Midland, by entering into the Facilities Agreement and accepting uninterrupted service under the contract, was on notice that it was obligated to perform. Consumers’ compliance (or non-compliance) with the Federal Power Act’s filing requirement does not impact the validity of the

contract. Rather, the filing of the contract with the Commission triggered the Commission's review of the reasonableness of the contract's rates and set an effective date for purposes of determining Consumers' refund obligations. When Midland sought to avoid making payments due under the Facilities Agreement, the Commission correctly clarified that Consumers' failure to file the Agreement sooner does not alter the legality of the Agreement, much less Consumers' and Midland's rights and responsibilities under the Facilities Agreement. To that end, the Commission reasonably directed Midland to reimburse Consumers for the costs incurred in providing Midland service.

ARGUMENT

I. THE COURT LACKS JURISDICTION WHERE PETITIONER ADVANCES AN IMPERMISSIBLE COLLATERAL ATTACK AND FAILED TO SEEK AGENCY REHEARING OF ISSUES IT RAISES ON APPEAL

A. Midland Advances An Impermissible Collateral Attack On An Order It Did Not Timely Challenge

Under the Federal Power Act, the Court has jurisdiction to hear petitions for review from any party aggrieved by a FERC order, provided that the party first sought rehearing at the Commission. 16 U.S.C. § 825l(a)-(b). A party cannot raise an issue on judicial review of later orders that challenge an earlier Commission decision that was not the subject of agency rehearing and judicial review. Such a “collateral attack” on an earlier, final order is impermissible. *See, e.g., Sacramento*

Mun. Util. Dist. v. FERC, 428 F.3d 294, 298-99 (D.C. Cir. 2005) (challenge to the validity of a tariff is an impermissible collateral attack on prior orders approving that tariff), and *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540, 556 (5th Cir. 2014) (petition challenging issue arising from prior orders not before the court is an impermissible collateral attack).

To determine whether an issue is barred as a collateral attack on a prior order, the court must determine whether the order upon which the petition is based “was merely a ‘clarification’” of a prior order, or whether it “was a ‘modification’” of a prior order. *Dominion Res., Inc. v. FERC*, 286 F.3d 586, 589 (D.C. Cir. 2002). The latter is reviewable on appeal, while the former is not. To differentiate between a clarification and a modification, the court asks whether “a reasonable [party] in [petitioner’s] position ‘would have perceived a very substantial risk that [the order] meant’ what the Commission now says it meant.” *See S. Co. Servs., Inc. v. FERC*, 416 F.3d 39, 45 (D.C. Cir. 2005) (quoting *Dominion Res., Inc.*, 286 F.3d at 589).

Midland challenges on appeal the justness and reasonableness of the charges incurred for service it received under the Facilities Agreement. Br. 4-5, 9 (issue 3), 31, 44-47, and 54-60. Specifically, Midland alleges that the charges under the Facilities Agreement are: (1) precluded under the Commission’s Order No. 2003; (2) an impermissible direct assignment of transmission network upgrade costs; and

(3) double-recovered from both Michigan Electric’s transmission customers and Midland.

If Midland questioned the justness and reasonableness of the Facilities Agreement rates, it should have raised its objections in a request for rehearing of the order in which the Commission accepted the rates as just and reasonable, i.e., the Facilities Agreement Order. But Midland did not. Midland first questioned the Facilities Agreement rates in a separate proceeding involving a different contract (the Agency Agreement) after the statutory 30-day period for seeking rehearing of the Facilities Agreement Order had run. *See* Agency Agreement Order P 9, JA 4 (holding that Midland’s challenge in the instant proceeding to the Facilities Agreement rates “represents an impermissible collateral attack on the rates” FERC “already approved” in the Facilities Agreement Order); *see also* Agency Agreement Rehearing Order P 14, JA 26 (noting that Midland intervened in the Facilities Agreement proceeding, but “did not contest the justness and reasonableness of the rates . . . or seek rehearing of the Facilities Agreement Order accepting the Facilities Agreement and its rates”).

The Facilities Agreement proceeding was a routine section 205 rate filing in which the Commission determines the justness and reasonableness of the contract rates. *See* 16 U.S.C. § 824d(a); *see also Wis. Pub. Power*, 493 F.3d at 246 (describing FERC’s reviewer role under the Federal Power Act). Accordingly, the

filing of the Facilities Agreement put Midland on notice that the justness and reasonableness of the contract's rates were a central issue to be determined in the Commission's order.

Because Midland (the only other party to the contract) did not object to or raise any concerns regarding the contract's rates, the Commission approved the Facilities Agreement without specific discussion of the rates. *See* Facilities Agreement Order PP 2, 26, and Ordering Para. B, JA 199, 209, 218; *see also* Facilities Agreement Rehearing Order P 30, JA 43 (noting that FERC determined in the Facilities Agreement Order that the charges were just and reasonable); *cf.* *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 528 (2008) (FERC required under the *Mobile-Sierra* doctrine to presume that the rate set in a freely negotiated contract meets the "just and reasonable" requirement).

Moreover, the Commission's application of the *Prior Notice Order's* time value remedy notified Midland that the Commission had established the justness and reasonableness of the Facilities Agreement rates. *See* Facilities Agreement Order PP 8, 26, JA 202, 209 (citing *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,979). As the Commission stated, the *Prior Notice Order* provides that "if a utility files an otherwise *just and reasonable* cost-based rate after new service has commenced, the Commission requires the utility to refund its customers the time

value of the revenues collected”⁷ *Id.* P 8 n.17, JA 202 (emphasis added).

Thus, the Commission could not have imposed the time value refund requirement absent its acceptance of the Facilities Agreement rates as just and reasonable.

Midland asserts that the Facilities Agreement Order only approved the contract rates associated with the two Dow Chemical meters. Br. 55. But nothing in Consumers’ Facilities Agreement filing or the Facilities Agreement Order in any way limited the scope of the FERC’s review of the contract. *See Agency Agreement Rehearing Order* P 14, JA 26. As the Commission noted, the entire contract (and the rates contained in the contract) was before the Commission. *Id.* (Midland “not justified” in believing otherwise).

Further, nothing in the Facilities Agreement Order stated or suggested that FERC’s acceptance of the contract was “prospective only” as Midland claims. *See* Br. 6. Had the Commission accepted the contract prospectively, then it could not have required the retroactive time value refunds back to 1988. The Commission, by ordering Consumers to refund the time value of revenues collected since 1988 pursuant to its *Prior Notice Order*, put Midland on notice that the Facilities Agreement was a valid, jurisdictional contract with just and reasonable rates since 1988.

⁷ Under the *Prior Notice Order* policy, if the contract rates are not just and reasonable, then additional refunds are due equal to the amount collected in excess of what is the FERC-determined just and reasonable rate. *See Prior Notice Order*, 64 FERC ¶ 61,139 at 61,979 & n.11.

Moreover, Midland unpersuasively claims that because the Facilities Agreement Order conditionally accepted the new generator interconnection agreement, “under no scenario” would Midland be subject to charges under the Facilities Agreement going forward. *See* Br. 6, 56. Midland had not yet executed the new interconnection agreement and, in the proceeding culminating in the Facilities Agreement Order, Midland vigorously protested several provisions in that draft agreement. *See* Facilities Agreement Order PP 29, 38, 45, 47, JA 210, 213, 215, 217 (listing contested provisions). The Facilities Agreement Order made plain that “Midland has the option of choosing between whether to continue the status quo and having its interconnection governed by the Facilities Agreement or increasing its capacity at the Midland Facility and having its interconnection governed by the provisions of the [new interconnection agreement].” *Id.* P 35, JA 212. In fact, it took Midland nine months to decide. *See Consumers Energy Co.*, 139 FERC ¶ 61,014 at P 4 (new interconnection agreement executed in June 2011). Thus, it was not inevitable that the “Facilities Agreement would soon be superseded” by a new generator interconnection agreement. *See* Br. 6.

Nor does the Commission’s directive requiring Michigan Electric to file the Agency Agreement excuse Midland’s failure to protest the Facilities Agreement rates in the Facilities Agreement proceeding. “The language of 16 U.S.C. § 825*l* does not permit the intertwining of orders for review purposes, that is, using a

timely petition to review an order for which the time limitations have run.” *Sierra Ass’n for Env’t v. FERC*, 791 F.2d 1403, 1407 (9th Cir. 1986) (dismissing appeal of later orders in a hydroelectric licensing proceeding). *See also Ky. Utils. Co. v. FERC*, 789 F.2d 1210, 1215 (6th Cir. 1986) (dismissing appeal of “compliance order [that] did not impose new terms and conditions, but only enforced those established in” an earlier electric rate proceeding).

Midland cannot bootstrap its objections to the Facilities Agreement rates into the Commission’s review of the Agency Agreement – a contract to which Midland is not a party. Nor can Midland wait until after the Commission affirmed its earlier determination that the rates are just and reasonable (*see Facilities Agreement Rehearing Order P 30, JA 43*), and turn around and argue that the Commission’s original determination is unwarranted. Such sandbagging is disfavored: “The remedy for [possible] ambiguity is to petition the Commission for reconsideration within the [statutory] period, enabling judicial review to be pursued (if Commission resolution of the ambiguity is adverse) after disposition of that petition.” *ICC v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 286 (1987) (agency decision unreviewable where petitioner did not seek rehearing); *see also ANR Pipeline Co. v. FERC*, 988 F.2d 1229, 1233 (D.C. Cir. 1993) (uncertainty regarding potential interpretation of FERC order does not excuse failure to seek

rehearing or clarification). The same result should be applied to Midland's belated challenge to the Facilities Agreement rates.

B. Midland's Challenges To The Agency Agreement Are Statutorily Barred From Judicial Review

Section 313 of the Federal Power Act, 16 U.S.C. § 825*l*, bars Midland's challenge to the Commission's orders approving the Agency Agreement because Midland failed to raise on rehearing in that proceeding: (i) Michigan Electric's qualifications as an agent under state law; and (ii) whether the Agency Agreement is an invalid assignment. *See* 16 U.S.C. § 825*l*(a)-(b); *see also* *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989) ("Parties seeking review of FERC orders must petition for rehearing of those orders and must *themselves* raise in that petition *all* of the objections urged on appeal.") (emphasis in original).

1. Midland Failed To Raise Its "State Law Defenses" To The Commission

The issue of whether Michigan Electric is a valid agent under Michigan law (Br. 49-53) was not an issue before the Commission in either the Agency Agreement proceeding, FERC Docket No. ER11-136, or in the two related Commission proceedings. "A party must first raise an issue with an agency before seeking judicial review." *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-

37 (1952) (explaining requirement “ensures ‘simple fairness’ to the agency and other affected litigants” and “provides this Court with a record to evaluate complex regulatory issues”)).

In all of Midland’s pleadings in the Agency Agreement proceeding, Midland makes only one passing reference to its “state law defenses” – in a footnote in its protest. *See* Midland’s Protest at 5 n.14, Docket Nos. ER11-136-000 and EL11-2-000 (Nov. 8, 2010), R.33, JA 338 (stating Midland “also has other state law defenses which it will raise if and when it is required to answer the complaint in [the District Court] case”); *see also* Midland’s Reply, Docket Nos. ER11-136-000 and EL11-2-000 (Dec. 8, 2010), R.39, JA 500-11 (no mention of “state law defenses”), and Midland’s Rehearing Request, Docket No. ER11-136-000 (Jan. 18, 2011), R.42, JA 513-25 (same). Nor did Midland raise its “state law defenses” on rehearing in the concurrently pending Facilities Agreement proceedings. *See* Midland’s Request for Rehearing of Declaratory Order, Docket No. EL11-2-000 (Apr. 19, 2012), R.49, JA 530-49 (no challenge to Michigan Electric’s qualification as agent); Midland’s Request for Rehearing of Facilities Agreement Rehearing Order, Docket No. ER10-2156-000 (Apr. 19, 2012), R.50, JA 550-68 (same). Because Midland did not raise this issue to the Commission or make any effort to explain its failure, the Court lacks jurisdiction to consider this argument. *See* 16 U.S.C. §§ 825l(a) and (b).

2. The Issue Of Whether Michigan Electric Was An Invalid Assignee Was Not Raised To FERC On Rehearing

Midland belatedly argues on appeal that the Commission failed to analyze whether Michigan Electric is an assignee rather than an agent. Br. 9, 52-54 (claiming Agency Agreement was an invalid assignment under the terms of the Facilities Agreement). Yet, Midland did not challenge FERC's characterization of Michigan Electric as an agent in the Agency Agreement proceeding. *See* Br. 49.

As the Commission noted, Midland's protest focused solely on its objections to charges under the Facilities Agreement. *See* Agency Agreement Order PP 5, 7, and 9, JA 3-4; and Agency Agreement Rehearing Order PP 10-19, JA 24-27. Midland never challenged the validity of the Agency Agreement. *See* Midland's Nov. 8, 2010 Protest at 11-24, JA 344-57 (arguments focused on rates and retroactive enforcement of the Agency Agreement and Facilities Agreement); Midland's Dec. 8, 2010 Reply, JA 500-11 (same); and Midland's Rehearing Request, Docket No. ER11-136 (Jan. 18, 2011), JA 513-25 (same).

Midland's passing reference to the issue in a footnote in the background section of its rehearing request is insufficient to be deemed fairly raised to the Commission. *See* 16 U.S.C. § 825l(a) (rehearing request must set forth grounds for rehearing with specificity). The entirety of the footnote reads:

[Midland's] discussion of the Agency Agreement should not be construed as acceptance of its terms. As noted in earlier submissions, the Agency

Agreement was executed without [Midland's] consent and in violation of a non-assignment provision in the Facilities Agreement.

Midland Request for Rehearing of Agency Agreement Order at 9 n.9, JA 521.

This bare statement is not enough to preserve the issue for judicial appeal. *See N.J. Zinc Co. v. FERC*, 843 F.2d 1497, 1502-03 (D.C. Cir. 1988) (Court lacks jurisdiction where specific objection was not made in rehearing application, despite petitioner's claim that it was encompassed by "overarching objection").

Moreover, the footnote's reference to "earlier submissions" is, apparently, to pleadings in the Facilities Agreement and Declaratory Order proceedings, but such bootstrapping of arguments is not permitted. Under Federal Power Act section 313(b), an objection cannot be preserved "indirectly." *See Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006) (rejecting argument made on rehearing to FERC by incorporating by reference objections made in other pleadings) (citing *Office of the Consumers' Counsel v. FERC*, 914 F.2d 290, 295 (D.C. Cir. 1990), and *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 460 (D.C. Cir. 2004)).

Because Midland did not assert these objections to the Agency Agreement with specificity in its application for rehearing to the Commission, nor did it claim that it had reasonable grounds for failing to do so, Midland is now statutorily barred from pursuing the issues on appeal. *See City of Nephi v. FERC*, 147 F.3d 929, 934 (D.C. Cir. 1998) (Court lacks jurisdiction to consider issues not raised on

rehearing to the Commission), and *City of Orrville v. FERC*, 147 F.3d 979, 990 (D.C. Cir. 1998) (statutory rehearing requirement to be strictly construed).

II. THE STANDARD OF REVIEW IS DEFERENTIAL

The court's review of Commission orders is governed by the "arbitrary and capricious" standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A); *see, e.g., Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 809 (D.C. Cir. 2007) (applying arbitrary and capricious standard to review FERC's conclusion that utility did not violate filed-rate doctrine). The Court must affirm the Commission's orders so long as the Commission examined the relevant data and articulated a rational connection between the facts found and the choice made. *Id.*; *see also NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007).

The Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Morgan Stanley*, 554 U.S. at 532 (same). Additionally, this Court gives substantial deference to FERC's interpretation of its own orders and regulations. *See, e.g., Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 740 (D.C. Cir. 2011); *see also NSTAR Elec.*, 481 F.3d at 799 (Court defers to FERC's interpretations of its own precedents).

III. THE COMMISSION CORRECTLY HELD THAT THE FACILITIES AGREEMENT IS A VALID AND ENFORCEABLE CONTRACT

Contracts hold an important role in the Federal Power Act. *See Morgan Stanley*, 554 U.S. at 551 (“uncertainties regarding . . . contract sanctity can have a chilling effect . . . which can harm customers in the long run”). Here, consistent with precedent regarding contract validity, the Commission affirmed Midland’s duty to abide by its contractual obligations to Consumers under the late-filed Facilities Agreement. *See Facilities Agreement Rehearing Order P 30, JA 43, and Declaratory Order P 20, JA 16.* As discussed below, Midland provides no basis for this Court to reject the accepted principle that the contractual obligations of unfiled contracts are enforceable against the parties to the contract.

A. The Facilities Agreement Is A Valid And Enforceable Contract Notwithstanding Its Late Filing

Under section 205 of the Federal Power Act, a regulated entity must file with the Commission all rates 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.” 16 U.S.C. § 824d(c); *see also* 18 C.F.R. § 35.1(a). Utilities may set rates “unilaterally by tariff; alternatively, sellers and buyers may agree on rates by contract.” *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 558 U.S. 165, 171 (2010) (citing 16 U.S.C. §§ 824d(c), (d)). Nevertheless, “the legality of rates so filed is not

conditioned upon the Commission’s approval. Unless they are challenged, either by an interested party or on the Commission’s initiative, the filed rates become legal rates.” *Boston Edison Co. v. FERC*, 856 F.2d 361, 368-71 (1st Cir. 1988) (giving overview of Federal Power Act § 205 framework) (quoting *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 255-56 (1951) (Frankfurter, J., dissenting)). Thus, section 205 of the Federal Power Act “defin[es] and implement[s] the powers of the Commission to review rates set initially by . . . companies.” *Id.* at 372 (quoting *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 343 (1956)). And where, as here, the rate is the result of a freely negotiated contract, the Commission must presume that the contract is just and reasonable. *See NRG Power Mktg.*, 558 U.S. at 174 (explaining the *Mobile-Sierra* doctrine).

The filing requirement, in the first instance, is a notice requirement. *See Me. Pub. Serv. Co. v. FPC*, 579 F.2d 659, 663-64 (1st Cir. 1978); *Borough of Lansdale v. FPC*, 494 F.2d 1104, 1110 & n.33 (D.C. Cir. 1974). *See also Xcel Energy Servs.*, 510 F.3d at 317 (“The filing and prior notice requirements of section 205 of the Federal Power Act, 16 U.S.C. § 824d, and FERC regulations, 18 C.F.R. § 35.3, provide FERC with timely information from which it can ‘monitor[] the reasonableness of prices and undue discrimination in the marketplace’ and ‘assist the public in filing complaints’ by providing it with ‘good information about

energy transactions.’”) (citing *Revised Pub. Util. Filing Requirements*, 99 FERC ¶ 61,107, at P 46 (2002)).

The Court’s *Mobile-Sierra* doctrine acknowledges that “filing” the contract (or tariff rates) with the Commission is “a *precondition* to changing a rate, not an *authorization* to do so in violation of a lawful contract.” *NRG Power Mktg.*, 558 U.S. at 172 (emphasis in original) (citing *United Gas v. Mobile*, 350 U.S. at 339-344). The *Mobile-Sierra* doctrine, derived from *Mobile Gas*, 350 U.S. 332, and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), recognizes that a salient purpose of the Federal Power Act was to preserve the “integrity of contracts, . . . [thereby permitting] the stability of supply arrangements.” *Boston Edison*, 856 F.2d at 370 (quoting *Mobile*, 350 U.S. at 344). This court has summarized the *Mobile-Sierra* rule as follows: “The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid.” *Richmond Power and Light Co. v. FPC*, 481 F.2d 490, 493 (D.C. Cir. 1973). Here, Consumers filed with FERC – albeit, belatedly – the exact contract it negotiated with Midland, the Facilities Agreement. Thus, under the *Mobile-Sierra* doctrine, the Commission reasonably accepted the Facilities Agreement as just and reasonable and prevented Midland from “shirk[ing] its contractual obligations.” *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364, 368 (D.C. Cir. 2013).

Further, the Commission reasonably determined that even though Consumers was required to file the Facilities Agreement in 1988, the fact that it did not do so until 2010 did not affect the legality of the contract's rates and the binding nature of the agreement. *See* Declaratory Order P 20, JA 16 (“failure of the parties to timely file the Facilities Agreement and the Agency Agreement does not affect their validity and enforceability during the period before they were filed”); *see also* Facilities Agreement Rehearing Order P 30 n.47, JA 43 (citing *Morgan Stanley*, 554 U.S. at 551, and *Permian Basin*, 390 U.S. at 822 (Federal Power Act regulatory system is premised on voluntary contractual agreements)). The Commission's conclusion is consistent with this Court's precedent that the *Mobile-Sierra* doctrine applies even to cases where the parties' agreement was unfiled despite a requirement that it be filed. *See, e.g., Compania de Gas Nuevo Laredo, S.A. v. FERC*, 606 F.2d 1024, 1028-29 (D.C. Cir. 1979) (ruling that rates established in a contract are effective for regulatory purposes even if the utility fails to file it with the Commission); *Sam Rayburn Dam Elec. Coop. v. FPC*, 515 F.2d 998, 1008-09 (D.C. Cir. 1975) (parties to contract bound by its terms whether or not the utility filed it with the Commission); *Borough of Lansdale*, 494 F.2d 1104 (rejecting attempt by utility to circumvent its contractual obligations on the ground that the contract had not yet been filed with the Commission); *see also Boston Edison Co. v. FERC*, 233 F.3d 60, 65 (1st Cir. 2000) (advance agency

approval not required for a contract to take effect and be presumed lawful). Accordingly, the Commission preserved the bargain struck by Midland and Consumers by holding that the Facilities Agreement is enforceable against Midland.

B. The FERC “Effective Date” Does Not Impact Contract Enforceability

Midland makes much of the fact that the Commission did not waive the notice requirement to allow the Facilities Agreement to have an earlier “effective date.” Br. 34-36. As the Commission explained, “Midland has confused the effective date for Commission acceptance of a rate filing with the enforceable date of a jurisdictional agreement.” Omnibus Rehearing Order P 19, JA 55; *cf. Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 921 (9th Cir. 2011) (“FERC has broad discretion to construe the FPA’s notice and filing requirements”). The FERC-set “effective date” is the date the rate became a “filed rate,” fixing the date that rate may subsequently be modified. *See* 18 C.F.R. § 35.2(f) (defining “effective date”); *see also Boston Edison*, 856 F.2d at 371-72 (detailing regulatory framework governing initial rates set by bilateral contracts). And, as discussed *supra* at pp. 31-33, the effective date does not impact the legality of the contract itself.

As relevant here, the FERC-set effective date determined the end-date for the penalty (i.e., time value refunds under the *Prior Notice Order*) for Consumers’ violation of the Commission’s filing requirement. *See* Omnibus Rehearing Order

P 19 n.31, JA 55. Waiver permits the Commission to set an “effective date” that is earlier than the date the utility filed the contract or rate schedule. The Commission’s *Prior Notice Order* established its policy for when, and under what circumstances, the Commission will waive the notice and filing requirement, as well as the penalty for violating the requirement. *Prior Notice Order*, 64 FERC ¶ 61,139 at 61,972. A utility avoids the penalty by obtaining waiver. Moreover, as the Commission explained, “a policy that gives no effect to late-filed agreements prior to the stated effective date . . . without waiver of the 60-day prior notice requirement . . . could be unjust.” Facilities Agreement Rehearing Order P 27, JA 42 (citing *El Paso Elec. Co.*, 105 FERC ¶ 61,131, at P 19 (2003), and *Morgan Stanley*, 554 U.S. at 545). Thus, the *Prior Notice Order* policy encourages compliance with section 205 filing requirements while “ensuring that a utility may collect bargained-for rates prior to filing of those rates.” *Id.*

Accordingly, Consumers’ failure to file the Facilities Agreement in a timely manner, and its decision to not seek waiver of the notice requirement, only served to open up a potentially larger refund requirement, but did not affect the legality of the Facilities Agreement. *See* Omnibus Rehearing Order P 19 n.31, JA 55; *see, e.g., Mont. Consumer Counsel*, 659 F.3d at 922 (not the job of the courts to second-guess FERC policy administering and effectuating section 205 filing requirement).

C. The Filed-Rate Doctrine Was Not Implicated By Consumers' Filing Of The Facilities Agreement

This case involves the filing of a contract that provides for a new service, not a change to an existing service. Thus, Midland's claim (Br. 33) that the Commission orders violated the filed-rate doctrine is meritless. The filed-rate doctrine "prohibits a federally regulated seller . . . from charging rates *higher* than those filed with the Federal Energy Regulatory Commission"⁸ *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 573 (1981) (emphasis added) (holding that a filed tariff rate for the purchase of gas prevailed over promise made in an agreement to pay a higher rate); *see also* Declaratory Order P 22 (rejecting Midland's argument that the filed-rate doctrine bars FERC from directing Midland to pay for the service it received prior to the filing of the Facilities Agreement). The doctrine gives effect to the Federal Power Act's prohibition against *changing* rates without first filing the rate modification with the Commission. *See* 16 U.S.C. § 824d(d). As the Supreme Court explained, the filed rate serves to prohibit "parties to vary by private agreement the rates filed with the Commission" *Arkansas Louisiana*, 453 U.S. at 582; *see also* *Town of Norwood v. FERC*, 217 F.3d 24, 28 (1st Cir. 2000) (under the filed-rate doctrine utility filings with the

⁸ The filed-rate doctrine also ensures that the question of whether a rate satisfies the just and reasonable standard is determined by the Commission, not the parties to the contract or trial courts. *See* *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 371 (1988).

regulatory agency prevail over unfiled contracts), and *Borough of Ellwood City v. FERC*, 583 F.2d 642, 649 (3d Cir. 1978) (filed-rate doctrine prohibits an increase to an agreed-to contract rate without prior filing “even though the initial rate was never filed”).

Thus, the filed-rate doctrine would prevent Consumers from changing the rate under the Facilities Agreement without filing the proposed new rate with the Commission. But that is not what happened here. Consumers did not seek to change its existing agreement with Midland. Rather, the rate Consumers filed with FERC was the agreed-to contract rate for the interconnection service Consumers provided Midland. Thus, the Commission observed the *Mobile-Sierra* doctrine and upheld the validity of the contract that Midland and Consumers voluntarily entered into by accepting the Facilities Agreement as a filed rate schedule. See Omnibus Rehearing Order P 20, JA 55-56 (FERC policy encourages compliance with filing requirements while “ensuring that a utility may collect bargained-for rates, even prior to the filing of those rates”), Facilities Agreement Rehearing Order P 27, JA 42 (policy that gives no effect to late-filed agreement without a waiver could be unjust) (citing *Morgan Stanley*, 554 U.S. at 545), and *id.* P 30, JA 43; see also *Morgan Stanley*, 554 U.S. at 534-35 (“under the FPA, ‘[w]hen commercial parties . . . avail themselves of rate agreements, the principal

regulatory responsibility [is] not to relieve a contracting party of an unreasonable rate.’”).

D. The Commission Decision Is Consistent With Precedent

Midland contends that the Commission’s position here – that, notwithstanding its late filing, the Facilities Agreement is enforceable against Midland – is inconsistent with precedent. *See* Br. 40-43. Midland is mistaken.

The Commission distinguished the cases Midland relies on in its brief. As the Commission explained, *Xcel Energy Servs.*, 510 F.3d 314, involved a materially different issue. *Xcel Energy* is a waiver case in which the utility challenged the Commission’s denial of its request for waiver to permit an earlier effective date. *See id.* at 316; *see also* Omnibus Rehearing Order P 24, JA 58 (distinguishing *Xcel Energy*). Here, Consumers did not seek a waiver.

Xcel Energy is further distinguishable by the fact that Xcel had never invoiced its customers for the service it provided under the unfiled contracts. With respect to the uninvoiced and uncollected rates, Xcel belatedly argued to the court that FERC’s decision not to waive the prior notice requirement “deprived Xcel of the ability to collect those charges.” *Xcel Energy*, 510 F.3d at 319. However, because Xcel failed to raise this argument in the underlying FERC proceeding, neither the Commission nor the court addressed it. *Id.* (Court lacked jurisdiction to hear argument not first urged before FERC).

The Commission also explained why *BP West Coast Prods., LLC v. FERC* is inapplicable to this case. 374 F.3d 1263 (D.C. Cir. 2004) (appeal of FERC’s Opinion No. 435, *SFPP, L.P.*, 86 FERC ¶ 61,022 (1999)). *BP West Coast* involved a challenge to oil pipeline rates “under a very different statute and regulatory regime,” the Interstate Commerce Act. See Omnibus Rehearing Order P 24, JA 58; see also Interstate Commerce Act, 49 U.S.C. app. § 1 *et seq.* (governing oil pipeline rates). The Interstate Commerce Act is distinct from the Federal Power Act in that it prohibits oil pipelines from providing transportation service unless the rates are on file with FERC. See 49 U.S.C. app § 6(7); see also *SFPP, L.P. v. FERC*, 592 F.3d 189, 193 (D.C. Cir. 2010) (Interstate Commerce Act prohibits pipeline from providing service unless rates are on file with FERC), and *Morgan Stanley*, 554 U.S. at 531 (noting that, unlike the Interstate Commerce Act, the Federal Power Act permits utilities to set rates through bilateral contracts). Indeed, in *SFPP v. FERC*, this Court summarily dismissed cases relied on by an oil pipeline petitioner because they involved “different statutory schemes,” specifically the Federal Power Act. See *SFPP v. FERC*, 592 F.3d at 193-94 (petitioner cited *Morgan Stanley*, 554 U.S. 527, and *Borough of Ellwood City*, 583 F.2d at 646-48).

Midland’s other primary authority to support its position, *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), is equally unhelpful as it also

concerns the Interstate Commerce Act. *See* Br. 30, 41, 43. In *Maislin*, the Supreme Court explained that “[t]he duty to file rates with the [Interstate Commerce] Commission . . . and *the obligation to charge only those rates . . .* have always been considered essential to preventing price discrimination and stabilizing rates.” *Id.* at 126 (emphasis added) (describing Interstate Commerce Act). It is the Interstate Commerce Act’s explicit prohibition against charging any rate other than the filed rate that distinguishes that Act from the Federal Power Act, which does not contain a similar proscription.

E. The Commission Reasonably Addressed Midland’s Rate Objections

Midland’s argument that the Commission failed to meaningfully respond to its objections raised on rehearing, regarding the recoverability of the charges for property taxes and operation and maintenance expenses under the Facilities Agreement (Br. 44-47, 54, 58-60), is baseless. The Commission did not disregard Midland’s claims regarding the lawfulness of the invoiced charges. Rather, the Commission reasonably dismissed them as a collateral attack on the prior, unchallenged Facilities Agreement Order. *See* Declaratory Order P 24, JA 18 (rejecting Midland’s challenge to the Facility Agreement rates “given the Commission’s acceptance of the rates . . . and Midland’s failure to seek rehearing of the Facilities Agreement Order”); *see also* Agency Agreement Order P 9, JA 4 (Midland’s rate challenge is an impermissible collateral attack); Agency

Agreement Rehearing Order P 14, JA 26 (Midland precluded from challenging rates because it failed to seek rehearing of the Facilities Agreement Order).

The Commission further explained that having failed to protest the Facilities Agreement filing, Midland's only avenue to challenge the Facilities Agreement rates is by filing a complaint with the Commission under section 206 of the Federal Power Act, 16 U.S.C. § 824e. *See* Declaratory Order PP 24-25, JA 18 (explaining that Midland's only recourse is to file a FPA section 206 complaint seeking to modify the Facilities Agreement's rates); *see also* Agency Agreement Order P 9 n.12, JA 4 (same); Agency Agreement Rehearing Order P 18 n.19, JA 27 (same). Midland chose not to do so.

IV. MIDLAND MISREPRESENTS THE COMMISSION'S DIRECTIVE

Contrary to Midland's assertions (Br. 1, 31, 48), the Commission did not order Midland to pay Michigan Electric. Nor did the Commission order Midland to pay any charges or rates under the Agency Agreement. Rather, the Commission clarified that Midland is "obligated to reimburse Consumers Energy for the costs (including property taxes) properly incurred under the Facilities Agreement to provide the [operation and maintenance] services." Declaratory Order P 20, JA 16; *see also* Omnibus Rehearing Order P 28, JA 59-60 (reiterating that Midland had received service from Consumers under the Facilities Agreement and, thus, "was obligated to pay Consumers for that service").

In response to Midland’s claims that the Agency Agreement establishes rates that are chargeable under the Facilities Agreement, the Commission determined that: (i) the Agency Agreement does not amend the Facilities Agreement rates; (ii) the only rate in the Agency Agreement is the monthly agent fee payable by Consumers; and (iii) the Agency Agreement does not establish rates that are chargeable under the Facilities Agreement. *See* Agency Agreement Order P 8, JA 4, and Agency Agreement Rehearing Order PP 11, 16, JA 25, 26. As the Commission explained “[t]he Agency Agreement does not purport to be anything other than what its name suggests – an agreement by which Consumers Energy has engaged Michigan Electric, as its agent, to perform certain of the operations and maintenance duties that would otherwise be performed by Consumers Energy under the Facilities Agreement.” Agency Agreement Rehearing Order P 11, JA 25. Accordingly, the Commission reasonably clarified that Michigan Electric does not have contractual rights enforceable against Midland. *See* Agency Agreement Order P 9 n.11, JA 4; Agency Agreement Rehearing Order P 18, JA 27.

CONCLUSION

For the foregoing reasons, the petitions for review should be dismissed to the extent they raise issues over which the Court lacks jurisdiction. In all other respects, the petitions should be denied and the Commission's orders upheld on the merits.

Respectfully submitted,

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FINAL BRIEF: October 27, 2014

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 9,782 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addenda.

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October 27, 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

Sec.	
801.	Congressional review.
802.	Congressional disapproval procedure.
803.	Special rule on statutory, regulatory, and judicial deadlines.
804.	Definitions.
805.	Judicial review.
806.	Applicability; severability.
807.	Exemption for monetary policy.
808.	Effective date of certain rules.

§ 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.

rate, or charge docketed with such organization within 120 days after such proposal is docketed.

(Feb. 4, 1887, ch. 104, part I, § 5b, as added Feb. 5, 1976, Pub. L. 94-210, title II, § 208(b), 90 Stat. 42, and amended Oct. 19, 1976, Pub. L. 94-555, title II, § 220(k), 90 Stat. 2630.)

§ 6. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 6. Schedules and statements of rates, etc., joint rail and water transportation

(1) Schedule of rates, fares, and charges; filing and posting

Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

(2) Schedule of rates through foreign country

Any common carrier subject to the provisions of this chapter receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this chapter, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

(3) Change in rates, fares, etc.; notice required; simplification of schedules

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and

to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges, or classifications not changed if, in its judgment, not inconsistent with the public interest.

(4) Joint tariffs

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

(5) Copies of traffic contracts to be filed

Every common carrier subject to this chapter shall also file with said Commission copies of all contracts, agreements, or arrangements, with other common carriers in relation to any traffic affected by the provisions of this chapter to which it may be a party: *Provided, however*, That the Commission, by regulations, may provide for exceptions from the requirements of this paragraph in the case of any class or classes of contracts, agreements, or arrangements, the filing of which, in its opinion, is not necessary in the public interest.

(6) Form and manner of publishing, filing, and posting schedules; incorporation of rates into individual tariffs; time for incorporation; rejection of schedules; unlawful use

The schedules required by this section to be filed shall be published, filed, and posted in such form and manner as the Commission by regulation shall prescribe. The Commission shall, beginning 2 years after February 5, 1976, require (a) that all rates shall be incorporated into the individual tariffs of each common carrier by railroad subject to this chapter or rail rate-making association within 2 years after the initial publication of the rate, or within 2 years after a change in any rate is approved by the Commission, whichever is later, and (b) that any rate shall be null and void with respect to any such carrier or association which does not so incorporate such rate into its individual tariff. The Commission may, upon good cause shown, extend such period of time. Notice of any such extension and a statement of the reasons therefor shall be promptly transmitted to the Congress. The Commission is authorized to reject any schedule filed with it which is not in accordance with this section and with such regulations. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(7) Transportation without filing and publishing rates forbidden; rebates; privileges

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter,

unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

(8) Preference to shipments for United States

In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given, over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned.

(9) Schedule lacking notice of effective date

The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(10) Penalty for failure to comply with regulations

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of \$500 for each such offense, and \$25 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(11) Jurisdiction of Commission over transportation by rail and water

When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction otherwise given by this chapter:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right-of-way, or by directing either or both the rail and water carrier, individually or in connection with one another to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Appendix.

(b) To establish proportional rates or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(12) Jurisdiction of Commission over carriers contracting with water carriers operating to foreign ports

If any common carrier subject to this Act enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Commission may by order require such common carrier to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

(Feb. 4, 1887, ch. 104, pt. I, § 6, 24 Stat. 380; Mar. 2, 1889, ch. 382, § 1, 25 Stat. 855; June 29, 1906, ch. 3591, § 2, 34 Stat. 586; June 18, 1910, ch. 309, § 9, 36 Stat. 548; Aug. 24, 1912, ch. 390, § 11, 37 Stat. 568; Aug. 29, 1916, ch. 417, 39 Stat. 604; Feb. 28, 1920, ch. 91, §§ 409-413, 41 Stat. 483; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 8, 54 Stat. 910; Aug. 2, 1949, ch. 379, § 5, 63 Stat. 486; Feb. 5, 1976, Pub. L. 94-210, title II, § 209, 90 Stat. 45.)

§ 7. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 7. Combinations to prevent continuous carriage of freight prohibited

It shall be unlawful for any common carrier subject to the provisions of this chapter to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this chapter.

(Feb. 4, 1887, ch. 104, pt. I, § 7, 24 Stat. 382; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

§ 8. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 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

(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

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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.

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

(g) *Frequency regulation.* The term *frequency regulation* as used in this part will mean the capability to inject or withdraw real power by resources capable of responding appropriately to a system operator's automatic generation control signal in order to correct for actual or expected Area Control Error needs.

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

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

§ 35.3 Notice requirements.

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

cordance with § 35.2(d) may be deferred by the public utility making a filing requesting deferral prior to the rate schedule or tariff's acceptance by the Commission.

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

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

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

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

§ 35.4 Permission to become effective is not approval.

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

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

§ 35.5 Rejection of material submitted for filing.

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

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§ 35.13, a detailed study supporting the amounts proposed to be collected in rates.

(c) A public utility that has recorded asset retirement obligations on its books, but is not seeking recovery of the asset retirement costs in rates, must remove all asset-retirement-obligations-related cost components from the cost of service supporting its proposed rates.

[Order 631, 68 FR 19619, Apr. 21, 2003]

§ 35.19 Submission of information by reference.

If all or any portion of the information called for in this part has already been submitted to the Commission, substantially in the form prescribed above, specific reference thereto may be made in lieu of re-submission in response to the requirements of this part.

§ 35.19a Refund requirements under suspension orders.

(a) *Refunds.* (1) The public utility whose proposed increased rates or charges were suspended shall refund at such time in such amounts and in such manner as required by final order of the Commission the portion of any increased rates or charges found by the Commission in that suspension proceeding not to be justified, together with interest as required in paragraph (a)(2) of this section.

(2) Interest shall be computed from the date of collection until the date refunds are made as follows:

(i) At a rate of seven percent simple interest per annum on all excessive rates or charges held prior to October 10, 1974;

(ii) At a rate of nine percent simple interest per annum on all excessive rates or charges held between October 10, 1974, and September 30, 1979; and

(iii)(A) At an average prime rate for each calendar quarter on all excessive rates or charges held (including all interest applicable to such rates or charges) on or after October 1, 1979. The applicable average prime rate for each calendar quarter shall be the arithmetic mean, to the nearest one-hundredth of one percent, of the prime rate values published in the *Federal Reserve Bulletin*, or in the Federal Reserve's "Selected Interest Rates" (Sta-

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tistical Release G. 13), for the fourth, third, and second months preceeding the first month of the calendar quarter.

(B) The interest required to be paid under clause (iii)(A) shall be compounded quarterly.

(3) Any public utility required to make refunds pursuant to this section shall bear all costs of such refunding.

(b) *Reports.* Any public utility whose proposed increased rates or charges were suspended and have gone into effect pending final order of the Commission pursuant to section 205(e) of the Federal Power Act shall keep accurate account of all amounts received under the increased rates or charges which became effective after the suspension period, for each billing period, specifying by whom and in whose behalf such amounts are paid.

[44 FR 53503, Sept. 14, 1979, as amended at 45 FR 3889, Jan. 21, 1980; Order 545, 57 FR 53990, Nov. 16, 1992]

§ 35.21 Applicability to licensees and others subject to section 19 or 20 of the Federal Power Act.

Upon further order of this Commission issued upon its own motion or upon complaint or request by any person or State within the meaning of sections 19 or 20 of the Federal Power Act, the provisions of §§ 35.1 through 35.19 shall be operative as to any licensee or others who are subject to this Commission's jurisdiction in respect to services and the rates and charges of payment therefor by reason of the requirements of sections 19 or 20 of the Federal Power Act. The requirement of this section for compliance with the provisions of §§ 35.1 through 35.19 shall be in addition to and independent of any obligation for compliance with those regulations by reason of the provisions of sections 205 and 206 of the Federal Power Act. For purposes of applying this section *Electric Service* as otherwise defined in § 35.2(a) shall mean: Services to customers or consumers of power within the meaning of sections 19 or 20 of the Federal Power Act which may be comprised of various classes of capacity and energy and/or transmission services subject to the jurisdiction of this Commission. *Electric Service* shall include the utilization of

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 27th day of October 2014, served the foregoing upon the counsel listed in the Service Preference Report via either email through the Court's CM/ECF system or U.S. mail as indicated below.

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