ORAL ARGUMENT SCHEDULED FOR JULY 22, 2016

In the United States Court of Appeals for the Ninth Circuit

Nos. 15-73803, *et al.*

MPS MERCHANT SERVICES, INC., *ET AL.*,
Petitioners,

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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FEDERAL RULES OF APPELLATE PROCEDURE

GLOSSARY

AER	APX Excerpts of Record
ALJ	Administrative Law Judge
APX	Petitioner APX, Inc.
BER	BP Excerpts of Record
BP	Petitioner BP Energy Company
Cal-ISO	California Independent System Operator
Cal. PUC	*Public Utilities Comm'n of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006)
CalPX	California Power Exchange Corporation
EER	Exelon Excerpts of Record
Exelon	Petitioner Exelon Generation Company, LLC
FER	FERC Excerpts of Record
FERC or Commission	Federal Energy Regulatory Commission
FPA	Federal Power Act
Gaming Orders	*American Elec. Power Service Corp*, 103 FERC ¶ 61,345 (2003), *on reh'g*, 106 FERC ¶ 61,020 (2004)
Harris	*Cal. ex rel. Harris v. FERC*, 809 F.3d 491 (9th Cir. 2015)
ID	*San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 142 FERC ¶ 63,011 (2013)
Illinova	Petitioner Illinova Corporation

GLOSSARY (CONTINUED)

JER	Petitioners' Joint Excerpts of Record
MER	MPS/Illinova Excerpts of Record
MMCP	Mitigated market clearing price
MPS	Petitioner MPS Merchant Services, Inc.
MPS/Illinova	Petitioners MPS Merchant Services, Inc. and Illinova Corporation
Op.536	*San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 149 FERC ¶ 61,116 (2014)
Op.536-A	*San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 153 FERC ¶ 61,144 (2015)
Op.536-B	*San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 154 FERC ¶ 61,063 (2016)
SER	Shell Excerpts of Record
Shell	Petitioner Shell Energy North America (US), L.P.

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

This proceeding involves orders of the Federal Energy Regulatory Commission ("FERC" or "Commission") on remand from *Public Utilities Comm'n of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006) ("*Cal. PUC*"), granting in part petitions for review of FERC determinations regarding the California energy crisis of 2000 and 2001. On remand, FERC established a trial-type hearing to address the remanded matters.

The issues on appeal are:

1. Whether the Court has jurisdiction, at this time, to review FERC's Summer Period remedy, which is currently pending on rehearing at FERC;

2. Whether FERC's Summer Period determinations are reasonable and supported by substantial evidence; and

3. Whether FERC's Refund Period determinations regarding Exelon's forward transactions are reasonable and supported by substantial evidence.

STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions are contained in the Addendum.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Federal Power Act ("FPA") section 313(b), 16 U.S.C. § 825*l*(b), over most, but not all, of the issues raised in the petitions here. As discussed *infra* (Argument Section I), the Court does not yet have jurisdiction to address the Summer Period (May 1 - October 2, 2000) remedy because rehearing requests regarding that remedy are pending at FERC.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Federal Power Act section 201(b)(1), 16 U.S.C. § 824(b)(1), grants the Commission exclusive jurisdiction over the transmission and wholesale sale of

electric energy in interstate commerce. *City of Redding, Cal. v. FERC*, 693 F.3d 828, 838 (9th Cir. 2012). Under FPA section 206(b), 16 U.S.C. § 824e(b), if the Commission finds a rate unjust and unreasonable, it may order refunds of any amounts paid in excess of the just and reasonable rate for any period after the "'refund effective date,' a date FERC establishes that must be at least 60 days after the filing of a complaint." *Cal. PUC*, 462 F.3d at 1045. FPA Section 309, 16 U.S.C. § 825h, "on the other hand, gives FERC authority to order refunds if it finds violations of the filed tariff and imposes no temporal limitations." *Id.*

II. Events Leading To The Challenged Orders

This Court is very familiar with the California energy crisis of 2000-2001. *See Cal. PUC*, 462 F.3d at 1036-44; *Cal. ex rel. Harris v. FERC*, 809 F.3d 491 (9th Cir. 2015) ("*Harris*"); *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1008 (9th Cir. 2004); *see also Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 538-41 (2008) (discussing California electric restructuring and consequences). In response to the energy crisis, the Commission initiated a series of proceedings to settle and reform markets going forward and, where appropriate, to provide ratepayer relief for completed transactions.

The proceedings here involve transactions in markets of the California Independent System Operator ("Cal-ISO"), which manages California's electric

transmission grid and balances electrical supply and demand, and the California Power Exchange Corporation ("CalPX"), which was a centralized wholesale auction market for trading electricity. *See Cal. PUC*, 462 F.3d at 1037-38. In *Cal. PUC*, this Court affirmed a number of FERC's determinations, but held that FERC also should have considered: (1) tariff violations that occurred prior to the refund effective date (October 2, 2000); (2) forward transactions (transactions of greater than 24 hours in Cal-ISO and CalPX markets); and (3) energy exchange transactions. *Id.* at 1035, 1045-65.

III. The Orders On Remand

A. The Hearing And ALJ Decision

On remand, the Commission established trial-type hearing proceedings before an Administrative Law Judge ("ALJ"). As to the Summer Period, the Commission directed the ALJ to address: (1) which market practices and behaviors violated the then-current Cal-ISO and CalPX tariffs; (2) whether any respondents engaged in those violations; and (3) whether any violations affected the market clearing price. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 135 FERC ¶ 61,183 (2011), JER 339 P 31. As to the Refund Period, the Commission directed the ALJ to calculate refunds for any forward

transactions subject to mitigation.[1] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 129 FERC ¶ 61,147 (2009), JER 386 P 28.

After considering all the evidence and testimony in the record, the Administrative Judge's Initial Decision found for the Summer Period, as pertinent here, that petitioners MPS Merchant Services, Inc. ("MPS"), Illinova Corporation ("Illinova") (collectively, "MPS/Illinova"), Shell Energy North America (US), L.P. ("Shell"), and APX, Inc. ("APX") committed tariff violations affecting the market clearing price. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 142 FERC ¶ 63,011 (2013) ("ID"), JER 229-64 PP 12-98. For the refund period, the ALJ found that petitioner Exelon Generation Company, LLC's ("Exelon") forward transaction exceeded the mitigated market clearing price ("MMCP") and, therefore was subject to refund in the amount of $2,845,024, exclusive of any interest and cost offsets. ID, JER 264-77 PP 99-127.

B. FERC's Orders

The Commission affirmed the ALJ's determinations. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 149 FERC ¶ 61,116 (2014) ("Op.536") (JER 119-91), *on reh'g*, 153 FERC ¶ 61,144 (2015) ("Op.536-A") (JER 17-66), *on reh'g*, 154 FERC ¶ 61,063 (2016) ("Op.536-B") (JER 8-12). In

[1] While energy exchange transactions were addressed at the hearing, all respondents found liable for refunds for those transactions were dismissed from the proceeding because they were non-jurisdictional entities or settled the claims against them. Op.536, JER 118 P 24.

addition, the Commission established a remedy for Summer Period violations. Op.536, JER 199-204; Op.536-A, JER 70-85; Op.536-B, JER 1-7. Petitioners MPS, Illinova, and Shell's requests for rehearing of that remedy are still pending before FERC.

SUMMARY OF ARGUMENT

Petitioners raise a number of challenges to the Commission's orders on remand. As the Commission was attentive to and complied with the Court's mandate in *Cal. PUC,* and reasonably affirmed the ALJ's determinations, however, none of the challenges has merit.

False Export And False Load Scheduling

FERC did not base its determinations that MPS and Shell engaged in false export only on the fact that they simultaneously exported and imported power to and from Cal-ISO. Rather, as FERC explained, the record evidence linked those exports and imports, and established MPS' and Shell's consistent pattern of false export behavior. MPS' and Shell's parking arrangements corroborated this evidence.

MPS/Illinova and Shell's contention that they cannot be found to have committed false export or false scheduling based on the Tariff's Protocol provisions is mistaken. Even if that contention were true, their briefs do not mention and, therefore waive any challenge to, FERC's additional finding that

their false export and false load scheduling behaviors violated Tariff section 2.2.11.1, which is not part of the Protocol.

Tariff section 22.1 did not authorize overscheduling. It simply established the administrative threshold for Cal-ISO to accept a schedule. In addition, false load scheduling was not justified to counter load-serving entities' underscheduling. Market participants were not permitted to violate the Tariff to counter others' underscheduling, and MPS and Shell failed to show that underscheduling violated the Tariff or that they engaged in false load scheduling strictly in response to underscheduling.

Moreover, as FERC found, false export and false load scheduling did not help Cal-ISO. By removing energy supplies from the day-ahead market to place them instead into the real-time market, false export and false load scheduling diminished Cal-ISO's grid reliability and caused load-serving entities to pay higher prices.

Anomalous Bidding

Shell's argument that FERC should not have used the marginal cost-based proxy to determine whether its bidding was anomalous has no merit. The marginal cost-based proxy was the production cost of the least efficient (highest cost) California electricity generator dispatched in an hour. And, as FERC and this and other courts have found, marginal cost is a reasonable proxy for prices a normal,

competitive energy market would have produced.

Price Effect

FERC reasonably affirmed the ALJ's adoption of the California Parties' methodology to evaluate whether each tariff violation affected the market clearing price.

The methodology's thresholds were not too low. They were the same thresholds CalPX and Cal-ISO used to determine market clearing price changes. Furthermore, the methodology's price effect findings were conservative, as they excluded inter-temporal and interdependent effects. Moreover, even when bid proxy prices were increased by 10 percent, almost all bids continued to show a price effect.

Nor should the methodology have included a price decrease for the real-time market. The day-ahead and real-time markets are not two separate markets serving different consumers. Rather, because false export and false load scheduling removed supply from the day-ahead market, demand that should have been met in the lower-priced day-ahead market had to be met instead in the higher-priced real-time market.

Furthermore, price effects for false exports should not have been evaluated in the real-time, instead of in the day-ahead, market. CalPX's markets were crucial to Cal-ISO's overall market structure and, therefore, Cal-ISO's Tariff and CalPX

market operations were interconnected. If sellers had not committed false export, their power would have been sold in, and there would have been no adverse impact on prices in, the day-ahead market.

APX

FERC acted reasonably and consistently with its joint and several liability precedent in finding that, as their Scheduling Coordinator, APX engaged, on behalf of its customers, in type III anomalous bidding and false load scheduling.

APX's claim that, under a 2007 settlement, APX's customers, not APX, must pay any Summer Period refunds is premature. The challenged orders did not direct APX, or any remaining Summer Period respondent, to disgorge any specific amounts. Whether APX (or its customers) and any other remaining respondent will have to disgorge, or will receive any disgorged funds, is being addressed in the ongoing FERC proceedings.

Similarly, BP's claim that FERC erroneously initiated procedures to establish APX customer liability is not properly before the Court. FERC's initiation of procedures is not final agency action. And, since FERC has not yet determined whether APX will have to disgorge any funds, which might then be apportioned to BP, BP lacks standing to raise this claim as well.

Summer Period Remedy

FERC's Summer Period remedy is not properly before the Court for review at this time because it is not yet final. MPS/Illinova's and Shell's requests for rehearing of that remedy are currently pending at FERC.

In any event, FERC's determination was within its broad remedial discretion and reasonable. Both principles of equity and record evidence supported requiring the remaining respondents to disgorge overcharges and excess payments they received for all sales in all hours during which market prices were inflated by any remaining respondents' tariff violations. As FERC explained, the record evidence persuasively established that respondents' tariff violations were not isolated incidents. Rather, each contributed to an environment in which more violations were possible, profitable, and occurred.

MPS/Illinova's claim that the remedy is inequitable because their false export and false load scheduling violations were helpful to Cal-ISO's markets is meritless. FERC reasonably found these violations did not help, but harmed, Cal-ISO's markets. Likewise, MPS/Illinova should not avoid disgorgement because their violations were relatively small compared to "major sellers" that already settled. MPS/Illinova's tariff violations inflated market clearing prices and, therefore, their unjust profits are subject to disgorgement.

Refund Period Determinations

FERC reasonably determined that, like the December 8, 2000 portion of Exelon's transaction with Cal-ISO, which already was mitigated under the MMCP methodology in the proceedings underlying *Cal. PUC*, the remaining December 6-7 and December 9-12 portions of that transaction should be mitigated under that methodology as well. As FERC concluded, other than their length, all portions of this transaction were alike.

ARGUMENT

I. Challenges To The Summer Period Remedy Are Not Properly Before The Court

Under this Court's precedent, its jurisdiction under Federal Power Act § 313(b) to review a FERC order depends on whether: (1) the order is final; (2) the order, if unreviewed, would inflict irreparable harm on the party seeking review; and (3) judicial review at this stage of the process would invade the Commission's discretion. *Harris*, 809 F.3d at 498 (quoting *Steamboaters v. FERC*, 759 F.2d 1382, 1387-88 (9th Cir. 1985)); *City of Fremont v. FERC*, 336 F.3d 910, 913-14 (9th Cir. 2003). Under that analysis, the Court does not have jurisdiction at this time to review the Summer Period remedy.

First, since MPS/Illinova's and Shell's requests for Commission rehearing of FERC's Op.536-B clarification of the remedy determination are still pending, that determination is not final. *See Cal. Dep't of Water Res. v. FERC*, 361 F.3d 517,

520 (9th Cir. 2004) ("[T]he fact that one part of an agency order remains pending before the agency does not deprive the court of jurisdiction to review a discrete issue that has been definitively resolved by the agency."); *see also Navajo Nation v. U.S. Dep't of Interior*, No. 13-15710, 2016 WL 1359869, at *5 (9th Cir. Apr. 6, 2016) (to be final, agency "action must mark the consummation of the agency's decisionmaking process") (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)) (internal quotation omitted).

In addition, the Summer Period remedy will not inflict irreparable harm on the petitioners if not reviewed now. In fact, all three petitioners challenging the remedy contend the Court should not address it. MPS/Illinova Br. 2, 32; Shell Br. 2, 35-38; *see also* Shell Br. 35 ("FERC's orders on remedy . . . will not inflict irreparable harm if unreviewed").

Moreover, review at this time would invade the province reserved to FERC's discretion. "An agency's discretion is at its zenith when it is fashioning . . . remedies and sanctions . . . ." *Cal. PUC*, 462 F.3d at 1053 (internal quotation and citation omitted; second omission by Court); *Ass'n of Pub. Agency Customers v. BPA*, 733 F.3d 939, 967 (9th Cir. 2013).

Accordingly, the Commission agrees with MPS/Illinova and Shell that their challenges to the Commission's Summer Period remedy are not properly before the Court at this time.

II. Standard Of Review

The Commission's determinations are reviewed under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Review under this standard is narrow. *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016); *see also Cal. Trout v. FERC*, 572 F.3d 1003, 1012 (9th Cir. 2009) (arbitrary and capricious review is "highly deferential"). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Elec. Power Supply Ass'n*, 136 S.Ct. at 782. "Rather, the court must uphold a rule if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)) (alterations by Court). The Court "may reverse under the arbitrary and capricious standard if the agency relied on factors that Congress did not intend it to consider, or offered an explanation for its decision that runs counter to the evidence or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008).

"'The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.'" *Id.* (quoting FPA § 313(b), 16 U.S.C. § 825*l*(b)).

"Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Cal. PUC*, 462 F.3d at 1045 (internal quotation omitted). "If the evidence is susceptible of more than one rational interpretation, [the Court] must uphold FERC's findings." *Id.* (internal quotation omitted).

Courts "'afford great deference to the Commission in its rate decisions.'" *Elec. Power Supply Ass'n*, 136 S.Ct. at 782 (quoting *Morgan Stanley*, 554 U.S. at 532); *see also Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 916, 918 (9th Cir. 2011) (same). Moreover, "[r]ecognizing that Congress explicitly delegated to FERC broad powers over ratemaking, including the power to analyze relevant contracts," courts "give substantial deference to the Commission's interpretation of filed tariffs." *Williams Nat. Gas Co. v. FERC*, 90 F.3d 531, 533 (D.C. Cir. 1996) (internal quotation omitted). *See also*, *e.g.*, *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008) (courts "generally give[] substantial deference to [FERC's] interpretation of filed tariffs, even where the issue simply involves the proper construction of language.") (internal quotation omitted). Likewise, the Court "must give deference to the Commission's interpretation of its own orders." *Cal. Trout v. FERC*, 572 F.3d at 1013 (citing *Cal. Dep't of Water Res. v. FERC*, 489 F.3d 1029, 1036 (9th Cir. 2007)).

III. FERC's Summer Period Determinations Were Reasonable And Supported By Substantial Evidence

The ALJ found, and the Commission affirmed, that the record established petitioners committed the following tariff violations (discussed more fully below) that affected market clearing prices:

Shell – Types II and III anomalous bidding, false exports, and false load scheduling;

MPS – False export, false load scheduling;

Illinova – False load scheduling;

APX – Type III anomalous bidding, false load scheduling.

Op.536, JER 120, 151-56, 163-71, 186-91 at PP 29, 94-107, 120-34, 170-84; Op.536-A, JER 16, 21-23, 26-31, 33-36, 43-50, 53-55, 60-66 at PP 4, 16-20, 28-34, 39-46, 59-73, 78-83, 95-111; ID, JER 238-40, 248-50 at PP 34-37, 53-63.

To remedy the violations, FERC determined that MPS, Illinova, Shell and APX should disgorge overcharges and excess payments they received for all sales during all Summer Period hours in which any of these parties' tariff violations inflated market prices. Op.536-B, JER 2-7; Op.536, JER 202-04 PP 209-12; Op.536-A, JER 70-72, 80, 82-84 PP 121-23, 142, 146, 150.

MPS, Illinova, Shell and APX raise numerous challenges to FERC's findings. None of these challenges has merit.

A. FERC Reasonably Found MPS and Shell Committed False Export Violations

1. False Export

False export involved a consistent pattern of a generator or marketer purchasing energy from within Cal-ISO, exporting it outside Cal-ISO, ostensibly as a sale or by parking the energy, and then returning the same energy to Cal-ISO's real-time market disguised as energy sourced from outside Cal-ISO.[2] Op.536, JER 163-64, 167 PP 120, 122, 127; Op.536-A, JER 43 P 59; ID, JER 236, 240 PP 26, 36. Since energy purchased in CalPX did not qualify for sale in Cal-ISO's real-time market, this energy would not have been accepted in the real-time market if it had not been misidentified as an import from outside Cal-ISO. CAX-167 (Rebuttal Testimony of Cal. Parties witness Mr. Taylor), FER 122-26.

Because false export involved submitting false information to Cal-ISO, it violated Cal-ISO Tariff section 2.2.11.1 (MER 764), which required schedules to identify the customer for whom a bid is submitted as well as the take-out point and

[2] In CalPX's day-ahead market, the single market clearing price was derived from sellers' and buyers' price and quantity determinations for the next day's energy transactions. *CPUC*, 462 F.3d 1027, 1038. In CalPX's "day of" or "hour-ahead" market, the single market clearing price was determined on an hourly basis. *Id.* In Cal-ISO's "imbalance energy" or "real-time market," established so Cal-ISO could procure energy in real-time to balance supply and demand on the grid, bids to supply energy were made no later than 45 minutes before the operating hour. *Id.* at 1039. Cal-ISO would rank the supply bids, purchase the required energy at the market clearing price, bill CalPX for electricity it required; CalPX would, in turn, bill the investor-owned utilities, who were forced to pay whatever price Cal-ISO paid its suppliers. *Id.*

the quantity of energy set for delivery at that location. Op.536, JER 163-64 P 120; Op.536-A, JER 48-49 P 70 & n.176; ID, JER 240 P 36. Likewise, false export violated the Tariff's Protocol section 2.1.1.5 (SER 213), which prohibits "unusual activity or circumstances relating to imports from or exports to other markets or exchanges." Op.536, JER 163 P 120. Moreover, since false export effectively withheld capacity from the day-ahead market, it also violated the withholding prohibition in Protocol section 2.1.1.1 (SER 213). *Id.*; Op.536-A, JER 49 P 70 (explaining that, if sellers had not committed false export, they would have bid their power into the CalPX day-ahead market at marginal cost-based proxy prices (citing CAX-310 (Rebuttal Testimony of Cal. Parties witness Dr. Fox-Penner), FER 359)).

False export enabled sellers to obtain higher real-time market clearing prices for energy sales. Op.536, JER 164 P 121; Op.536-A, JER 47-48 PP 68-69 & n.175; ID, JER 236, 240 PP 26, 36. Shell and MPS obtained higher prices, and subsequently higher profits, in 87 percent and 58 percent of the hours, respectively, by selling in real-time through false export than if they had sold the same energy in the day-ahead market. Op.536-A, JER 48 P 69.

False export also hurt grid reliability, since power that otherwise would have been supplied to the day-ahead market, as the market design intended,[3] and historical data confirmed,[4] was not supplied until grid imbalance was a reality in real-time. Op.536, JER 164, 169-70 PP 121, 132; Op.536-A, JER 53 P 79.

2. MPS' And Shell's Challenges To FERC's False Export Findings Lack Merit

MPS (Br. 43, 45) and Shell (Br. 14) claim that FERC improperly found they engaged in false export because the record purportedly established only that they simultaneously exported power from, and imported power into, Cal-ISO. In fact, however, FERC's determination that MPS and Shell engaged in false export was based on multiple tiers of evidence: (1) California Parties witness Mr. Taylor's screening analysis, which linked exports in the day-ahead and hour-ahead markets to imports in the real-time market; (2) MPS' and Shell's consistent patterns of false export behavior (MPS engaged in false export during 403 hours of the Summer Period for a total of 15,972 megawatt-hours of energy; Shell engaged in such

[3] "Under the intended functioning of [Cal-ISO]'s organized markets, load-serving entities were supposed to acquire all the energy they required in the day-ahead time frame through the CalPX market; market participants that wanted to sell energy into [Cal-ISO] were also supposed to bid into the day-ahead market; and [Cal-ISO]'s real-time market was intended to function as an imbalance market." Op.536-A, JER 60 P 96 (citing CAX-1, FER 3).

[4] The record showed that, historically, those who had power sources within Cal-ISO nearly always scheduled through the day-ahead and hour-ahead markets; the real-time market typically provided only about one percent of power delivered to load within Cal-ISO. Op.536-A, JER 53 P 79 (citing CAX-310, FER 302, 331).

behavior during 110 hours of the Summer Period for a total of 1,657 megawatt-hours of energy);[5] and (3) corroborative evidence provided by MPS' and Shell's parking arrangements. Op.536, JER 167-69 PP 127-31; Op.536-A, JER 43-47, 50 PP 59-61, 64-67, 73; CAX-1 (Direct Testimony of Cal. Parties witness Mr. Taylor) at 79-90, FER 4-15; CAX-108 (Technical Appendix to Mr. Taylor's testimony) at 1-16, FER 98-113; CAX-167 at 104-54, FER 121-71.

MPS (Br. 43-44) asserts that its parking arrangements overlapped with only four days on which FERC found it committed false export, and Shell asserts (Br. 14) that "there was never any identification of parking transactions that facilitated False Exports." As FERC explained however, parking arrangements simply corroborated evidence establishing false export violations, and were not necessary to establish those violations. Op.536-A, JER 46-47 PP 65-67. In addition, while not necessary, record evidence did link Shell's pattern of false exports with its City of Glendale parking arrangement. Op.536-A, JA 45-46 PP 64-65 (citing CAX-26 (Term Strategies document), FER 23-25; CAX-35 (Marketing Services Agreement), FER 26-96; Tr. 4822:9-13, FER 187); *see also* CAX-1 at 177-81, FER 16-20, and Tr. 4821-41, FER 186-206.

[5] By contrast, FERC found that the record did not establish that Koch Energy had engaged in false export, because the evidence showed that Koch Energy engaged in false export behavior during only seven bidding hours for a total of only 174 megawatt-hours of energy, which did not establish a consistent pattern. Op.536, JER 167 P 127; Op.536-A, JER 43 P 59.

Shell notes that there were mismatches in location, counterparty, or volume between paired exports and imports. Br. 15. But an exact match between the exports and imports was neither necessary nor reasonably expected. Op.536-A, JER 44 PP 60-61; Op.536, JER 169 P 131. The real-time auction might have accepted only a portion of a false export bid. Op.536-A, JER 44 P 60; Op.536, JER 169 P 131. Furthermore, since it was in the suppliers' interest to disguise false export transactions, it was unsurprising that there would not be a one-to-one match in location, counterparty or quantity. Op.536-A, JER 44 P 61 (citing CAX-167 at 137, FER 154); *see also* CAX-167 at 138, FER 155.

MPS (Br. 43) and Shell (Br. 15-18) argue that FERC's false export determinations are inconsistent with its false import or "ricochet" determinations in *American Elec. Power Service Corp*, 103 FERC ¶ 61,345 (2003), *on reh'g*, 106 FERC ¶ 61,020 (2004) ("Gaming Orders"). FERC reasonably explained that, while there may be transactional similarities between false export transactions and the ricochet transactions at issue in the Gaming Orders, false export inherently includes submitting false information, which violates the Tariff. Op.536, JER 164 P 121; Op.536-A, JER 48-50 PP 70-71.

MPS asserts that the Protocol's purpose was to monitor market activity, not to prohibit specific conduct. Br. 3-39. To the contrary, the Protocol, which became part of the Tariff in 1998, sets out market participants' rights and

obligations, which are enforceable by FERC. Op.536-A, JER 65 P 111; ID, JER 231 P 16 (citing Gaming Orders, 103 FERC ¶ 61,345 at PP 23-26, *on reh'g*, 106 FERC ¶ 61,020 P 36); *see also Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 PP 7-11 (2003).

MPS (Br. 35-37, 45) and Shell (Br. 13-15) also mistakenly contend that the Protocol provisions FERC found they violated by engaging in false export (sections 2.1.1.1 and 2.1.1.5, SER 212-13) were too vague to put them on notice of this violation. Protocol section 2.1.1.1 prohibited "withholding of Generation capacity under circumstances in which it would normally be offered in a competitive market." SER 212. By withholding capacity from the lower-priced day-ahead market to instead bid it into the higher-priced real-time market, MPS and Shell withheld capacity that normally would have been bid into the day-ahead market. Op.536, JER 163 P 120; Op.536-A, JER 49 P 70. Likewise, providing false information indicating that energy was being imported into, rather than originally sourced from within, Cal-ISO to gain access to the real-time market was "unusual activity or circumstances relating to imports from or exports to other markets or exchanges," as prohibited by Protocol section 2.1.1.5 (SER 213).

In any case, FERC also found that MPS' and Shell's false export behavior violated Tariff section 2.2.11.1 (MER 764), which was not part of the Protocol. Op.536, JER 163-64 P 120; Op.536-A, JER 48-49 P 70 & n.176; ID, JER 240

P 36. Neither MPS' nor Shell's brief mentions Tariff section 2.2.11.1 or challenges FERC's section 2.2.11.1 findings. Accordingly, MPS and Shell have waived any challenge to FERC's determination that their false export actions violate Tariff section 2.2.11.1. *See, e.g.*, *Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (citing *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996)); Fed. R. App. P. 28(a)(9)(A)).

B. FERC Reasonably Found MPS, Illinova, And Shell Committed False Load Scheduling

1. False Load Scheduling

False load scheduling (or "overscheduling") involved scheduling load based on inflated demand to move supply from CalPX's day-ahead market to the higher-priced Cal-ISO real-time market. Op.536, JER 186-87 PP 170, 172; Op.536-A, JER 60 P 97; ID, JER 236, 241-43 PP 27, 38-43.

False load scheduling violated Cal-ISO Tariff section 2.2.7.2 (SER 206-07), which, to ensure energy for forecasted load is purchased in advance of the real-time market, requires scheduling coordinators[6] to submit balanced schedules based on their load's actual forecasted demand. ID, JER 242 P 42; Op.536, JER 186 P 170; Op.536-A, JER 60-61 PP 96-97 (citing CAX-1 at 17, FER 3).

[6] Any participant scheduling transmission on Cal-ISO's grid was a "Scheduling Coordinator." ID, JER 241 P 39.

In addition, since the information in false load schedules did not correspond to actual load, those schedules violated Cal-ISO Tariff section 2.2.11.1 (requiring each schedule to include an identified "take-out point" and the quantity of energy set for delivery at that location, MER 764), and Protocol sections 2.1.1.3 ("unusual trades or transactions," SER 212) and 2.1.1.5 ("unusual activity or circumstances relating to imports from or exports to other markets or exchanges," SER 213). Op.536, JER 186-87 PP 170-71; ID, JER 243 P 43.

Providing fictitious information through false load scheduling compromised Cal-ISO's ability to ensure grid reliability. Op.536, JER 187 P 172; ID, JER 247 P 50. Moreover, false load scheduling competed for, and removed supply from, CalPX's day-ahead market, which caused load-serving entities to pay higher prices in Cal-ISO's markets. Op.536-A, JER 61 P 98; ID, JER 247 P 50 (citing Tr. 3096:15-23, FER 184).

2. MPS', Illinova's And Shell's False Load Scheduling Claims Lack Merit

Illinova asserts that the Commission erred in finding it violated Tariff section 2.2.7.2 (SER 206-07) by engaging in false load scheduling because, purportedly, Tariff section 22.1 (MER 767) "expressly authorized imbalances of up to 20 [megawatts] in either direction." Br. 41; *see also* Br. 42-43. As FERC explained, however, the 20 [megawatt] tolerance band did not establish a threshold for a legitimate forecast error; it simply established the administrative threshold for

Cal-ISO to accept a schedule from the CalPX market. Op.536, JER 189 P 175; *see also* Op.536-A, JER 60-61 P 97; Tariff section 22 (MER 767) (titled "Schedule Validation Tolerances"); section 2.2.7.2 (SER 206-07) ("A Scheduling Coordinator shall submit to [Cal-ISO] only Balanced Schedules"); Taylor Testimony (MER 1280-81) (explaining that the purpose of section 2.2.7.2 is to require scheduling coordinators to make a good faith effort to ensure their generation equals their demand and that section 22.1 simply "says that [Cal-ISO] would validate schedules that were within the tolerance band.").

In any event, FERC also found Illinova violated Tariff section 2.2.11.1 (SER 208) by engaging in false load scheduling. Op.536, JER 186 P 170. MPS/Illinova's brief (like Shell's and APX's brief) does not mention, or make any challenges regarding, FERC's section 2.2.11.1 findings. Likewise, Illinova does not make any substantive claims challenging FERC's determination that Illinova violated Protocol sections 2.1.1.3 and 2.1.1.5 by submitting false load schedules.

MPS argues that the Commission erred in finding it engaged in false load scheduling because it was not the scheduling coordinator for the transactions under its agreement with the City of Azusa (CAX-41, MER 744-60). Br. 39-40. This argument is not properly before the Court as it is currently pending on rehearing before FERC (*see* MER 19-20; Op.536-B, JER 1 P 1). *See supra* Argument Section I.

MPS' argument, in any case, fails. The agreement itself referred to the MPS-Asuza transactions as an "SC to SC exchange." CAX-41, MER 755, 756. And, even if MPS were not a scheduling coordinator for these transactions, its agreement with Azusa enabled it to engage in false load scheduling. Op.536-A, JER 83 P 148; *see also* Op.536, JER 191 P 185. As Mr. Taylor testified, the agreement was "simply a version of False Load Scheduling of Energy purchased in the [CalPX] executed cooperatively by the two parties." CAX-1 at 193, FER 21; *see also* Taylor Testimony, MER 1285 (explaining that MPS submitted the false load schedule in conjunction with the municipality, or induced the municipality to submit the false load schedule); CAX-1 at 194, FER 22 (noting that MPS and Azusa "jointly implemented the false load strategy and shared profit from their uninstructed energy sales into the [Cal-ISO real-time] market"). It would elevate form over substance to absolve MPS of false load scheduling when MPS collaborated with Azusa to engage in false load scheduling.

Next, MPS (Br. 40-41) and Shell (Br. 18-21) argue that false load scheduling was not anomalous, but widely practiced,[7] and that Cal-ISO took no action to stop it because it was beneficial to the markets. FERC reasonably found otherwise.

First, FERC explained that false load scheduling is anomalous behavior under the Protocol because it departs from what would be expected in a

[7] Shell conceded below that it "did engage in the practice of overscheduling of load . . . ." SER 28.

competitive market not requiring regulation. Op.536-A, JER 65-66 P 111; *see also* Protocol section 2.1.1, SER 212 ("Anomalous behavior . . . is defined as behavior that departs significantly from the normal behavior in competitive markets that do not require continuing regulation or as behavior leading to unusual or unexplained market outcomes.").

Furthermore, false load scheduling did not benefit Cal-ISO's markets, it harmed them. Op.536, JER 187 P 172; Op.536-A, JER 61-62 PP 98-100. It not only increased prices in the day-ahead market, but also undercut the markets' intended functioning. Op.536-A, JER 60-62 PP 96, 98-100; Op.536, JER 187 P 172. "[L]oad-serving entities were supposed to acquire all the energy they required in the day-ahead time frame through the CalPX market; market participants that wanted to sell energy into [Cal-ISO] were also supposed to bid into the day-ahead market; and [Cal-ISO]'s real-time market was intended to function as an imbalance market." Op.536-A, JER 60 P 96; *see also id.* ("The whole purpose of the balanced schedule requirement in section 2.2.7.2 of the [Cal-ISO] tariff is to ensure that load-serving entities acquire sufficient energy for forecast demand in the day-ahead market, and that all energy available is offered in the day-ahead market;" "purpose of the balanced schedule requirement is to ensure that sufficient energy is purchased in advance of the real-time market").

While the record showed that false load scheduling was practiced by a number of entities and that Cal-ISO employees were aware of the practice, this did not mean Cal-ISO believed the practice was beneficial. Op.536-A, JER 65 P 109; *id.*, JER 64-65 PP 106-08. Cal-ISO was under tremendous pressure during the energy crisis, which may well have prevented it from considering false load scheduling an enforcement priority and caused Cal-ISO to accept energy from wherever, and under whatever conditions, it could be found. *Id.*, JER 65 P 109; Op.536, JER 188 P 173.

MPS (Br. 40) and Shell (Br. 19-20) claim that overscheduling was justified to counter load-serving entities' underscheduling. Shell further claims that the complainants are barred from recovering for false load scheduling violations because they engaged in underscheduling. Br. 20-21. Market participants, however, are not permitted to violate the Tariff by overscheduling to counter others' underscheduling. Op.536, JER 190 PP 180-81. And MPS and Shell did not present evidence showing that they engaged in false load scheduling strictly in response to underscheduling or that underscheduling violated the Tariff. Op.536-A, JER 65 P 110; Op.536, JER 190-91 P 182. Moreover, MPS' and Shell's arguments ignore that false load scheduling made it impossible for load-serving entities to acquire sufficient energy at a reasonable price to satisfy even

underscheduled load levels. Op.536-A, JER 65 P 110; Op.536, JER 191 P 183 (citing CAX-167 at 63-66, FER 117-20).

MPS (Br. 31, 40) and Shell (Br. 19) are correct that FERC determined in the Gaming Orders (*American Electric Power*, 103 FERC ¶ 61,345 P 60) that it would not impose penalties for false load scheduling violations in that enforcement proceeding. Op.536-A, JER 60 P 95. FERC did so because it believed then that overscheduling load helped reduce reliability problems in Cal-ISO's markets and would not affect market clearing prices. *American Electric Power*, 103 FERC ¶ 61,345 P 60. As already explained, FERC reasonably concluded otherwise based on the record here. *See FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 514-16 (2009) (agency may appropriately change its mind as long as it provides reasoned basis for doing so).

Finally, MPS/Illinova (Br. 35-37, 40, 43) and Shell (Br. 13-14, 18-21) contend that the Protocol provisions FERC found they violated, by engaging in false load scheduling (sections 2.1.1.3 and 2.1.1.5 (SER 212-13)), were too vague to put them on notice of this violation. Like the similar contentions regarding false export Protocol violations, these contentions have no merit.

As FERC explained, false load schedules provided misinformation as to the take-out point and quantity of energy set for delivery at that location. Thus, they violated not only the requirements of Cal-ISO Tariff section 2.2.11.1 (SER 208),

but also constituted "unusual trades or transactions" and "unusual activity or circumstances relating to imports from or exports to other markets or exchanges," in violation of Protocol sections 2.1.1.3 and 2.1.1.5 (SER 212-13). Op.536, JER 186-87 PP 170-71; ID, JER 243 P 43. And, again, because MPS/Illinova and Shell neither mention Tariff section 2.2.11.1 nor challenge FERC's section 2.2.11.1 findings, they waive any challenge to FERC's determination that their false load scheduling violated Tariff section 2.2.11.1. *See Rizk*, 629 F.3d at 1091 n.3.

C. FERC Reasonably Found Shell Engaged In Types II And III Anomalous Bidding

1. Anomalous Bidding

Anomalous bidding (bidding behavior that departs from normal competitive behavior or that leads to unusual or unexplained market outcomes) is prohibited by Protocol sections 2.1.1 (SER 212-13) and 2.1.3 (SER 213). ID, JER 231-38 PP 16-18, 24-32; Op.536, JER 131, 151 PP 51, 94.

i. Type II

Type II anomalous bids, which violated Protocol sections 2.1.1, 2.1.1.4, and 2.1.3 (SER 212), involved a consistent pattern of bidding above marginal cost in conjunction with (during the same hour as) other tariff violations (i.e., false export, false load, or withholding). Op.536, JER 151-52 PP 95-96; Op.536-A, JER 35 P 45; ID, JER 233, 235-36, 238-39 PP 18, 24-27, 34. These consistently excessive bids were used to exploit supply shortages, which were often artificially created by

suppliers, and resulted in unusual and unexplained market outcomes such as inexplicably high market clearing prices. ID, JER 235 P 24.

ii. Type III

In Type III anomalous bidding, although a seller's marginal cost was below the market price, the seller had a consistent pattern of submitting bids so high above market price that it was unlikely its bids would be accepted. This practice, which diminished Cal-ISO's available supply or increased the market clearing price, violated Protocol sections 2.1.1, 2.1.1.1, 2.1.1.4, and 2.1.3 (SER 212-13). Op.536, JER 153-56 PP 99, 103-04, 106; ID, JER 237-38, 239 PP 28-31(citing CAX-110 (Direct testimony of Cal. Parties witness Dr. Berry) at 47, FER 115), 35.

2. Shell's Challenge To FERC's Anomalous Bidding Findings Lacks Merit

Shell argues that FERC should not have used the California Parties' marginal cost-based proxy (the production cost of the least efficient (highest cost) California electricity generator dispatched in an hour) to determine whether Shell's bidding was anomalous because Shell was a marketer, not a generator, and offered its power at prevailing market prices. Br. 22-24. As FERC explained, however, marginal cost is a reasonable proxy for the prices a normal, competitive energy market would have produced. Op.536, JER 145-48 PP 82, 84,[8] 87 (citing, *e.g.*, *San*

[8] In this paragraph, marketers are referred to as "importers." *See* CAX-110 at 51-53 (explaining that marketers were importers, and that, under the California

Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs., 97 FERC ¶ 61,275 at 62,212 (2004); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,115 at 61,363 (2001)); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 769 ("marginal cost -- i.e., the added cost of meeting another unit of demand . . . is the price an efficient market would produce."); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) (competitive markets should produce prices close to marginal cost); ID, JER 260-64 PP 88-98.

Thus, just as it was appropriate for FERC to use the marginal cost-based mitigated market clearing price as a proxy for appropriate prices during the Refund Period, *see Pac. Gas & Elec. Co. v. FERC*, 464 F.3d 861, 865 (9th Cir. 2006) (the MMCP "estimated what the market price for energy would have been in a competitive market"), it was appropriate for FERC to use the marginal cost-based methodology here as a proxy in determining whether bids during the Summer Period were anomalous. Op.536, JER 147-48 P 87.

D. The Violations Affected The Market Clearing Price

FERC reasonably affirmed the ALJ's determination that the California Parties' methodology to evaluate whether each tariff violation affected the market clearing price was accurate, reasoned, and appropriately tailored to meet the unique

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Parties' marginal cost-based proxy methodology, the marginal cost proxy for marketers was the marginal cost of the most expensive generator dispatched in the real-time market in each hour); ID, JER 260-61 PP 88-91 (same).

characteristics of each violation. ID, JER 230, 239-40, 249-50 PP 14, 34-35, 37, 62-63; Op.536, JER 152-54, 169, 189 PP 97, 192, 132-33, 176-79; Op.536-A, JER 53-55 PP 78-82; *see also* Dr. Fox-Penner's testimony explaining methodology (CAX-143, FER 207-90; CAX-145, FER 291-98; CAX-310, FER 299-391); *Elec. Power Supply Ass'n*, 136 S.Ct. at 782 (positively noting that FERC relied on expert economist's views).

Under that methodology, the actual market clearing price in each hour was compared to what the clearing price would have been had each individual violation not occurred (i.e., if the closest possible legal alternative transaction had instead occurred); the difference, if any, represented that single-violation-in-isolation's price effect. CAX-310, FER 319-62; CAX-143, FER 225-36; Tr., SER 259-61, 264-67; Op.536, JER 169, 189 PP 132-33, 176; Op.536-A, JER 53-55 PP 78-82.

MPS/Illinova (Br. 45-47) and Shell (Br. 24-25, 31-35) argue that the methodology's price-effect threshold (one-hundredth of a penny per megawatt-hour for the day-ahead market; one penny per megawatt-hour for the real-time market) was too low. But those were the same thresholds CalPX and Cal-ISO used to determine market clearing price changes in those markets. Tr., MER 1030, 1040, 1042, 1049-50; Tr., FER 176.

Next, MPS/Illinova (Br. 45) and Shell (Br. 33-34) point to evidence (CAX-145 at 8, SER 244) as indicating that some price effect results were within the

methodology's $1 margin of error. Even if that were true, CAX-145 at 8 discusses only the methodology used to determine price effects in the real-time market. Real-time market clearing prices were used to determine only whether anomalous bidding violations affected market clearing prices. Tr., FER 177-79. False load scheduling and false export violation effects, by contrast, were determined based on market clearing prices in the day-ahead market (Tr., FER 178), which the methodology perfectly replicated (CAX-145, FER 294), leaving no margin of error. MPS, Illinova, and Shell were all found to have committed false load scheduling and/or false export violations that affected the market clearing price. While Shell was also found to have committed anomalous bidding violations that affected the market clearing price, the average price effect in the real-time market was $30, so many violations had effects well over $1. Tr., FER 173, 176.

Moreover, as FERC found, the methodology's price effect findings were conservative. Op.536, JER 152-54, 189 PP 97, 102, 176; Op.536-A, JER 54-55 PP 181-82. First, the methodology's sensitivity analysis, which increased the bid proxy measure for each violation type by 10 percent, continued to show a price effect for virtually all violations in each category. CAX-310, FER 304-05, 335, 361, 370-71; Op.536-A, JER 55 P 82.

Furthermore, the individual violation price effect findings excluded inter-temporal effects (a violation's effect on market clearing prices in other hours) and

interdependent effects (a violation's effect on other transactions in the same hour). Op.536-A, JER 54 P 81 (citing CAX-143, FER 225-27, 229, 287; CAX-310, FER 301, 374, 376); Op.536-B, JER 3, 5 PP 5, 10-11; *see also* CAX-143, FER 283-86, and CAX-310, FER 389-91 (discussing inter-temporal effects); CAX-143, FER 256-82, and CAX-310, FER 384-89 (discussing inter-seller effects). Because of price persistence, tariff violations affected transactions for weeks after they occurred. Op.536-B, JER 3, 5 PP 5, 10 (citing CAX-143, FER 209, 283, 285; Tr., FER 183). Moreover, sellers overtly or tacitly colluded and adjusted their behavior in response to supply offer changes. *Id.*, JER 3, 5 PP 5, 10 (citing CAX-143, FER 259-77; Tr., FER 183). In addition, some violations were interdependent with other simultaneous violations. *Id.*, JER 3 P 5; *see also, e.g.*, Tr., FER 181-83.

Moreover, as FERC noted, while MPS, Illinova and Shell could have submitted an alternative methodology showing that a higher price threshold was warranted and rebutting that the California Parties' methodology was conservative, they failed to do so. Op.536-A, JER 54 P 81.

MPS/Illinova also argue that the California Parties needed to quantify the more complete and accurate price effects that would have resulted if inter-temporal and interdependent effects were considered. Br. 46-47. Specific quantification of those additional effects, however, was unnecessary to support FERC's point that the individual price effect analysis it considered here was conservative.

Shell asserts that "Dr. Fox-Penner admitted it is not possible to measure numerically the effect of a single isolated tariff violation on the California market-clearing price." Br. 32 (citing CAX-143, SER 220). Dr. Fox-Penner actually stated that "it is not possible to measure numerically the full effect of a single isolated tariff violation on California market [clearing prices]." CAX-143, SER 220 (emphasis omitted). Dr. Fox-Penner explained that this is because "tariff violations don't happen in isolation. If you're isolating the effect you're automatically not getting the full effect." Tr., FER 175.

Next, MPS/Illinova contend that Dr. Fox-Penner's testimony regarding seller interactions focused on parties that had settled, never mentioned Illinova, and mentioned MPS only once, concerning a parking contract during a period in which MPS was not found to have engaged in false export. Br. 47. None of this undercuts the conservative nature of the price effects findings. MPS acknowledges (Br. 43-44) that its parking arrangements overlapped with four days on which FERC found it committed false export. And, even if MPS/Illinova were correct that the seller interaction testimony did not apply to them, they do not, nor could they, claim that the inter-temporal effects testimony does not apply to any of their violations.

Shell asserts that the price effects analysis ignored that prices in other markets purportedly decreased. Br. 24-31. Specifically, Shell contends that, while

supply decreased in the day-ahead market as a result of false export and false load scheduling, supply increased in the real-time market and, therefore, the price effect analysis should have included a price decrease in the real-time market. Br. 27, 30-31.

As FERC explained, however, because, contrary to the market's design, false export and false load scheduling removed supply from the day-ahead market and placed it instead into the real-time market, demand that should have been met in the lower-priced day-ahead market had to be met instead in the higher-priced real-time market. Op.536, JER 169, 187, 190 PP 132, 172, 178; Op.536-A, JER 54 P 80. "[T]he CalPX [day-ahead market] and the real-time market were not two separate markets serving different consumers. [They] were two parts of the same market structure serving the same consumers. Moving a megawatt between the two markets is not a transaction to legitimately serve higher demand, but to exploit the essentially inelastic demand for electricity that is common to all real-time energy markets, and that all market structures seek to mitigate by rules and regulations." Op.536, JER 187 P 172 (citing CAX-1, FER 2). Furthermore, FERC pointed out, if Shell believed its false export transactions had a beneficial effect on

market clearing prices, it should have provided (but did not provide) specific evidence to that effect. Op.536, JER 170 P 133.[9]

Next, Shell argues that the methodology illogically analyzed price effects in the day-ahead market because false export violated Cal-ISO's Tariff and Shell's false exports were not sourced from CalPX. Br. 29. As just discussed, however, if sellers had not committed false export, they would have sold their power in, and there would have been no adverse impact on prices in, CalPX's day-ahead market. Op.536-A, JER 53 PP 79-80. Cal-ISO's Tariff provisions and CalPX market operations, which were crucial to Cal-ISO's overall market structure, were interconnected. Op.536, JER 191 P 184.

Shell's argument that there was no basis to conclude it would have sold its power in the day-ahead market because it was not obligated to do so (Br. 30) fails as well. Not only did the market design intend that power be offered for sale into the day-ahead rather than the real-time market, but historical data showed that that is what actually occurred; the real-time market typically provided only about one

[9] Shell asserts that the California Parties stated false export would increase day-ahead prices and decrease real-time prices. Br. 28 (citing CAX-310, SER 250). In fact, the cited testimony states "it was possible that [real-time] prices could have been lowered slightly at the same time that [day-ahead] prices were increased," but "due to the fact that [day-ahead] volumes far exceeded the size of [real-time] volumes, . . . on balance, even in those instances in which [real-time] prices, in isolation, may have declined, the California Parties were harmed by these tariff violations, especially when the total effect of all combined violations is considered." CAX-310, SER 250.

percent of power delivered to load within Cal-ISO. Op.536, JER 169-70 P 132 (citing CAX-310, FER 302); Op.536-A, JER 53 P 79. Those who had power sources within Cal-ISO nearly always sold their power through CalPX day-ahead markets. *Id.*

E. FERC's APX Determinations Were Reasonable

APX argues that FERC improperly found it engaged in false load scheduling (described *supra* p. 22) and Type III anomalous bidding (described *supra* p. 30) because, while it submitted the schedules and bids underlying the violations, it did so on behalf of its customers. Br. 4-6, 19-23.

FERC recognized that APX committed the tariff violations on behalf of its customers. Op.536-A, JER 21 P 16. Nevertheless, FERC explained that it had long been settled that APX and its customers would be held jointly and severally liable for tariff violations where, as here, refund liability could not be apportioned based on specific transactions to individual customers. *Id.* (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 127 FERC ¶ 61,269 P 272 (2009) (AER 138); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 122 FERC ¶ 61,274 PP 54-56 (2008); and *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 105 FERC ¶ 61,066 P 170 (2009) (AER 329)); *see also* Op.536, JER 120 P 29; ID, JER 289 PP 159-60; *Automated Power Exchange, Inc. v. FERC*, 204 F.3d 1144, 1147, 1150 (D.C. Cir. 2000)

(affirming FERC's findings in *Automated Power Exchange, Inc.*, 82 FERC ¶ 61,287 at 62,108 (1998), that APX has effective control over sales in the marketplace and is an integral part of the transactional chain because APX determines the price at which energy is sold in Cal-ISO's markets, and it takes the combined actions of APX and its customers to effectuate sales in those markets).

This is an exception from the general rule that scheduling coordinators are individually liable for violations related to schedules they submit. *See, e.g., San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 125 FERC ¶ 61,214 P 36 (2008). As the cases FERC cited explain, because APX only facilitates sales into Cal-ISO, and is not a competing market participant like other buyers and sellers, FERC holds APX liable for violations related to its transactions only when liability cannot be apportioned to individual customers based on specific transactions. *See San Diego Gas & Elec.*, 127 FERC ¶ 61,269 PP 130, 272 (AER 74, 138-39); *San Diego Gas & Elec.*, 122 FERC ¶ 61,274 PP 54-55; *San Diego Gas & Elec.*, 105 FERC ¶ 61,066 PP 164, 166, 170 (AER 326-27, 329).

Thus, FERC acted consistently with its joint and several liability precedent in finding that APX engaged, on behalf of its customers, in Type III anomalous bidding and false load scheduling. Op.536-A, JER 21 P 16. Under that precedent it was irrelevant whether APX knew its customers were acting in violation of the Tariff or intended to commit Tariff violations on their behalf. *Id.*

APX claims that, under the 2007 settlement between APX and its customers, its customers, not APX, must pay any Summer Period refunds. Br. 22-23 (citing APX Settlement section 4.1.4, BER 217; Settlement Term Sheet section 7, BER 148-49; Op.536-A, JER 22 P 18). But the challenged orders simply determined that APX committed specific Tariff violations; they did not direct APX, or any remaining Summer Period respondent, to pay any specific refunds for their violations. *See* Op.536, JER 202-04 PP 209-13. Whether APX (or its customers) and other remaining respondents will have to disgorge or will receive any disgorged funds, and the amounts to be disgorged or received, is currently being addressed in the ongoing FERC proceedings.

Accordingly, as APX notes (Br. 25), FERC found the claim that its customers incurred a net financial harm of $18-$20 million (APX Br. 23-27; BP Br. 25-27) to be premature. Op.536-A, JER 22-23 P 19. FERC did not yet have a record on which it could determine whether APX was a net disgorgement recipient. *Id.*; Op.536, JER 202-04 PP 209-13.

BP Energy Company ("BP"), an APX customer (BP Br. 5), claims that "it was error for FERC to initiate procedures to establish individual APX participant liability for the Summer Period without first making a finding that APX owed net refunds for the Summer Period." Br. 19-24 (capitalization in heading altered). This claim is not properly before the Court for lack of finality and standing.

FERC's mere initiation of procedures is not final agency action. *See, e.g.*, *Fairbanks N. Star Borough v. U.S Army Corps of Engineers*, 543 F.3d 586, 591, 596 n.11 (9th Cir. 2008) (citing *Bennett*, 520 U.S. at 177-78; *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242-43 (1980)). FERC's directive that "APX address the issue of apportionment in its compliance filing" (Op.536-A, JER 22 P 18) did not consummate, but merely initiated, procedures to determine whether, if the record being compiled in the ongoing proceeding establishes APX must disgorge any funds, BP or other APX customers will be apportioned any of that disgorgement. Moreover, since FERC has not yet determined whether APX will have to disgorge any funds, which might then be apportioned to BP, BP lacks a definitive, current injury-in-fact sufficient to establish standing to raise this claim. *See, e.g.*, *Alcoa, Inc. v. Bonneville Power Admin*, 698 F.3d 774, 793-94 (9th Cir. 2012).

F. FERC's Remedy Determination Was Within Its Broad Discretion And Reasonable

After the ALJ's Decision, the California Parties moved FERC to apply the Refund Period's mitigated market clearing price methodology to "correct all Summer Period prices in the [Cal-ISO] and [CalPX] to the lawful tariff rate," and "order all public utility Respondents to refund, with interest at the FERC rate, amounts collected above the MMCP in the Summer Period[.]" AER 489.

FERC determined that the appropriate remedy for "tariff violations that affected market clearing prices [was] disgorgement of payments the Respondents received above the applicable [Summer Period] marginal cost proxy price." Op.536, JER 202-03 P 209. Thus, FERC "direct[ed] the Respondents to submit . . . compliance filing[s] providing calculations of their excess payments and overcharges due for disgorgements based on the California Parties' marginal cost proxy-based methodology and price effect analysis." *Id.*, JER 203 P 210. To ensure this would not be confiscatory, FERC permitted respondents to provide specific evidence on cost offsets, i.e., costs not reflected in the marginal cost proxy, to offset the amount to be disgorged. *Id.*, JER 203-04 PP 211-12.

The California Parties sought clarification that the ordered remedy required all respondents to disgorge all amounts they received above the marginal cost proxy price for each hour of the Summer Period. *See* Op.536-A, JER 70-72 PP 121-23. FERC clarified that "the Respondents found to have engaged in tariff violations impacting the market clearing price are directed to disgorge the amounts received above the marginal cost-based proxy price for *all* sales they made during the trading hours in which the market clearing price was affected by their tariff violations." *Id.*, JER 80 P 142. FERC explained that:

> By committing a tariff violation that affected the market clearing price, the Respondents benefitted from the sales made at the inflated prices. These unjust overcharges must be disgorged. We agree with the California Parties that the filed rate doctrine prohibits the Respondents from profiting from

> rates impacted by their own wrongdoing.[10] Accordingly, we grant the California Parties' request for clarification. However, we reiterate that the remedy ordered in this proceeding is seller-specific and applies only to those sellers that committed tariff violations affecting the market clearing price."[11]

Id.; *see also id.* JER 82 P 146.

FERC also clarified potential cost offsets, explaining that it will permit evidence regarding whether the marginal cost-based proxy price methodology results in an overall revenue shortfall for their Summer Period transactions. Op.536-A, JER 83-84 P 150; Op.536-B, JER 7 P 15. "Specifically, consistent with the Commission's approach in the Refund Proceeding, we will limit cost recovery to the costs incurred to make sales into the [Cal-ISO] and CalPX markets during the relevant trading hours." Op.536-A, JER 84 P 150.

The California Parties sought, and FERC granted, clarification that the remaining respondents should disgorge overcharges and excess payments they received for all sales during all hours of the Summer Period during which market

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[10] "The filed rate doctrine precludes marketers from charging rates different from those filed with or fixed by the Commission." Op.536-A, JER 80 n.328 (citing cases).

[11] Explaining that Federal Power Act "section 309 does not eliminate the section 206 notice requirement. Sellers that complied with existing tariffs had no notice that the price at which they transacted may be later changed due to uncovered tariff violations by other market participants. Therefore, imposing refund liability on sellers that were in compliance with the existing tariffs would be inconsistent with the section 206 notice requirement." Op.536-A, JER 80 n.329.

prices were inflated by tariff violations committed by any of the remaining respondents. Op.536-B, JER 2-6.

FERC explained that both principles of equity and record evidence supported this remedy. Op.536-B, JER 4-5 P 9. Specifically, the record showed that respondents' tariff violations affected transactions outside the hours in which they were committed. *Id.*, JER 3, 5 PP 5, 10. Because of price persistence, their violations had significant inter-temporal effects for weeks after the initial price increase. *Id.*, JER 3, 5 PP 5, 10 (citing CAX-143, 209, 283, 285; Tr., FER 183); *see also* Shell Br. 23 (explaining that Shell "offered power in the California markets at prevailing market prices"). Moreover, the record included evidence of explicit coordination between sellers and multiple analyses showing that sellers tacitly colluded and adjusted their behavior in response to supply offer changes. Op.536-B, JER 3, 5 PP 5, 10 (citing CAX-143 FER 259-77at 69-87; Tr., FER 183). In addition, some violations were interdependent with other simultaneous violations. *Id.*, JER 3 P 5; *see also*, *e.g.*, Tr., FER 181-83.

This evidence persuasively showed that respondents' tariff violations were not isolated incidents. Op.536-B, JER 5 P 11. Instead, each contributed to an environment in which more violations were possible, profitable, and occurred. *Id.* These collective tariff violations enabled the respondents to sell power in excess of

just and reasonable price levels throughout the Summer Period. *Id.* (citing Op.536, JER 188 P 173; Op.536-A, JER 54 P 81).

MPS/Illinova and Shell raise several arguments challenging FERC's Summer Period remedy. While that remedy is not properly before the Court because it is currently pending on rehearing before FERC, *see supra* Argument I, the arguments against it nevertheless lack merit.

Shell contends that there is no evidence that the remaining respondents colluded or coordinated unlawfully to affect prices. Br. 48-50. Even assuming that were true, Shell does not challenge the other bases for FERC's finding that the tariff violations affected other transactions -- price persistence and interdependent, simultaneous violations. Op.536-B, JER 3, 5 PP 5, 10.

Next, Shell contends that a seller should be able to retain the market clearing price in an hour unaffected by its own violation. Br. 50-54. Similarly, MPS/Illinova argue that FERC cannot require a party to disgorge profits on the "theory" that its tariff violations are causally connected to another party's violations. Br. 49-55, 57. As FERC explained, however, the record here showed that each respondent's tariff violations contributed to an environment in which more tariff violations were possible, profitable, and occurred, and that their collective violations enabled the respondents to sell power at improper prices throughout the Summer Period. Op.536-B, JER 5 P 11; *see also* Op.536-A,

JER 80 P 142 ("the filed rate doctrine prohibits the Respondents from profiting from rates impacted by their own wrongdoing.").

MPS/Illinova also contend that the remedy should not require them to disgorge amounts above the marginal-cost-based proxy price. Br. 53-55. But, as already discussed (*see supra* pp. 30-31), marginal cost appropriately replicates the price that would have been paid in a competitive market. Op.536-A, JER 85 P 154; Op.536, JER 145-48 PP 82, 84, 87; ID, JER 260-64 PP 88-98.

Next, MPS/Illinova claim the remedy is inequitable because their false export and false load scheduling violations were helpful to Cal-ISO's markets. Br. 55. As already discussed (*see supra* pp. 17-18, 26), FERC reasonably found these violations did not help, but harmed, Cal-ISO's markets. Op.536, JER 164, 169-70, 187 PP 121, 132, 172; Op.536-A, JER 53, 60-62 PP 79, 98-100; ID, JER 247 P 50.

Nor was the remedy inequitable because MPS/Illinova's violations were relatively small compared to the "major sellers" that already settled. Br. 56-57. "[B]y committing tariff violations that inflated market clearing prices, MPS and Illinova received unjust profits which now have to be disgorged." Op.536-A, JER 82 P 146.

Finally, MPS/Illinova contend that the *Mobile-Sierra*[12] presumption prevents FERC from requiring disgorgement without first finding that remedy required in the public interest. Br. 57-60. As is discussed more fully *infra* Argument section IV.C., even if the *Mobile-Sierra* presumption would otherwise apply in this circumstance, Cal-ISO Tariff section 19 (EER 377) contained a *Memphis* clause and, therefore, the *Mobile-Sierra* presumption does not apply.

IV. FERC's Determinations Regarding Exelon's Refund Period Forward Transaction Were Reasonable And Appropriate

The Exelon-Cal-ISO forward Refund Period transaction at issue was a continuous multi-day sale consisting of three segments: (1) December 6-7, 2000; (2) December 8, 2000; and (3) December 9-12, 2000. Op.536, JER 215 P 233. The December 8 single-day segment, considered a spot market transaction, was mitigated under the mitigated market clearing price methodology in the proceedings underlying this Court's *Cal. PUC* decision. *Id.* (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 101 FERC ¶ 63,026 PP 486-90 (2002)). The remaining segments of the transaction were before the

[12] "The *Mobile-Sierra* doctrine takes its name from two cases that dealt with the authority of FERC's predecessor, the Federal Power Commission, to determine whether rates set bilaterally by contract (as opposed to those set unilaterally by tariff) are just and reasonable." *Harris*, 809 F.3d at 501 (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956)). "Where it applies, the doctrine requires FERC to presume that a contracted-for rate is 'just and reasonable' under the FPA." *Id.*

Commission on remand from *Cal. PUC*, which found that FERC improperly excluded forward transactions as outside the scope of the original complaint. *Id.*

A. FERC Approriately Affirmed The ALJ's Determination To Apply The Mitigated Market Clearing Price To The Remainder Of Exelon's Forward Transaction

Exelon contends that FERC erred in determining that, like the December 8 portion of its transaction with Cal-ISO, the December 6-7 and December 9-12 portions should be mitigated under the Refund Period's MMCP methodology. Br. 11-24.

In support of this contention, Exelon first argues that the forward and spot portions of this transaction are not alike because, in its view, only the spot portion was impacted by spot market forces. Br. 13. As FERC found, however, "[t]here is a critical interdependence among the prices in [Cal-ISO]'s organized spot markets, the prices in the bilateral spot markets in California . . . and the prices in forward markets." ID, JER 272-73 P 115 (quoting *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,418 at 62,547 (2001)); *see also id.* (finding record evidence linked systemic dysfunction in Cal-ISO's markets to the forward transaction); *Cal. PUC*, 462 F.3d at 1057-58 (recognizing connection between spot market dysfunction and forward transaction prices); *Morgan Stanley*, 554 U.S. at 552-53 (FERC must consider price effects "down the line").

Exelon also asserts that, while Cal-ISO entered into the spot portion of the transaction to ensure grid reliability, it entered into the forward portion only as a price hedge. Br. 13-15. To the contrary, Cal-ISO entered into both the spot and forward portions of this transaction to maintain grid reliability. Op.536, JER 214-16 PP 232-34; *see also id.* P 234 (noting that, in *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 92 FERC ¶ 61,172 at 62,608 (2000), FERC directed Cal-ISO to adopt a more forward approach to acquiring resources to reliably operate the grid); *id.* P 232 ("In anticipation of power shortages, [Cal-ISO] was planning ahead by entering into an oral agreement with [Exelon] for future delivery of power."); Op.536-A, JER 97 P 178 ("Considering that [Cal-ISO] was operating under the supply deficiency conditions, the only alternative for the forward transaction at issue would have been an [out-of-market] spot transaction."). Exelon acknowledges this, noting that the forward transaction "'was intended to ensure that [] [Cal-ISO] had sufficient supply in place ahead of time to meet future demand.'" Br. 16 (quoting CEI-15, EER at 9) (omission by Exelon).

Next, Exelon argues there was no evidence that it exercised market power in the forward transaction. Br. 15-16. But, as FERC found in an early order in the underlying proceeding (*San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 93 FERC ¶ 61,294 at 61,998-99 (2000); *see also San Diego Gas*

& Elec., 97 FERC ¶ 61,275 at 62,218), abuse of market power is not required for a determination that rates are unjust and unreasonable. Op.536-A, JER 94-95 P 172.

Finally, on this point, Exelon contends forward transactions tend to create stability in, and have a downward impact on, power prices. Br. 16-17. Even assuming this tends to be true, the forward portions of the transaction here, like the spot portion, exceeded the mitigated market clearing price, and, therefore, were unjust and unreasonable and subject to MMCP mitigation. Op.536-A, JER 92, 97 PP 168, 178; Op.536, JER 213, 216 PP 230, 235-36; ID, JER 270-74 PP 113-15, 120-21; *see also Cal. PUC*, 462 F.3d at 1058 (noting that record evidence indicated "sellers had successfully manipulated forward markets to raise prices").

FERC reasonably concluded that, other than their length, the forward and spot bilateral transactions were alike. Op.536, JER 214 P 230; Op.536-A, JER 95, 97 PP 173, 178; ID, JER 272-73 P 115. Moreover, FERC appropriately exercised its broad remedial discretion by applying the same MMCP remedy for all portions of this unjust and unreasonable transaction. Op.536, JER 216 P 236; Op.536-A, JER 97 P 178; *see also Cal. PUC*, 462 F.3d at 1053 (noting that an agency's discretion is "at its zenith" when fashioning remedies); *Ass'n of Pub. Agency Customers*, 733 F.3d at 967 (same).

B. FERC Appropriately Permitted Exelon To Submit Cost-Offset Evidence

Exelon asserts that it is confiscatory to mitigate the forward transaction under the MMCP methodology. Br. 17-25. To ensure applying the mitigated market clearing price would not be confiscatory, however, FERC provided Exelon multiple opportunities to submit specific cost offset evidence directly attributable to this transaction, including fuel costs, nitrogen oxide emission costs, and transmission costs and losses. Op.536-A, JER 93-94 PP 169-71; Op.536-B, JER 8 P 17; Op.536, JER 216-17 P 237. FERC added that, because Exelon knew the specific resource used for the transaction, it should be able to provide evidence clearly linking its costs with the resource and sale. Op.536-A, JER 94 P 171. Moreover, FERC directed that the cost offset filing meet the requirements outlined in *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 112 FERC ¶ 61,176 PP 103-05 (2005) (requiring filing to include, among other things, the costs incurred to make a sale, and detailed work papers supporting such costs). *Id.*

On December 4, 2015, Exelon submitted a fuel cost allowance filing. R. 5307. Because Exelon's filing did not include evidence of its actual incurred costs, i.e., invoices showing the cost of fuel purchased to generate electricity for the forward transaction, Opinion 536-B rejected it as deficient. Op.536-B, JER 9, 11 PP 20-21, 27. Exelon filed a petition for rehearing regarding its cost offsets filing, which is currently pending before FERC.

C. FERC Properly Concluded That The *Mobile-Sierra* Presumption Did Not Apply To The Forward Transaction

FERC found that the *Mobile-Sierra* presumption that a rate is just and reasonable did not apply to the forward transaction here because it was entered into by Cal-ISO under Tariff section 2.3.5.1.5 (EER 375), which was subject to Tariff section 19's *Memphis* clause[13] (EER 377). Op.536-A, JER 95 PP 174-76; Op.536, JER 205-07, 213-16 PP 215-18, 230-34; ID, JER 265-70 PP 101, 104-12.

Exelon contends Tariff section 2.3.5.1.5 does not apply to the bilateral forward transaction here. Br. 27-29. In its view, the provision only applies to Cal-ISO's annual planning and operating reserve criteria, and is triggered only after Cal-ISO receives all bids for reserves as part of its annual process. Br. 29.

FERC found that, since Cal-ISO's obligation to meet reliability criteria does not end with ensuring an accurate forecast and soliciting bids to meet that forecast, it was not appropriate to interpret Tariff section 2.3.5.1.5 so narrowly. Op.536-A, JER 95 P 174. "By entering into the forward market transaction at issue in anticipation of future power shortage, [Cal-ISO] was performing its primary function of providing service to its customers by ensuring uninterrupted power

[13] "The name of the clause comes from *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div.*, [358 U.S. 103 (1958),] in which the Supreme Court held that parties may 'contract out of the *Mobile-Sierra* presumption by specifying in their contracts that a new rate filed with the Commission would supersede the contract rate.'" *Harris*, 809 F.3d at 502 n. 6 (quoting *Morgan Stanley*, 554 U.S. at 534).

supply and thus was acting pursuant to its tariff authority in section 2.3.5.1.5." Op.536, JER 215 P 234; *see also id.* (noting that the forward transaction is a Commission-directed extension of Cal-ISO's authority to enter into out-of-market spot transactions (citing *San Diego Gas & Elec.*, 92 FERC ¶ 61,172 at 61,608)).

FERC's reasonable interpretation of Tariff section 2.3.5.1.5, which FERC had approved, not Exelon's contrary interpretation, deserves deference and should be upheld. *See Old Dominion*, 518 F.3d at 48; *Williams*, 90 F.3d at 533.

There also is no merit to Exelon's assertion (Br. 33) that the *Memphis* clause does not apply because Cal-ISO did not make an FPA section 205 rate filing to prospectively alter the contract rate. A section 205 rate filing is not required for a *Memphis* clause to apply. The existence of a Memphis clause prevents application of the *Mobile-Sierra* presumption of justness and reasonableness. ID, JER 266-68 PP 104-05, 107 (citing *Morgan Stanley*, 554 U.S. at 534); Op.536, JER 205-06, 213 PP 216, 230; *see also Harris*, 809 F.3d at 502 n. 6 (same); *Morgan Stanley*, 554 U.S. at 543 n.2 (a *Memphis* clause precludes application of *Mobile-Sierra* presumption); *id.* at 545 (*Mobile-Sierra* applies the same regardless of when a contract rate is challenged). FERC found, and Exelon does not dispute, that Tariff

Section 19 was a *Memphis* clause. ID, JER 269-70 PP 110-11; Op.536, JER 213-14 P 230; Op.536-A, JER 96 P 175.[14]

Finally, Exelon argues that FERC also found the *Mobile-Sierra* presumption did not apply because sellers were on notice that their sales may be subject to refund. Br. 34 (citing Op.536-A, JER 96-97 P 177). FERC's statement that the refund effective date provided notice that sales to Cal-ISO may be subject to refund was not made in response to Exelon's *Mobile-Sierra* claims, but in response to Exelon's claim that mitigating the forward transaction would have a chilling effect on suppliers. Op.536-A, JER 96-97 P 177. FERC's further point that its decision to mitigate this forward transaction was fact-specific and had no bearing on other transactions, Br. 34-35 (citing Op.536-A, JER 96-97 P 177), likewise responded to Exelon's chilling-effect claim.

CONCLUSION

FERC's determinations here involve both technical understanding and policy judgment, and should be upheld. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 784. The petitions for review should be dismissed in part and denied in part or, alternatively, denied in their entirety.

[14] Exelon argues instead that the Tariff's *Memphis* clause (section 19, EER 377) does not apply here because the forward transaction was not entered into under the Tariff. Br. 33. As explained above, *see supra* pp. 52-53, FERC found otherwise.

STATEMENT OF RELATED CASES

Per Circuit Rule 28-2.6, this case is on remand from *Pub. Utilities Comm'n of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006). Other than those stated in Petitioners' Statements of Related Cases, no additional cases are related to this one.

Respectfully submitted,

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May 26, 2016

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C) and 9th Cir. R. 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points, and contains 12,333 words, not including the tables of contents and authorities, the glossary, the certificate of counsel, and the addendum.

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May 26, 2016

ADDENDUM
Statutes

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dicial 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 judicial 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

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	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

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	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

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	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

§ 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;

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term ''sale of electric energy at wholesale'' when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term ''public utility'' when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),[1] 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

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

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

(g) Books and records

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

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

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

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

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

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

(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 anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

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

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

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

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

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

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

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

of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms ''electric utility companies'' and ''registered holding company'' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.[1]

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term ''short-term sale'' means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term ''applicable Commission rule'' means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

[1] See References in Text note below.

individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–452 effective on 60th day following Oct. 15, 1970, and not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before 60th day following Oct. 15, 1970, see section 260 of Pub. L. 91–452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

§ 825g. Hearings; rules of procedure

(a) Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 10, 1920, ch. 285, pt. III, § 308, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

§ 825h. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 10, 1920, ch. 285, pt. III, § 309, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 858.)

COMMISSION REVIEW

Pub. L. 99–495, § 4(c), Oct. 16, 1986, 100 Stat. 1248, provided that: ''In order to ensure that the provisions of Part I of the Federal Power Act [16 U.S.C. 791a et seq.], as amended by this Act, are fully, fairly, and efficiently implemented, that other governmental agencies identified in such Part I are able to carry out their responsibilities, and that the increased workload of the Federal Energy Regulatory Commission and other agencies is facilitated, the Commission shall, consistent with the provisions of section 309 of the Federal Power Act [16 U.S.C. 825h], review all provisions of that Act [16 U.S.C. 791a et seq.] requiring an action within a 30-day period and, as the Commission deems appropriate, amend its regulations to interpret such period as meaning 'working days', rather than 'calendar days' unless calendar days is specified in such Act for such action.''

§ 825i. Appointment of officers and employees; compensation

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 10, 1920, ch. 285, pt. III, § 310, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amended Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attor-neys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employ-ees of the United States'' have been omitted as obsolete and superseded.

Such appointments are subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order No. 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed Pub. L. 89–554, Sept. 6, 1966, § 8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5. Section 5102 of Title 5 contains the applicability provi-sions of the 1949 Act, and section 5103 of Title 5 author-izes the Office of Personnel Management to determine the applicability to specific positions and employees.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

ation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, § 311, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Public Printer under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Printing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

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

CODIFICATION

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the

hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon 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 chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

(June 10, 1920, ch. 285, pt. III, § 314, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 109–58, title XII, § 1288, Aug. 8, 2005, 119 Stat. 982.)

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in

MPS Merchant Services, Inc., et al.,
v. FERC
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 26, 2016.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participant:

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 15-73803, 16-70524, 15-73836, 16-70004, 16-7

I, Beth G. Pacella , certify that this brief is identical to the version submitted electronically on [date] May 26, 2016 .

Date May 31, 2016

Signature /s/ Beth G. Pacella

(either manual signature or "s/" plus typed name is acceptable)