ORAL ARGUMENT NOT YET SCHEDULED

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

Nos. 13-1008, 15-1320, and 16-1009 (consolidated)

TNA MERCHANT PROJECTS, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Final Brief: August 18, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent submits:

A. Parties and Amici

The parties and intervenors appearing before this Court are identified in Petitioner's brief.

B. Rulings Under Review

This case arises after remand in *TNA Merchant Projects, Inc. v. FERC*, 616 F.3d 588 (D.C. Cir. 2010). *TNA Merchant Projects* addressed the Commission's orders in *Chehalis Power Generating, L.P.*, 112 FERC ¶ 61,144 (2005) ("*Chehalis I*"), R. 8, JA 96-102, and *Chehalis Power Generating, L.P.*, 113 FERC ¶ 61,259 (2005) ("*Chehalis II*"), R. 20, JA 113-18.

The rulings under review in this appeal are:

Order on Remand, *Chehalis Power Generating, L.P.*, 134 FERC ¶ 61,112 (2011) ("*Chehalis III*"), R. 94, JA 246-53;

Order Denying Rehearing, *Chehalis Power Generating, L.P.*, 141 FERC ¶ 61,116 (2012) ("*Chehalis IV*"), R. 102, JA 281-90;

Order on Voluntary Remand and Clarifying Policy on Filing of Reactive Power Service Rate Schedules, *Chehalis Power Generating, L.P.*, 145 FERC ¶ 61,052 (2013) ("*Chehalis V*"), R. 104, JA 291-300;

Order on Rehearing, *Chehalis Power Generating, L.P.*, 152 FERC ¶ 61,050 (2015) ("*Chehalis VI*"), R. 114, JA 319-32; and

Order on Rehearing, *Chehalis Power Generating, L.P.*, 153 FERC ¶ 61,194 (2015) ("*Chehalis VII*"), R. 119, JA 333-41.

C. Related Cases

Counsel is not aware of any related cases pending in this Court or any other court. This case is on remand from this Court's decision in *TNA Merchant Projects*, 616 F.3d at 593.

/s/ Susanna Y. Chu
Susanna Y. Chu
Attorney

August 18, 2016

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Bonneville	Intervenor Bonneville Power Administration.
Chehalis	Chehalis Power Generating, LLC. Petitioner TNA Merchant Projects, Inc., formerly the corporate parent of Chehalis, sold its ownership interest in Chehalis, but retained the right to litigate and receive any proceeds from its claims in this proceeding. Br. 8. For consistency with this Court's 2010 decision in *TNA Merchant Projects* and Petitioner's brief, the Commission refers to Petitioner as "Chehalis" throughout.
Commission or FERC	Respondent Federal Energy Regulatory Commission.

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BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

After lengthy litigation involving multiple agency orders, one remand from this Court, and one voluntary remand by the Federal Energy Regulatory Commission ("FERC" or the "Commission"), this case distills to a single issue—whether the Federal Power Act authorizes the Commission to compel another federal agency, the Bonneville Power Administration ("Bonneville"), to disgorge approximately $2 million in refunds previously paid to it by Petitioner, a wholesale electric power generator, under a policy that the Commission later determined should not be applied to Petitioner.

COUNTER-STATEMENT OF JURISDICTION

After this Court's remand in *TNA Merchant Projects, Inc. v. FERC*, 616 F.3d 588 (D.C. Cir. 2010), the Commission upheld an earlier finding of refund liability against Petitioner Chehalis Power Generating, LLC ("Chehalis").[1] Reasoning that Chehalis should have filed a rate schedule prior to May 2005 governing its provision of "reactive power" service to Bonneville, even though the service was provided at no charge, the Commission concluded that Chehalis's May 2005 rate filing constituted a "changed rate" subject to the Commission's suspension and refund authority.

On voluntary remand, however, the Commission clarified its policy regarding the filing requirements for reactive power service. Recognizing that its precedents had not been entirely clear, the Commission determined that, in fairness, its clarified policy should apply prospectively only. Accordingly, the Commission found that it would be appropriate for Chehalis to recover refunds it had issued to Bonneville prior to the agency's policy clarification, thus absolving Chehalis of refund liability arising from the May 2005 filing.

[1] Petitioner's brief explains that TNA Merchant Projects, Inc. was formerly the corporate parent of Chehalis. TNA Merchant Projects sold its ownership interest in Chehalis, but retained the right to litigate and receive any proceeds from this proceeding. Br. 8. For consistency with this Court's 2010 decision in *TNA Merchant Projects* and Petitioner's brief, the Commission refers to Petitioner as "Chehalis."

But upon consideration of Chehalis's motion for recoupment of the refunds it had issued to Bonneville, the Commission concluded that it lacked jurisdiction to compel Bonneville—a federal power administration generally exempt from regulation under the Federal Power Act—to disgorge the funds. The Commission expressed no opinion as to whether another administrative or judicial forum would have authority to order Bonneville to return the money to Chehalis.

Chehalis's issues 1 and 2 challenge the bases for the Commission's earlier finding of refund liability, specifically (1) the Commission's view that Chehalis should have filed a rate schedule for reactive power service prior to May 2005, and (2) the Commission's characterization of the May 2005 rate filing as a "changed rate." Br. 2. Because the last three challenged orders absolve Chehalis from liability arising from its May 2005 filing, Chehalis has suffered no cognizable injury arising from the Commission's stated views. Petitioner issues 1 and 2 thus do not present a live controversy susceptible to judicial review, and should be dismissed. *See, e.g., New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013).

This leaves for merits review issue 3, which concerns the scope of the Commission's statutory authority to compel Bonneville to disgorge the refunds it has received from Chehalis.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF THE CASE

This appeal arises from a series of seven orders issued over the course of ten years, from 2005 through 2015. To avoid confusion, the Commission, like Petitioner, will refer to the orders as *Chehalis I–VII*. All seven orders are listed in the Circuit Rule 28(a)(1) certificate at the outset of this brief, but the last three orders are most pertinent to this appeal: the Commission's order on voluntary remand, 145 FERC ¶ 61,052 (2013) ("*Chehalis V*"), JA 291-300, and the Commission's subsequent rehearing orders, 152 FERC ¶ 61,050 (2015) ("*Chehalis VI*"), JA 319-32, and 153 FERC ¶ 61,194 (2015) ("*Chehalis VII*"), JA 331-41.

I. PROCEEDINGS LEADING TO 2010 *TNA MERCHANT PROJECTS* DECISION

The Chehalis facility is a 520-megawatt electric generating plant located in Chehalis, Washington. *TNA Merchant Projects*, 616 F.3d at 589. The plant is interconnected with the electric transmission system of the Bonneville Power Administration ("Bonneville"). *Id.* at 589-90. Bonneville is a federal agency within the Department of Energy that, among other things, markets electric power generated at federal hydroelectric dams in the Pacific Northwest. Bonneville Motion to Intervene, No. 13-1008, Feb. 12, 2013, at 1-2.

Prior to 2005, Chehalis supplied reactive power[2] to the Bonneville transmission system under an interconnection agreement that did not provide for compensation for the service. In February 2005, Chehalis and other independent generators entered into a settlement agreement with Bonneville, establishing a process under which they could seek compensation for providing reactive power. *TNA Merchant Projects*, 616 F.3d at 590. Pursuant to the settlement, in May 2005, Chehalis submitted to the Commission a rate schedule setting forth the reactive power rates it proposed to charge Bonneville. *Id.*

Chehalis characterized its proposed rate schedule as an "initial rate" on the basis that Chehalis previously had not charged for the service. *Id.* This characterization was significant because, under established authority in this Circuit, a proposal to *change* an existing rate is subject to the Commission's suspension and refund authority under section 205(e) of the Federal Power Act, 16 U.S.C. § 824d(e). *TNA Merchant Projects*, 616 F.3d at 590 (citing *Southwestern Elec. Power Co. v. FERC*, 810 F.2d 289, 291 (D.C. Cir. 1987); *Middle South Energy, Inc. v. FERC*, 747 F.2d 763, 772 (D.C. Cir. 1984)). By contrast, the Commission's ratemaking authority with respect to initial rates is "purely prospective." *Id.*

[2] "Electric power consists of two components. The first component, 'real' power, is the active force that causes electrical equipment to perform work. The second component, 'reactive' power, is necessary to maintain adequate voltages so that 'real' power can be transmitted." *TNA Merchant Projects*, 616 F.3d at 590 n.2 (quoting *Southern Co. Servs., Inc.*, 80 FERC ¶ 61,318, at 62,080 (1997)).

The Commission disagreed with Chehalis's characterization of its proposed rate schedule as an initial rate, stating, "An initial rate schedule must involve a new customer and a new service." *Chehalis I* at P 23, JA 101; *Chehalis II* at PP 10-15, JA 115-18. Since Chehalis had been providing reactive power service to Bonneville, "albeit without charge," the Commission found that the proposed rate schedule constituted a changed rate subject to the agency's suspension and refund authority. *Chehalis I* at P 23, JA 101.

Finding that "Chehalis's proposed rate schedule has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful," the Commission set the matter for an evidentiary hearing and accepted the filing, effective August 1, 2005, subject to refund. *Id.* P 21, JA 100. Thus, Chehalis's proposed rate would go into effect just days after the issuance of the Commission's order; however, if the Commission concluded, after the hearing, that Chehalis's rates were not just and reasonable under section 205(a) of the Federal Power Act, 16 U.S.C. § 824d(a), Chehalis could be ordered to issue refunds to Bonneville under section 205(e), 16 U.S.C. § 824d(e).[3]

[3] As this Court has explained, "[s]ection 205(e) empowers the Commission . . . to investigate the lawfulness of a rate . . . , and to suspend the effectiveness of the changed schedule for up to five months. The Commission may also order that increased rates and charges be collected subject to refund so that when the rate schedule goes into effect after suspension, the 'interested public utility or public utilities' must refund the amount of the increased rates or charges

Subsequently, a FERC Administrative Law Judge convened an evidentiary hearing, and determined that certain costs were not properly included in Chehalis's proposed rates. *Chehalis Power Generating, L.P.*, 118 FERC ¶ 63,009 at P 170 (2007), JA 181. The Commission affirmed the majority of the Administrative Law Judge's determinations, and directed Chehalis to file a revised rate schedule and to issue refunds to Bonneville. *Chehalis Power Generating, L.P.*, 123 FERC ¶ 61,038 at PP 11-13 and ordering paragraph (2008), JA 188, 240-41. Chehalis did not appeal the Commission's rate determinations.

In *TNA Merchant Projects*, Chehalis sought review of the Commission's determination, in *Chehalis I* and *Chehalis II*, that its proposed rate schedule constituted a "changed rate" subject to suspension and refund. On review, the Court explained that the Federal Power Act does not define "initial" versus "changed rates," and the Court would "defer to a reasonable definition by the Commission." *TNA Merchant Projects*, 616 F.3d at 593 (citations omitted).

However, the Court found that the Commission failed to adequately respond to Chehalis's argument that a rate cannot be classified as "changed" unless it was previously filed, and Chehalis had not previously filed a rate for providing reactive power service to Bonneville. *Id.* at 592-93 (noting that it was undisputed that the

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'found not justified' by the Commission." *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 949 (D.C. Cir. 2016) (quoting 16 U.S.C. § 824d(e)).

interconnection agreement between Chehalis and Bonneville had not been filed with the Commission, but it was disputed whether the interconnection agreement should have been filed). The Court vacated FERC's orders and remanded the case "for the Commission to provide an explanation if it can." *Id.* at 593.

II. PROCEEDINGS AFTER REMAND FROM *TNA MERCHANT PROJECTS*

On remand, the Commission again found that the rate schedule constituted a changed rate, explaining that Chehalis should have had a rate schedule on file previously when it was providing the same service without charge. *Chehalis III* at P 19, JA 251; *Chehalis IV* at PP 17, 21-23, JA 285, 287-88. Chehalis appealed to this Court (No. 13-1008). After Chehalis filed its opening brief, the Commission sought voluntary remand to more fully analyze the arguments raised by Chehalis in its brief on appeal.

On voluntary remand, the Commission issued *Chehalis V*. In that order, the Commission continued to express the view that Chehalis should have filed a rate schedule prior to 2005 governing its provision of reactive power to Bonneville, even when it received no compensation for the service, thus making the May 2005 filing a changed rate. *Chehalis V* at P 11, JA 296 (noting that it was undisputed that the provision of reactive power is a service subject to FERC's jurisdiction).

The Commission recognized, however, that its precedents may not have been entirely clear. In particular, the Commission previously had accepted notices

of cancellation of reactive power rate schedules where compensation was no longer being paid. *Id.* P 12, JA 297. Accordingly, the Commission clarified that, "*on a prospective basis*, . . . the rates, terms, and conditions for [reactive power] service must be pursuant to a rate schedule on file with the Commission, even though the rate schedule would provide no compensation for such service." *Id.* (emphasis added). Because the Commission had clarified its policy, and announced that it would apply prospectively, the Commission concluded that "it would be appropriate for Chehalis to recover the amounts previously refunded to [Bonneville], with interest." *Id.* P 14, JA 299. In addition, the Commission stated that "it does not intend to exercise its authority to impose enforcement sanctions for a jurisdictional entity's failure, prior to this order, to have a rate schedule on file for the provision of reactive power service without compensation." *Id.* P 14 n.35, JA 299.

As the Commission explained on rehearing, it had "balanc[ed] the equities" and determined it would be appropriate for Chehalis to recover the funds "because the Commission's policy may not have been entirely clear" prior to *Chehalis V*, and "Chehalis should not be penalized given the need for clarification of the policy . . . . " *Chehalis VI* at P 22, JA 328-29. However, addressing Chehalis's

motion for an order requiring Bonneville to return the funds,[4] the Commission concluded that it lacked authority under the Federal Power Act to compel Bonneville to disgorge the funds, given its status as a governmental entity exempt from the provisions of subchapter II of the Federal Power Act. *Id.* P 29, JA 332 (citing 16 U.S.C. § 824(f)). Chehalis filed a petition for review of the Commission's orders in *Chehalis V* and *Chehalis VI* (No. 15-1320). That appeal was held in abeyance pending ongoing agency proceedings.

Prior to filing its petition for review in 15-1320, Chehalis had requested rehearing of the Commission's order in *Chehalis VI* with regard to the denial of Chehalis's motion for recoupment from Bonneville. In *Chehalis VII*, the Commission confirmed its conclusion that it lacked jurisdiction to order Bonneville to return the refunds previously issued to it. In particular, the Commission considered Chehalis's argument that FERC could order Bonneville to repay the funds under section 309 of the Federal Power Act, 16 U.S.C. § 825h. *Chehalis VII* at P 16, JA 338. The Commission reasoned, based on the statutory

[4] A refund report filed by Chehalis indicated that Chehalis had refunded $3,401,619.94 to Bonneville on May 15, 2008. Chehalis stated that it sought the return of $2,042,457.10, representing refunds for the August 1, 2005 through September 30, 2006 period. *Chehalis VI* at P 24, JA 329-30. *See also* Motion of TNA Merchant Projects, Inc. for Order Requiring Recoupment of Payments, Nov. 18, 2013, R. 105, JA 301-308; Amendment of TNA Merchant Projects, Inc. to Motion for Order Requiring Recoupment of Payments, Dec. 17, 2013, R. 111, JA 309-18.

text and relevant case law, that section 309 did not authorize the Commission to exercise jurisdiction over Bonneville in this matter. *Id.* PP 16-19, JA 338-40 ("The issue . . . is not one of rationality or policy, but one of jurisdictional limits on the Commission's authority."). Chehalis petitioned for review (No. 16-1009).

SUMMARY OF ARGUMENT

Upon reconsideration of its prior orders, the Commission reversed course in *Chehalis V* and determined that, in fairness, Chehalis should be absolved of refund liability relating to reactive power service it provided to Bonneville. Specifically, the Commission held that it would be appropriate for Chehalis to recover the refunds it previously issued to Bonneville.

In light of this determination, Chehalis has suffered no cognizable injury relating to the Commission's earlier characterization of Chehalis's May 2005 filing as a changed rate, or the Commission's clarification that, going forward, all suppliers of reactive power must file rate schedules with the Commission, even when they are providing the service at no charge. Thus, Petitioner issues 1 and 2—addressing the Commission's statement that Chehalis should have filed a rate schedule prior to May 2005, and the characterization of Chehalis's May 2005 filing as a changed rate subject to refund—should be dismissed for lack of standing and/or lack of a live controversy.

This leaves Petitioner issue 3. Mindful of jurisdictional limitations on its authority, the Commission explained in *Chehalis VI* and *Chehalis VII* that, although Chehalis should recover refunds it previously paid to Bonneville, the Federal Power Act does not grant the Commission authority to compel Bonneville, another federal agency, to repay such funds.

As discussed in Argument section I, the Commission reasonably concluded that it could not compel Bonneville to disgorge funds without exceeding its jurisdiction under the Federal Power Act. The Commission's interpretation of its statutory jurisdiction is consistent with judicial decisions reviewing Commission refund orders concerning Bonneville and other governmental entities.

As discussed in Argument section II, Chehalis's challenges to the Commission's characterization of its May 2005 filing as a changed rate (Petitioner issues 1 and 2) should be dismissed for lack of jurisdiction. Should the Court proceed to the merits, the Commission carefully reconsidered its earlier orders after remand from *TNA Merchant Projects*, and issued a policy clarification that fully satisfies the Court's directive to provide an explanation regarding its characterization of Chehalis's May 2005 filing.

ARGUMENT

I. THE COMMISSION REASONABLY CONCLUDED THAT IT LACKS AUTHORITY UNDER THE FEDERAL POWER ACT TO COMPEL BONNEVILLE, AN EXEMPT GOVERNMENTAL ENTITY, TO DISGORGE FUNDS RECEIVED FROM CHEHALIS

A. Standard of Review

The Commission's interpretation of the Federal Power Act is entitled to *Chevron* deference. *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014); *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 687 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). Such deference applies even when an agency is construing the scope of its own statutory jurisdiction. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-73 (2013). *See also National Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1279 (D.C. Cir. 2007) ("FERC's interpretations of the jurisdictional provisions of the Federal Power Act . . . enjoy *Chevron* deference.") (citation omitted).

B. The Federal Power Act Precludes the Relief Sought by Chehalis

As this Court has explained, "FERC is a creature of statute, and the agency has only those authorities conferred upon it by Congress." *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007) (citation and internal quotations omitted). Accordingly, "FERC exceeds its jurisdiction . . . if it regulates an entity that Congress has explicitly exempted from the statute." *Id.* (citations omitted).

1. The Substantive Provisions of the Federal Power Act Do Not Permit the Commission to Exercise Jurisdiction Over Bonneville in this Matter

This proceeding arises from Chehalis's rate filing under section 205, 16 U.S.C. § 824d, which appears in subchapter II of the Federal Power Act. Subchapter II of the Federal Power Act governs the Commission's regulation of "*electric utility companies* engaged in interstate commerce." 16 U.S.C. §§ 824, 824a-w (emphasis added). Specifically, section 201(e) provides that the Commission is empowered to regulate "public utilities," defined as entities that "own[] or operate[] facilities subject to the jurisdiction of the Commission . . . . " 16 U.S.C. § 824(e). The statute then provides, in section 201(f), that governmental entities—including United States agencies—are exempt from regulation by the Commission under subchapter II, unless a provision specifically states that it applies to governmental entities. 16 U.S.C. § 824(f) ("No provision in [subchapter II] shall apply to, or be deemed to include, the United States . . . or any agency, authority, or instrumentality of [the United States], . . . unless such provision makes specific reference thereto.").

As this Court has observed, "Because governmental entities are exempt from the [Federal Power Act], FERC cannot regulate them . . . . " *Transmission Agency*, 495 F.3d at 667 (citing Federal Power Act § 201(f), 16 U.S.C. § 824(f)). *See also Bonneville Power Admin. v. FERC*, 422 F.3d 908, 915 (9th Cir. 2005), *cert.*

denied, 552 U.S. 1076 (2007) ("The import of these provisions is clear. Congress was careful to specify which utilities fall within the definition of 'public utility.' Even though governmental and municipal utilities are public in normal parlance, they are not 'public utilities' under the [Federal Power Act].").[5]

The Commission reasonably concluded, based on the text of the Federal Power Act "as interpreted by the courts in [*Transmission Agency*] and [*Bonneville*]," that it lacked authority to order Bonneville to disgorge the refunds previously paid to it by Chehalis. *Chehalis VII* at P 18, JA 339. In *Transmission Agency* and *Bonneville*, both this Circuit and the Ninth Circuit held that the Commission lacks authority to order governmental entities such as Bonneville to issue refunds.

In *Bonneville*, the Ninth Circuit found that the Commission lacked authority to require Bonneville and other governmental entities to issue refunds for excessive charges during the California energy crisis of 2000-2001. 422 F.3d at 920 ("FERC specifically ordered governmental entities/non-public utilities to pay refunds, an

[5] As the Ninth Circuit observed with approval in *Bonneville*, the Commission's "long-standing interpretation" of its jurisdiction under the Federal Power Act "confirms that governmental entities/non-public utilities lie outside its rate-making and refund authority." 422 F.3d at 921 (noting that FERC had concluded that "Congress expressed its clear intent," through section 201(f), that the Federal Power Act was to "subject private enterprise alone to regulation by [FERC], and not to extend that regulation to government and its instrumentalities") (citation omitted).

action that lies outside Congress's clearly expressed intent that FERC's . . . refund authority should apply only to public utilities."). Citing *Bonneville*, this Court found in *Transmission Agency* that the Commission "acted contrary to law" when it ordered a municipal utility to pay refunds after overcollecting on its revenue requirements. 495 F.3d at 674-75; *see also id.* at 676 ("[W]e cannot reconcile the clear and unambiguous language of [section] 201(f) with FERC's refund order.").

Similarly, this Court recently found that the Commission lacked authority to impose a monetary penalty on another federal power agency for violating certain reliability standards set forth in subchapter II of the Federal Power Act. *See Southwestern Power Admin. v. FERC*, 763 F.3d 27 (D.C. Cir. 2014). Relying, in part, on section 201(f), the Court reasoned that the provision authorizing FERC to impose monetary penalties did not specifically refer to the United States. *Id.* at 33. Accordingly, the relevant statutory text did not represent an unequivocal waiver of the federal government's sovereign immunity from monetary penalties. *Id*. at 31-33.

2. In the Absence of Specific Statutory Authorization, Section 309 Does Not Permit the Commission to Exercise Jurisdiction Over Bonneville

Contrary to Chehalis's suggestion, Br. 37-43, in the absence of statutory authorization in subchapter II, the Commission may not rely on section 309 of the Federal Power Act, 16 U.S.C. § 825h, to compel Bonneville to disgorge the

refunds it previously received from Chehalis. Section 309, codified in subchapter III of the Federal Power Act, provides that "[t]he Commission shall have the 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*." 16 U.S.C. § 825h (emphasis added). The provision goes on to state: "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 or all statements, declarations, applications, and reports to be filed with the Commission . . . ." *Id.*

As the Commission reasoned:

> Section 309 . . . provides the Commission with the ancillary powers necessary to fulfill its statutory obligations, including those obligations found in subchapter II. But section 309 is not an independent grant of authority . . . . Using the Commission's section 309 authority to order recoupment would be an overreach, because the Commission's refund authority under section 205 does not extend to exempt [entities] such as Bonneville. And the Commission's ancillary authority under section 309 does not grant the Commission any broader authority than that provided by section 205, because section 309 makes no specific reference to authority over governmental entities or exempt public utilities.

Chehalis VII at P 17 (citations omitted), JA 338-39.

The Commission's reasoning is consistent with this Court's precedents. As this Court has explained, section 309 is of "an implementary rather than substantive character." *New England Power Co. v. FERC*, 467 F.2d 425, 430

(D.C. Cir. 1972). That is, it "merely augment[s] existing powers conferred upon the agency by Congress," but "do[es] not confer independent authority to act." *Id.* at 430-31. *See also Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1257 (D.C. Cir. 1973) (explaining that parallel provision in the Natural Gas Act did not confer authority on the Federal Power Commission to alter its procedures for setting rates, because the "necessary and appropriate" provision "cannot enlarge the choice of permissible procedures beyond those that may be fairly implied from the substantive sections [of the Natural Gas Act] and the functions there defined").

None of the cases cited by Chehalis, Br. 41-42, supports the proposition that Federal Power Act section 309 confers authority on the Commission to compel a governmental entity such as Bonneville to disgorge funds. *Exxon Co., USA v. FERC*, 182 F.3d 30 (D.C. Cir. 1999), *Public Utilities Commission of California v. FERC*, 988 F.2d 154 (D.C. Cir. 1993), and *Tennessee Valley Municipal Gas Association v. FPC*, 470 F.2d 446, 452 (D.C. Cir. 1972), do not address section 309 and, moreover, do not address the issue of Commission jurisdiction over governmental entities. Similarly, *Black Oak Energy LLC*, 153 FERC ¶ 61,231 (2015), *on reh'g*, 155 FERC ¶ 61,013 (2016), concerned the recoupment of refunds previously ordered by the Commission, but did not involve governmental entities.

This Court's recent ruling in *Xcel Energy Services Inc. v. FERC*, 815 F.3d 947 (D.C. Cir. 2016), does not alter the analysis. In *Xcel*, the Court held that the

Commission erred in concluding that it lacked authority to correct an acknowledged legal error, *i.e.*, allowing a regional transmission organization's rates to take effect immediately without refund protection. 815 F.3d at 954-55 (discussing section 309). Although *Xcel* explains that section 309 "vests the Commission with broad remedial authority," *id.* at 954, the Court's ruling does not speak to the exercise of the Commission's jurisdiction over governmental entities, such as Bonneville, that are generally exempt from the Federal Power Act. *See id.* at 953 ("Xcel did not argue that the Commission has authority under the Federal Power Act to order refunds from [a non-jurisdictional entity]."). Thus, *Xcel* provides no support for Chehalis's position that the Commission may use section 309 to order a federal agency to turn over funds to another party.

Xcel is also inapposite because it addressed the Commission's authority to correct an acknowledged legal error, where the error "was contrary to section 205," and thus, as the Court found, "*ultra vires*." 815 F.3d at 955. By contrast, in this case, the Commission merely stated that it would be "appropriate" for Chehalis to recover the refunds it had paid to Bonneville in light of the Commission's policy clarification and determination that the clarified policy should not be applied to Chehalis.

The challenged orders reflect the Commission's considered, deliberate effort to act within the scope of its authority under the Federal Power Act. In light of the

applicable case law—and the silence of the Federal Power Act on the issue—the Commission reasonably concluded that it could not compel Bonneville to disgorge funds without exceeding its jurisdiction under the Federal Power Act.[6]

II. PETITIONER'S CHALLENGES CONCERNING THE COMMISSION'S CHARACTERIZATION OF CHEHALIS'S MAY 2005 FILING SHOULD BE DISMISSED, BUT IF THE COURT REACHES THE MERITS, THE ORDERS SHOULD BE UPHELD

A. Chehalis Cannot Demonstrate a Cognizable Injury Arising from FERC's Characterization of the May 2005 Rate Schedule as a "Changed Rate"

Petitioner's issue 1 challenges the Commission's view that, prior to May 2005, Chehalis should have filed a rate schedule governing its provision of reactive power to Bonneville, even though it was providing the service at no cost. Br. 2. Petitioner's issue 2 challenges the Commission's characterization—based on its view that Chehalis should have previously filed a rate schedule—of Chehalis's May 2005 filing as a changed rate subject to refund and suspension under the Federal Power Act. *Id.* These challenges do not present a live controversy susceptible to judicial review.

On voluntary remand from this Court, in *Chehalis V*, the Commission

[6] Even if Chehalis is barred from obtaining relief in this proceeding, it is possible that Chehalis may be able to obtain relief in another forum. *See Chehalis VI* at P 29, JA 332 (expressing "no opinion on whether, or to what extent, other administrative or judicial fora may have authority to compel Bonneville to make such repayments"). *See also Bonneville*, 422 F.3d at 926 (declining to take any "position on remedies available outside of the [Federal Power Act]").

clarified that its policy requires reactive power suppliers to file rate schedules, even where the service is being provided at no charge. *Chehalis V* at PP 11-13, JA 296-99. Recognizing that its precedents may not have been entirely clear, however, the Commission announced that the clarified policy would apply prospectively. *Id.* Thus, the policy would not apply to Chehalis, and Chehalis would be absolved of refund liability to Bonneville: "[I]t would be appropriate for Chehalis to recover the amounts previously refunded to [Bonneville], with interest." *Id.* at P 14, JA 299. *See also Chehalis VI* at PP 19-21, JA 327-28.

In so holding, the Commission reaffirmed its view that Chehalis "should have" filed a rate schedule prior to its May 2005 filing governing its provision of reactive power to Bonneville. *Chehalis V* at P 11, JA 296. As Chehalis recognizes, the Commission's decision "effectively reversed a previous order pursuant to which Chehalis had been required to pay refunds to [Bonneville]." Br. 37. In these circumstances, the Commission's statement regarding what Chehalis should have done prior to May 2005 amounts to an advisory opinion with no legal effect. The Court should not issue an advisory opinion of an advisory opinion. *See Public Serv. Elec. & Gas Co. v. FERC*, 783 F.3d 1270, 1271, 1274 (D.C. Cir. 2015) (dismissing petition as no longer presenting a live controversy due to FERC order issued during pendency of appeal, "because Article III of the Constitution does not permit us to issue an advisory opinion"); *see also Teledesic LLC v. FCC*,

275 F.3d 75, 83 (D.C. Cir. 2001) (finding claims to be moot, where petitioner's challenges had "evaporated" in light of agency's change of policy).

Constitutional standing requires a showing of an actual or imminent injury in fact, fairly traceable to the challenged agency action, that will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As this Court explained in *New England Power Generators Association, Inc. v. FERC*, 707 F.3d 364, 368-69 (D.C. Cir. 2013), there is no cognizable injury where petitioners have already achieved their desired outcome.

In *New England Power Generators*, the Commission determined that certain rates were not automatically entitled to *Mobile-Sierra* "public interest" treatment, but nevertheless exercised its discretion to apply that standard when reviewing the rates. *Id.* at 368. A group of suppliers sought review, contending that the rates were contract rates that must receive the *Mobile-Sierra* presumption. *See id.* at 366. The Court found no cognizable injury, because the Commission had, in fact, applied that standard: "[Petitioner] may have preferred FERC's wholehearted endorsement of the . . . rates as contract rates, but its desired outcome—application of *Mobile-Sierra*'s public interest standard—has already been achieved." *Id.* at 369.

Here, Chehalis's "desired outcome"—reversal of the Commission's original determination that Chehalis is required to issue refunds to Bonneville—has already

been achieved. The only issue remaining is whether the Commission may compel Bonneville to return the funds already paid by Chehalis (discussed in Argument section I above). Thus, consistent with this Court's precedents, Petitioner's issues 1 and 2 should be dismissed for lack of standing and/or lack of a live controversy.

B. Standard of Review

This Court reviews Commission actions under the Administrative Procedure Act's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow," and the Court "may not substitute [its] own judgment for that of the Commission." *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

In particular, "[a] court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives. 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.' And nowhere is that more true than in a technical area like electricity rate design." *Electric Power Supply Ass'n*, 136 S. Ct. at 782 (citation omitted).

As the Court has recognized, the classification of a rate schedule as a changed rate is "precisely the type of question we must leave to the technical

expertise of the Commission; we will not substitute our judgment unless the Commission's judgment is unreasonable and cannot be rationally reconciled with the terms of the [Federal Power Act]." *Florida Power & Light Co. v. FERC*, 617 F.2d 809, 815 (D.C. Cir. 1980). *See also TNA Merchant Projects*, 616 F.3d at 593 (Court will "defer to a reasonable definition" of "initial" versus "changed" rates by the Commission, since the Federal Power Act does not define those terms).

C. If the Court Reaches the Merits, the Commission's Reasonable Determination that the May 2005 Filing Constituted a Changed Rate Should Be Upheld

If the Court addresses the Commission's classification of Chehalis's May 2005 filing, it should uphold the challenged orders as falling comfortably within the exercise of the agency's technical expertise and policy judgment. The challenged orders reasonably explain the Commission's conclusion that—although the agency would not penalize Chehalis for failing to do so—(1) Chehalis technically should have filed a rate schedule prior to May 2005 governing its provision of reactive power to Bonneville, and (2) Chehalis's May 2005 filing thus constituted a changed rate subject to suspension and refund under section 205(e), 16 U.S.C. § 824d(e). *See Chehalis V* at PP 1, 11-13, JA 291, 296-99; *see also, e.g.*, *Chehalis III* at PP 18-21, JA 251-53; *Chehalis IV* at PP 17-25, JA 285-89.

As this Court recently confirmed—and as the Commission noted—"the primary aim" of the Federal Power Act is "the protection of consumers from

excessive rates and charges." *Xcel*, 815 F.3d at 952 (citation omitted). By requiring the filing of rate schedules for reactive power service—even when such service is being provided at no charge—the Commission "ensure[s] that, when [a] generator . . . files for a change in the rate for reactive power service, e.g., increasing the rate . . . from zero, as in this case[], the Commission has the authority to . . . make it effective subject to refund in order to ensure that ratepayers are protected from changed rates that may be unjust and unreasonable." *Chehalis VI* at P 18, JA 326-27 (internal quotations and citation omitted). *See also Chehalis V* at P 13, JA 297-99 ("Taking a broad view as to what constitutes a change in rate clearly serves, by making filings subject to the Commission's suspension and refund authority under section 205(e) . . . to protect customers of electricity from excessive or exploitative rates.") (quoting *Southwestern Elec. Power Co.*, 39 FERC ¶ 61,099, at 61,293 (1987)).

The provision of reactive power is a jurisdictional service subject to Commission regulation; no party suggested otherwise in the agency proceedings. *Chehalis IV* at P 17, JA 285. And section 205(c) of the Federal Power Act grants broad authority to the Commission to regulate filings by public utilities relating to the provision of jurisdictional services. *See, e.g., Chehalis VI* at P 16, JA 325-26. Section 205(c) provides:

> Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time

> and in such form as the Commission may designate, . . . schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

16 U.S.C. § 824d(c). As the Commission observed, "[T]he statute does not make . . . a filing optional, or otherwise grant discretion to utilities to decide whether or when they must file their rates, terms, and conditions." *Chehalis VI* at P 16, JA 325-26.

As the Commission explained, the regulations promulgated under this statutory provision broadly interpret the Commission's authority. "[T]he Commission's regulations provide that utilities must submit to the Commission rate schedules governing *not just* rates and charges, but also the provision of 'electric service.'" *Chehalis VI* at P 15, JA 325 (citing 18 C.F.R. § 35.1(a)) (emphasis in original). The relevant regulation provides:

> Every public utility shall file with the Commission . . . full and complete rate schedules and tariffs . . . clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy subject to the jurisdiction of this Commission, [and] *the classifications, practices, rules and regulations affecting such* rates, charges, classifications, *services*, rules, regulations or practices, as required by section 205(c) of the Federal Power Act.

18 C.F.R. § 35.1(a) (emphasis added).

The Commission further explained that 18 C.F.R. § 35.2(b) "defines a 'rate schedule' as 'a statement of electric service' and not just 'rates and charges for or

in connection with that service,' but also 'all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service . . . . " *Chehalis VI* at P 16, JA 325-26. Moreover, "18 C.F.R. § 35.2(a) defines 'electric service' as the transmission of electric energy in interstate commerce and the sale of electric energy for resale in interstate commerce, and is 'without regard to the form of payment or compensation for the sales or services rendered . . . . " *Chehalis VI* at P 16, JA 325-26. Thus, contrary to Chehalis's contentions, Br. 17-36, there is ample room in the broad language of 16 U.S.C. § 824d(c) and the relevant regulations to support the Commission's view that Chehalis should have filed a rate schedule prior to May 2005 and, accordingly, that the May 2005 filing constituted a changed rate.

The challenged orders reflect the Commission's reasoned technical and policy judgment on a subject recognized by the Court to be soundly within the Commission's purview, and should be upheld. *See Florida Power & Light*, 617 F.2d at 816 ("The Commission draws the line between initial and changed rates, and it may alter that line so long as it proceeds on a reasoned basis that is not clearly outside the statutory framework.") (citation omitted). As in *Electric Power Supply Association*, 136 S. Ct. at 784, "the disputed question here involves both technical understanding and policy judgment." And as in that case, the Commission has "addressed th[e] issue seriously and carefully, providing reasons

in support of its position . . . . " *Id.* Accordingly, as in *Electric Power Supply Association*, if the Court reaches the merits, it should proceed deferentially and uphold the challenged orders.

CONCLUSION

For the foregoing reasons, the petitions for review, to the extent they are not dismissed for lack of jurisdiction, should be denied on the merits.

Respectfully submitted,

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August 18, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,459 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

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August 18, 2016

ADDENDUM

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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;

as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 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

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

(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 commission's regulatory responsibilities affecting the provision of electric service.

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

2005—Subsec. (b)(2). Pub. L. 109–58, § 1295(a)(1), substituted ''Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title'' for ''The provisions of sections 824i, 824j, and 824k of this title'' and ''Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''Compliance with any order of the Commission under the provisions of section 824i or 824j of this title''.

Subsec. (e). Pub. L. 109–58, § 1295(a)(2), substituted ''section 824e(e), 824e(f), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''section 824i, 824j, or 824k of this title''.

Subsec. (f). Pub. L. 109–58, § 1291(c), which directed amendment of subsec. (f) by substituting ''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,'' for ''political subdivision of a state,'', was executed by making the substitution for ''political subdivision of a State,'' to reflect the probable intent of Congress.

Subsec. (g)(5). Pub. L. 109–58, § 1277(b)(1), substituted ''2005'' for ''1935''.

1992—Subsec. (g). Pub. L. 102–486 added subsec. (g).

1978—Subsec. (b). Pub. L. 95–617, § 204(b)(1), designated existing provisions as par. (1), inserted ''except as provided in paragraph (2)'' after ''in interstate commerce, but'', and added par. (2).

Subsec. (e). Pub. L. 95–617, § 204(b)(2), inserted ''(other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title)'' after ''under this subchapter''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1277(b)(1) of Pub. L. 109–58 effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such date, see section 1274 of Pub. L. 109–58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102–486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102–486, set out as a note under section 796 of this title.

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Pub. L. 95–617, title II, § 214, Nov. 9, 1978, 92 Stat. 3149, provided that:

''(a) PRIOR ACTIONS.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall apply to, or affect, any action taken by the Commission [Federal Energy Regulatory Commission] before the date of the enactment of this Act [Nov. 9, 1978].

''(b) OTHER AUTHORITIES.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title.''

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon

TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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, attorneys, 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 employees 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 provisions of the 1949 Act, and section 5103 of Title 5 authorizes 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.

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

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

Subpart A—Application

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

(a) Every public utility shall file with the Commission and post, in conformity with the requirements of this part, full and complete rate schedules and tariffs and those service agreements not meeting the requirements of § 35.1(g), clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy subject to the jurisdiction of this Commission, the classifications, practices, rules and regulations affecting such rates, charges, classifications, services, rules, regulations or practices, as required by section 205(c) of the Federal Power Act (49 Stat. 851; 16 U.S.C. 824d(c)). Where two or more public utilities are parties to the same rate schedule or tariff, each public utility transmitting or selling electric energy subject to the jurisdiction of this Commission shall post and file such rate schedule, or the rate schedule may be filed by one such public utility and all other parties having an obligation to file may post and file a certificate of concurrence on the form indicated in § 131.52 of this chapter: *Provided, however*, In cases where two or more public utilities are required to file rate schedules or certificates of concurrence such public utilities may authorize a designated representative to file upon behalf of all parties if upon written request such parties have been granted Commission authorization therefor.

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

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

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

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

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

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

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

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

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

(f) A rate schedule applicable to the sale of electric power by a public utility to the Bonneville Power Administration under section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act (Pub. L. No. 96–501 (1980)) shall be filed in accordance with subpart D of this part.

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

are subject to the filing requirements of this part.

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

§ 35.2 Definitions.

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

(b) *Rate schedule*. The term *rate schedule* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing and may take the physical form of a contract, purchase or sale or other agreement, lease of facilities, or other writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A rate schedule is designated with a Rate Schedule number.

(c)(1) *Tariff*. The term *tariff* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section offered on a generally applicable basis, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A tariff is designated with a Tariff Volume number.

(2) *Service agreement*. The term *service agreement* as used herein shall mean an agreement that authorizes a customer to take electric service under the terms of a tariff. A service agreement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A service agreement is designated with a Service Agreement number.

(d) *Filing date*. The term *filing date* as used herein shall mean the date on which a rate schedule, tariff or service agreement filing is completed by the receipt in the office of the Secretary of all supporting cost and other data required to be filed in compliance with the requirements of this part, unless such rate schedule is rejected as provided in § 35.5. If the material submitted is found to be incomplete, the Director of the Office of Energy Market Regulation will so notify the filing utility within 60 days of the receipt of the submittal.

(e) *Posting* (1) The term posting as used in this part shall mean:

(i) Keeping a copy of every rate schedule, service agreement, or tariff of a public utility as currently on file, or as tendered for filing, with the Commission open and available during regular business hours for public inspection in a convenient form and place at the public utility's principal and district or division offices in the territory served, and/or accessible in electronic format, and

(ii) Serving each purchaser under a rate schedule, service agreement, or tariff either electronically or by mail in accordance with the service regulations in Part 385 of this chapter with a copy of the rate schedule, service agreement, or tariff. Posting shall include, in the event of the filing of increased rates or charges, serving either electronically or by mail in accordance with the service regulations in Part 385 of this chapter each purchaser under a

are subject to the filing requirements of this part.

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

§ 35.2 Definitions.

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

(b) *Rate schedule*. The term *rate schedule* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing and may take the physical form of a contract, purchase or sale or other agreement, lease of facilities, or other writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A rate schedule is designated with a Rate Schedule number.

(c)(1) *Tariff*. The term *tariff* as used herein shall mean a statement of (1) electric service as defined in paragraph (a) of this section offered on a generally applicable basis, (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, or regulations which in any manner affect or relate to the aforementioned service, rates, and charges. This statement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A tariff is designated with a Tariff Volume number.

(2) *Service agreement*. The term *service agreement* as used herein shall mean an agreement that authorizes a customer to take electric service under the terms of a tariff. A service agreement shall be in writing. Any oral agreement or understanding forming a part of such statement shall be reduced to writing and made a part thereof. A service agreement is designated with a Service Agreement number.

(d) *Filing date*. The term *filing date* as used herein shall mean the date on which a rate schedule, tariff or service agreement filing is completed by the receipt in the office of the Secretary of all supporting cost and other data required to be filed in compliance with the requirements of this part, unless such rate schedule is rejected as provided in § 35.5. If the material submitted is found to be incomplete, the Director of the Office of Energy Market Regulation will so notify the filing utility within 60 days of the receipt of the submittal.

(e) *Posting* (1) The term posting as used in this part shall mean:

(i) Keeping a copy of every rate schedule, service agreement, or tariff of a public utility as currently on file, or as tendered for filing, with the Commission open and available during regular business hours for public inspection in a convenient form and place at the public utility's principal and district or division offices in the territory served, and/or accessible in electronic format, and

(ii) Serving each purchaser under a rate schedule, service agreement, or tariff either electronically or by mail in accordance with the service regulations in Part 385 of this chapter with a copy of the rate schedule, service agreement, or tariff. Posting shall include, in the event of the filing of increased rates or charges, serving either electronically or by mail in accordance with the service regulations in Part 385 of this chapter each purchaser under a

rate schedule, service agreement or tariff proposed to be changed and to each State Commission within whose jurisdiction such purchaser or purchasers distribute and sell electric energy at retail, a copy of the rate schedule, service agreement or tariff showing such increased rates or charges, comparative billing data as required under this part, and, if requested by a purchaser or State Commission, a copy of the supporting data required to be submitted to this Commission under this part. Upon direction of the Secretary, the public utility shall serve copies of rate schedules, service agreements, or tariffs, and supplementary data, upon designated parties other than those specified herein.

(2) Unless it seeks a waiver of electronic service, each customer, State Commission, or other party entitled to service under this paragraph (e) must notify the public utility of the e-mail address to which service should be directed. A customer, State Commission, or other party may seek a waiver of electronic service by filing a waiver request under Part 390 of this chapter providing good cause for its inability to accept electronic service.

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

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

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

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

§ 35.3 Notice requirements.

(a)(1) *Rate schedules or tariffs.* All rate schedules or tariffs or any part thereof shall be tendered for filing with the Commission and posted not less than sixty days nor more than one hundred-twenty days prior to the date on which the electric service is to commence and become effective under an initial rate schedule or tariff or the date on which the filing party proposes to make any change in electric service and/or rate, charge, classification, practice, rule, regulation, or contract effective as a change in rate schedule or tariff, except as provided in paragraph (b) of this section, or unless a different period of time is permitted by the Commission. Nothing herein shall be construed as in any way precluding a public utility from entering into agreements which, under this section, may not be filed at the time of execution thereof by reason of the aforementioned sixty to one hundred-twenty day prior filing requirements. The proposed effective date of any rate schedule or tariff filing having a filing date in accordance with § 35.2(d) may be deferred by the public utility making a filing requesting deferral prior to the rate schedule or tariff's acceptance by the Commission.

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

(b) *Construction of facilities.* Rate schedules, tariffs or service agreements

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that, on August 18, 2016, I served the foregoing brief on all parties to this proceeding through the Court's CM/ECF system.

/s/ Susanna Y. Chu
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