ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 20-1062 and 20-1101 (consolidated)

OKLAHOMA GAS AND ELECTRIC COMPANY, *ET AL.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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September 25, 2020

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

The parties before this Court are identified in the Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review:

1. *Southwest Power Pool, Inc.*, 166 FERC ¶ 61,160 (2019) ("Remand Order"), JA __; and

2. *Southwest Power Pool, Inc.*, 170 FERC ¶ 61,125 (2020) ("Rehearing Order"), JA __.

C. Related Cases:

The orders challenged here were issued on voluntary remand of orders that were before this Court in *Xcel Energy Services, Inc. v. FERC*, D.C. Cir. No. 18-1105 (*Sw. Power Pool, Inc.*, 156 FERC ¶ 61,020 (2016), *on reh'g*, 161 FERC ¶ 61,144 (2017)). After the petitioner in that case submitted its opening brief, this Court issued *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018), which addressed filed rate doctrine and rule against retroactive ratemaking matters. The Court granted the Commission's unopposed motion for voluntary remand to permit the Commission to consider the implications of *Old Dominion*, which the Commission did in the orders challenged here.

Counsel is unaware of any other related cases currently pending in this or any other court.

/s/ Beth G. Pacella
Beth G. Pacella
Deputy Solicitor

September 25, 2020

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GLOSSARY

Billing Procedure	Section I.7.1 of Southwest Power Pool, Inc.'s Tariff, which contains a one-year limit on billing adjustments
Commission or FERC	Respondent Federal Energy Regulatory Commission
Crediting Procedure	Attachment Z2 to Southwest Power Pool, Inc.'s Tariff, which sets out the process to compensate entities for the costs they paid to upgrade certain transmission facilities that are subsequently used to provide transmission service to other customers
Historical period	2008-2016
Oklahoma Gas	Petitioner Oklahoma Gas and Electric Company
Regional Operator or SPP	Petitioner Southwest Power Pool, Inc.
Remand Order	*Southwest Power Pool, Inc.*, 166 FERC ¶ 61,160 (2019)
Remand Rehearing Order	*Southwest Power Pool, Inc.*, 170 FERC ¶ 61,125 (2020)
Waiver Order	*Southwest Power Pool, Inc.*, 156 FERC ¶ 61,020 (2016)
Waiver Rehearing Order	*Southwest Power Pool, Inc.*, 161 FERC 61,144 (2017)
Xcel	Xcel Energy Services Inc.

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

This appeal involves challenges to Federal Energy Regulatory Commission ("Commission" or "FERC") orders responding to a 2016 proposal by a regional transmission operator, Southwest Power Pool, Inc. ("Regional Operator" or "SPP"), to retroactively charge transmission customers for the costs to upgrade transmission facilities on which they were provided service from 2008-2016 ("historical period"). The Commission determined, following a voluntary remand of

earlier orders granting the waiver request, that the retroactive charges would, in the circumstances presented, violate the time limit in the Regional Operator's FERC-jurisdictional Tariff to invoice such charges and, therefore, were prohibited by the filed rate doctrine and the rule against retroactive ratemaking.

The issues on appeal are:

(1) Whether the Commission reasonably determined that the Regional Operator's proposal to retroactively charge transmission customers for transmission upgrade costs was prohibited by the filed rate doctrine and the rule against retroactive ratemaking in the circumstances here, where: (a) the Regional Operator's Tariff governing the transmission service included a one-year time limit to assess such charges; and (b) transmission customers did not have adequate notice that they could retroactively be assessed those charges going back eight years; and

(2) Whether the Commission appropriately exercised its broad remedial discretion in determining, in light of the filed rate doctrine, the rule against retroactive ratemaking, and the equities here, that the Regional Operator should refund historical period transmission upgrade

cost charges that were invoiced after the time limit in the Regional Operator's Tariff for doing so.

STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF FACTS

I. The Federal Power Act, The Filed Rate Doctrine, And The Rule Against Retroactive Ratemaking

The Federal Power Act requires regulated entities to file with the Commission schedules showing "all rates and charges," and the "classifications, practices and regulations affecting such rates and charges" ("rules"), for any FERC-jurisdictional service. Federal Power Act section 205(c), 16 U.S.C. § 824d(c). If a utility wishes to change its filed rates, charges, or the rules affecting those rates and charges, it must provide 60-days' notice to the Commission by filing new rate schedules "stating plainly" the changes to be made and the time when they shall take effect. Federal Power Act section 205(d), 16 U.S.C. § 824d(d); *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1226 (D.C. Cir. 2018). The Federal Power Act also permits the Commission

to prospectively change regulated utilities' rates, charges, and rules if it finds their existing rates, charges and rules are unjust, unreasonable, unduly discriminatory, or preferential. Federal Power Act section 206(a), 16 U.S.C. § 824e(a). "[T]he Commission has no authority under the Act to allow retroactive change[s] in the rates charged to consumers." *Old Dominion*, 892 F.3d at 1226.

These principles are collectively known as the "filed rate doctrine." *Old Dominion*, 892 F.3d at 1226-27. That doctrine prohibits a regulated entity from collecting a rate, or implementing rules affecting a rate, other than those on file with the Commission, and prohibits the Commission from retroactively changing a rate or the rules affecting a rate. *Id.* at 1227 (citing *Ark.-La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981)); *see also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966-67 (1986) ("the filed rate doctrine is not limited to 'rates' per se," but also includes matters directly affecting rates); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773-74 (2016) (FERC regulates not only rates but also "the panoply of rules and practices affecting them").

The rule against retroactive ratemaking, a corollary to the filed rate doctrine, "prohibits the Commission from adjusting current rates to make up for a utility's over-or-under collection in prior periods." *Old Dominion*, 892 F.3d at 1227 (internal quotation omitted).

This Court has explained that the "prohibition against retroactively charging rates that differ from those that were on file during the relevant time period yields in only two limited circumstances: (i) when a court invalidates the set rate as unlawful; and (ii) when the filed rate takes the form not of a number but of a formula that varies as the incorporated factors change over time." *Old Dominion*, 892 F.3d at 1227 (citing *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 22-23 (D.C. Cir. 2014)). "The filed rate doctrine and the rule against retroactive ratemaking leave the Commission no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations." *Id.* at 1230.

II. The Regional Operator's Tariff Waiver Request And The Commission's Tariff Waiver Orders

The Regional Operator is a regional transmission organization that provides FERC-jurisdictional transmission service over

approximately 60,000 miles of transmission lines in portions of Arkansas, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming. R. 1, SPP Petition for Tariff Waiver, at 2, JA ___.

On April 1, 2016, the Regional Operator filed a petition for "Tariff Waiver." *Id.*, JA ___-__. The Regional Operator explained that it was "necessary" to waive the Tariff's "Billing Procedure" provision, section I.7.1, which contains a one-year limit on billing adjustments, to allow the Regional Operator to retroactively implement, back eight years to 2008, the Tariff's transmission upgrade crediting provision, Attachment Z2 (which this brief will refer to as "Crediting Procedure"). *Id.* at 1, 8-11, 16, JA ___, ___-__, ___.[1]

The Crediting Procedure sets out the process to compensate entities for the costs they paid to upgrade certain transmission facilities that are subsequently used to provide transmission service to other customers. *Id.* at 2, JA ___. But the Regional Operator explained that,

[1] The Billing Procedure is set out in petitioners' brief at A-15. Portions of the text of the Crediting Procedure (Sections I and II.D) are attached to the petitioners' brief at A-16 to A-17. The entire Crediting Procedure (Sections I-IV) is included in the Addendum to this brief at A10-A16.

due to its delayed development of the necessary software to implement the Crediting Procedure, it had not yet charged customers that received transmission service over those upgrades for any upgrade costs, and had not yet compensated any entities for the costs they incurred in upgrading the transmission facilities. *Id.* at 1, 7-8, 10, JA ___, ___-__, ___; *see also id.* at 9, JA ___ ("to account for the historical period in which SPP has been unable to calculate, collect and distribute credit payment obligations due to delays in SPP's implementation of the revenue crediting process, SPP seeks a waiver of Tariff provisions in order to implement the revenue crediting process for the historical period commencing with the first impacts in 2008").

Several parties protested the Tariff waiver request. *See Sw. Power Pool, Inc.*, 156 FERC ¶ 61,020 P 16 (2016) ("Waiver Order"), *on reh'g*, 161 FERC 61,144 (2017) ("Waiver Rehearing Order"). As pertinent here, Xcel Energy Services Inc. ("Xcel") argued that the Billing Procedure was part of the Tariff's filed rate upon which customers relied and which cannot be waived. R. 20, Xcel Protest at 14-17, JA ___-__.

In the Waiver Order, the Commission applied a four-part test in determining to waive, back to 2008, the Billing Procedure's one-year limit on billing adjustments, i.e., whether: (1) the applicant acted in good faith; (2) the waiver was of limited scope; (3) the waiver addressed a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties. Waiver Order at PP 52-58, JA ___-__. Regarding the filed rate doctrine, the Waiver Order stated that the Commission "disagree[d] with protestors' claims that SPP's waiver request should only apply prospectively because to do so would deprive upgrade sponsors of compensation to which they are entitled and anticipated receiving since 2008 under the Tariff, consistent with the filed rate." *Id.* P 55, JA ___.

Parties argued on rehearing that the waiver would allow an impermissible retroactive recalculation of rates in violation of the filed rate doctrine and the rule against retroactive ratemaking. *See* Waiver Rehearing Order P 9, JA ___. The Waiver Rehearing Order rejected that argument, stating that transmission customers were on notice from both transmission study reports and the Tariff's Crediting

Procedure "that they could have directly assigned cost responsibility" for transmission upgrades. *Id.* P 30 & n.53.

III. *Old Dominion* And The Commission's Voluntary Remand Of The Waiver Orders

Xcel petitioned this Court for review of the Waiver Orders. D.C. Cir. No. 18-1005. After Xcel submitted its opening brief, this Court issued *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223 (D.C. Cir. 2018). In that opinion, the Court addressed filed rate doctrine and rule against retroactive ratemaking matters, and reaffirmed that "[t]he filed rate doctrine and the rule against retroactive ratemaking leave the Commission no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations." *Old Dominion*, 892 F.3d at 1230.

The Commission filed an unopposed motion for voluntary remand of the Waiver Orders to permit it to consider the implications of *Old Dominion* on this case. *See* July 19, 2018 Mot. for Voluntary Remand in D.C. Cir. No. 18-1005. The Court granted the motion in a July 31, 2018 order.

IV. The Challenged Orders

The Commission issued a notice affording parties the opportunity to submit briefs "addressing the significance to these proceedings of the *Old Dominion* decision or any other matter of relevance." R. 47, Briefing Notice, JA ___-__. A number of briefs were filed, some arguing for affirmance of the Waiver Orders and some arguing for their reversal. *See Sw. Power Pool, Inc.*, 166 FERC ¶ 61,160 PP 14-40 (2019) ("Remand Order"), *on reh'g*, 170 FERC ¶ 61,125 (2020) ("Remand Rehearing Order"). After considering the matters raised in the briefs (and then later the matters raised on rehearing), the Commission reversed its Waiver Order determinations and denied the Regional Operator's request for a Tariff waiver. Remand Order PP 43-58, JA ___-__; Remand Rehearing Order PP 20-26, 35-38, 40-42, 50-52, 59-61, JA ___-__, ___-__, ___-__, ___-__, ___-__. Two Commissioners issued concurring statements. *Id.*, JA ___-__.

The Commission found that, in the circumstances here, the filed rate doctrine and the rule against retroactive ratemaking prohibited it from retroactively waiving the Billing Procedure's one-year time limit to allow the Regional Operator to retroactively charge customers

transmission upgrade costs going back eight years (from 2008-2016). Remand Order PP 44-55, JA ___-__; Remand Rehearing Order PP 20-26, 35-38, 40-42, 50-52, JA ___-__, ___-__, ___-__, ___-__.

The Commission explained that the Billing Procedure, including its one-year time limit on billing adjustments, is part of the Regional Operator's filed rate that cannot be waived. Remand Order P 50, JA ___; Remand Rehearing Order PP 23, 25, 26, JA ___, ___. Moreover, nothing the Regional Operator pointed to provided transmission customers adequate notice that they might be charged retroactively back to 2008 for transmission upgrades. Remand Order P 52, JA ___. While the Tariff's Crediting Procedure (Attachment Z2) was on file with the Commission, it did not notify transmission customers that the Regional Operator intended to retroactively invoice them beyond the one-year limit set out in the Tariff's Billing Procedure (section I.7.1). *Id.* And the information provided in study reports and to stakeholders did not provide adequate notice since that information was not on file with the Commission. *Id.*; Remand Rehearing Order P 24, JA ___ (citing, *e.g.*, *Old Dominion*, 892 F.3d at 1232; *West Deptford*, 766 F.3d at 23-24).

SUMMARY OF ARGUMENT

The Commission reasonably found that, in the circumstances here, the filed rate doctrine and the rule against retroactive ratemaking prohibited it from retroactively waiving the Billing Procedure's one-year time limit. The time limit is part of the Regional Operator's filed rate (Tariff section I.7.1) that cannot be waived. And nothing the Regional Operator pointed to provided transmission customers notice adequate to satisfy the filed rate doctrine and the rule against retroactive ratemaking that they might be charged retroactively back to 2008 for transmission upgrades.

While the Crediting Procedure (Tariff Attachment Z2) was on file with the Commission, it did not contain any language notifying transmission customers that the Regional Operator intended to retroactively invoice them beyond the Billing Procedure's one-year limit for doing so. And although customers may have been aware from the stakeholder proceedings and study report notations that the Regional Operator ultimately intended to implement the Crediting Procedure retroactively for the historical period, the stakeholder proceedings and

study reports could not provide sufficient notice because they were not on file with the Commission.

The Regional Operator and Oklahoma Gas and Electric Company ("Oklahoma Gas") argue that the Commission should have addressed cost causation principles. But as the Commission reasonably explained, cost causation was not a factor here because the filed rate doctrine prohibited it from waiving the Billing Procedure. As this Court has found, it is appropriate to depart from traditional cost causation principles in light of filed rate doctrine concerns.

Moreover, the Commission appropriately exercised its broad remedial discretion in ordering refunds for historical period (2008-2016) transmission upgrade cost charges in the circumstances here. The Commission found that refunds were appropriate to protect the core principles of adequate advance notice and rate certainty underlying the Federal Power Act's rate provisions and the Billing Procedure's time limit.

The Commission recognized that the Crediting Procedure was also part of the Regional Operator's filed rate and that Oklahoma Gas advanced substantial funds in reliance on receiving credits under that

provision. But the Crediting Procedure did not contain any language indicating that the Billing Procedure's invoicing and time limit provisions did not apply. So transmission upgrade sponsors could not reasonably have expected that their upgrade costs would be reimbursed through charges invoiced outside the Billing Procedure's time limit.

While the Regional Operator and Oklahoma Gas assert that the equities balance out against refunds, the Commission's determination that refunds were appropriate in consideration of the filed rate doctrine concerns and equities here was well within its broad remedial discretion, and should be affirmed.

ARGUMENT

I. Standard Of Review

The 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 that standard is narrow. *Elec. Power Supply Ass'n*, 136 S. Ct. at 782. The court "must affirm the Commission's orders so long as FERC examined the relevant data and articulated a rational connection between the facts found and the choice

made." *PJM Power Providers Grp. v. FERC*, 880 F.3d 559, 562 (D.C. Cir. 2018) (internal quotation omitted).

The Commission's factual findings are conclusive if supported by substantial evidence. *Minisink Residents for Envtl. Pres. and Safety v. FERC*, 762 F.3d 97, 108 (D.C. Cir. 2014). Substantial evidence "requires more than a scintilla, but can be satisfied by something less than a preponderance of evidence." *Id.* (internal quotation marks omitted). *See also Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("not our job" to determine if "FERC made the better call," but only to review if the Commission "engaged in reasoned decisionmaking").

In reviewing the Commission's interpretation of a jurisdictional tariff, the Court applies the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under the Court's "*Chevron*-like" interpretation of filed tariffs, the Court gives substantial deference to the Commission's interpretation unless the tariff language is unambiguous. *ESI Energy, LLC v. FERC*, 892 F.3d 321, 323 (D.C. Cir. 2018); *Old Dominion*, 892 F.3d at 1230. Unambiguous tariff language reflects the clear intent of the parties.

Koch Gateway Pipeline Co. v. FERC, 136 F.3d 810, 814-15 (D.C. Cir. 1998).

The Court also defers to the Commission's interpretation of its own precedent. *ESI Energy*, 892 F.3d at 329; *NSTAR Elec. & Gas Co. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007); *see also ANR Pipeline Co. v. FERC*, 863 F.2d 959, 963 (D.C. Cir. 1988) (noting "the Commission's superior capacity to construe its own decisions").

The scope of judicial review of Commission remedial determinations is "particularly narrow"; the court will set aside the Commission's remedial decision only if it constitutes an abuse of discretion. *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 224 (D.C. Cir. 1999); *see also La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008) (same).

II. The Commission Reasonably Determined That, In The Circumstances Here, The Filed Rate Doctrine And The Rule Against Retroactive Ratemaking Prohibited It From Retroactively Waiving The Tariff's One-Year Time Limit On Billing Adjustments

In 2016, the Regional Operator asked the Commission to waive its Tariff's one-year billing adjustment time limit retroactively to 2008, to allow the Regional Operator to charge transmission customers who had

been provided service on upgraded transmission facilities during the 2008-2016 period costs for those upgrades. R.1, JA ___-__. The Commission originally believed it could grant the waiver request after applying a four-factor test. *See* Waiver Order at PP 52-58, JA ___-__; *see also supra* p. 8 (setting out factors). But when this Court issued *Old Dominion*, 892 F.3d 1223, which addressed filed rate doctrine and rule against retroactive ratemaking matters, during briefing on review of the Waiver Orders, the Commission realized that further consideration of the waiver request was appropriate. So the Commission moved for voluntary remand of the Waiver Orders, which the Court granted. *See* July 19, 2018 Mot. for Voluntary Remand and July 31, 2018 Court Order in D.C. Cir. No. 18-1005.

The Commission invited parties in the FERC proceeding to submit briefs regarding the implications of *Old Dominion,* the filed rate doctrine, and the rule against retroactive ratemaking on the Regional Operator's Tariff waiver request. *See* Remand Order PP 13-40, JA ___-__. After considering the matters raised in the briefs and the rest of the record, the Commission determined that, under the circumstances here, the requested retroactive Tariff waiver was prohibited by the filed rate

doctrine and the rule against retroactive ratemaking. *Id.* at PP 44-55, JA ___-__; Remand Rehearing Order PP 20-26, 35-38, 40-42, 50-52, JA ___-__, ___-__, ___-__, ___-__.

As the Commission explained, the Billing Procedure, including its one-year time limit on billing adjustments, is part of the Regional Operator's filed rate that cannot be waived. Remand Order P 50, JA ___; Remand Rehearing Order PP 23, 25, 26, JA ___, ___. And nothing the Regional Operator pointed to provided transmission customers adequate notice that they might be charged retroactively back to 2008 for transmission upgrade costs. Remand Order P 52, JA ___. The Tariff's Crediting Procedure (Attachment Z2) did not provide notice that the Regional Operator intended to retroactively invoice transmission customers beyond the one-year limit set out in the Tariff's Billing Procedure (section I.7.1). Remand Order P 52, JA ___; *see* Att. Z2, Addendum at A10. And the study reports and information provided to stakeholders did not provide notice sufficient to satisfy the filed rate doctrine and the rule against retroactive ratemaking, since they were not on file with the Commission. Remand Order P 52, JA ___; Remand Rehearing Order P 24, JA ___ (citing, *e.g.*, *Old*

Dominion, 892 F.3d at 1232; *West Deptford*, 766 F.3d at 23-24). Accordingly, the Commission reasonably denied the Regional Operator's request for waiver of the Tariff's Billing Procedure. Remand Order P 58, JA ___.

The Regional Operator and Oklahoma Gas contend on several bases that the Commission erred in its determinations here. None of their contentions has merit.

A. The Billing Procedure Did Not Plainly Allow The Regional Operator To Retroactively Charge Transmission Customers For Transmission Upgrade Costs During The Historical Period

The Regional Operator and Oklahoma Gas first claim that it was not necessary to waive the Billing Procedure's one-year time limit for billing adjustments here, because a "plain reading" of that provision "clearly" and "unambiguously" allowed the Regional Operator to retroactively charge transmission customers for upgrade costs back to 2008. Br. 21-23. But the Regional Operator's filing of, and its statements in, the waiver request confirm that the Billing Procedure did not plainly permit the historical period charges it sought to impose here.

The Regional Operator's Petition for Tariff Waiver stated that it was "necessary" to waive the Billing Procedure's time-limit on billing adjustments to allow it to retroactively charge transmission customers for upgrade costs during the historical period. Waiver Request at 1, 8-11, 16, JA ___, ___-__, ___. And while the Regional Operator stated halfway through its petition that waiver might not be necessary, that statement was based on the Regional Operator's belief that "settlement of the credit amounts under Attachment Z2 *can reasonably be construed* as an initial settlement because SPP has not yet attempted to collect these amounts from Transmission Customers . . . ." *Id.* at 11 (emphasis added). The Regional Operator acknowledged that it proposed to collect transmission upgrade costs that "*may be* beyond the one-year limitation on billing adjustments in Section 7.1 of the Tariff." *Id.* (emphasis added); *see also* Br. 36 (noting that the Regional Operator sought waiver to avoid any doubt about whether the Billing Procedure's time limit applied).

The Commission reasonably rejected the Regional Operator's later-raised claim that the Billing Procedure plainly allowed it to wait years—until it eventually developed procedures to calculate

transmission upgrade costs—to charge transmission customers for those costs. Remand Order PP 46-47, 49, JA ___-__; Remand Rehearing Order PP 20-21, 23-24, JA ___-__. This claim ignored the first sentence of the Billing Procedure, which provides that: "*Within a reasonable time after the first day of each month*, the Transmission Provider shall submit an invoice to the Transmission Customer for the charges for all services furnished under the Tariff during the preceding month." Tariff section I.7.1, Billing Procedure, Pet. Br. A-15 (emphasis added). This broad language requires the Regional Operator to invoice customers each month for all services furnished under the Tariff during the previous month. Remand Order P 47, JA ___; Remand Rehearing Order P 24, JA ___. That includes transmission upgrade cost charges, which arise only in connection with transmission service. Remand Order PP 47, 49, JA ___-__. The Regional Operator's failure to timely calculate transmission upgrade costs did not permit it or the Commission to ignore the Billing Procedure's one-year time limit for billing adjustments. Remand Rehearing Order P 21, JA ___; *see also id.* at P 24, JA ___ ("There is no exception for processes or services that may take longer than one year to implement."); *id.* at P 23, JA ___ (the

Billing Procedure "requires that SPP must both issue and correct any invoices in a timely manner").

B. The Commission Reasonably Interpreted The Tariff's Billing Procedure

The Regional Operator and Oklahoma Gas next assert that, even if the Billing Procedure is ambiguous, it did not bar the retroactive transmission upgrade costs charges because the Regional Operator "did in fact invoice such charges 'within a reasonable time,' (i.e., as soon as SPP had the tools to do so)." Br. 25 (quoting Billing Procedure, Pet. Br. A-15), 47. But in fact, as just discussed, the Billing Procedure requires that invoices be submitted "[w]ithin a reasonable time after the first day of each month . . . for the charges for all services furnished under the Tariff during the preceding month." Billing Procedure, Pet. Br. A-15; *see also* Remand Order P 47, JA ___ (the Billing Procedure requires the Regional Operator to invoice customers each month for all services furnished under the Tariff during the preceding month); Remand Rehearing Order P 24, JA ___ (same); *id.* at P 23, JA ___ (the Billing Procedure requires the Regional Operator to both issue and correct any invoices in a timely manner). The Commission reasonably found that the Regional Operator did not meet that Tariff standard, since it did not

invoice customers each month for transmission upgrade costs. Remand Order PP 47, 49, JA ___-__.

The Regional Operator and Oklahoma Gas are not helped by their claim that, because transmission upgrade cost charges are determined through a different settlement process than other transmission service charge components, they are stand-alone rate components and not billing adjustments. *See* Br. 25-27. Whether the transmission upgrade costs are a stand-alone rate component or an adjustment to already-invoiced transmission charges, the Regional Operator failed to meet the Billing Procedure's requirements to (1) invoice customers each month for all services furnished under the Tariff during the preceding month and (2) issue adjustments to those invoices within one year. Remand Order PP 47, 49, JA ___-___; Remand Rehearing Order PP 20, 24, JA ___, ___.

The Commission reasonably found that language in the Billing Procedure addressing estimated charges did not apply here. *See* Br. 27-30. That language states that:

> Invoices may be issued using estimated data to the extent actual data is not available by the fifth (5th) working day of the month following service. Adjustments reflecting the difference in billing between the estimated and actual data

> will be included on the next regular invoice, with such adjustment being due when that invoice is due. Any other corrections found to be necessary will be made on the next regular monthly invoice.
>
> Billing adjustments for reasons other than (a) the replacement of estimated data with actual data for service provided, or (b) provable meter error, shall be limited to those corrections and adjustments found to be appropriate for such service within one year after rendition of the bill reflecting actual data for such service.

Billing Procedure, Pet. Br. A-15. As the Regional Operator acknowledges, it was unable to estimate data regarding transmission upgrade cost charges during the historical period. Br. 5-7; R. 69, SPP Rehearing Request, at 31, JA ___, *cited in* Remand Rehearing Order P 22, JA ___. So there was no estimated data to be replaced with actual data, and the Billing Procedure's language regarding such replacement did not apply. Remand Rehearing Order P 22, JA ___; Remand Order PP 47-48, JA __-__.

The Commission further found that its determination here promotes rate certainty. *See* Br. 30, 47. Giving full effect to the Billing Procedure's one-year time limit, rather than subordinating it to the Crediting Procedure, assures customers that they will not be assessed new charges after the Tariff's time limit to do so passes. Remand

Rehearing Order PP 25, 37, JA ___, ___; *see also id.* P 35, JA ___ (the Commission neither elevated nor subordinated the Tariff provisions here; it interpreted the Tariff as a whole). As the Commission pointed out and the Regional Operator acknowledges, rate certainty is the primary rationale for time bar provisions like that in the Billing Procedure. *Id.* (citing SPP Rehearing Request at 28, JA ___); *see also* Br. 30 (same).

And as the Commission found, the Billing Procedure's time limit is part of the Tariff's filed rate that applies to other Tariff provisions, including the Crediting Procedure. Remand Order P 50, JA ___ (citing, *e.g.*, *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 139 FERC ¶ 61,254 P 44 (2012), *on reh'g*, 153 FERC ¶ 61,037 P 27 (2015), *aff'd*, *Seminole Elec. Coop. v. FERC*, 861 F.3d 230 (D.C. Cir. 2017); *N.Y. State Elec. & Gas Corp.*, 133 FERC ¶ 61,094 P 63, *on reh'g*, 142 FERC ¶ 61,151 P 26 (2013)); Remand Rehearing Order P 23, JA ___ (discussing *Seminole* decisions); *id.* at P 25, JA ___ (discussing *N.Y. State Elec. & Gas*); *id.* at P 40, JA ___.

Moreover, the Billing Procedure's broad language informed all interested parties, including those that sponsored transmission

upgrades (*see* Pet. Br. 31, 33; *see also* Int. Br. 9-10), that its invoicing and timing provisions applied to "*all* services furnished under the Tariff" in a given month. Remand Rehearing Order PP 24 (quoting Billing Procedure, Pet. Br. A-15) (emphasis added), 35, 50-51, JA ___, ___, ___-__. Any reliance transmission upgrade sponsors placed on the Tariff's Crediting Procedure (*see* Pet. Br. 31-33, 42, 47; *see also* Int. Br. 11-17, 21) without considering the ramifications of the Billing Procedure's invoicing and time-limit requirements was unreasonable. *See* Remand Rehearing Order PP 50-51, JA ___-__ (explaining that Oklahoma Gas's agreement with the Regional Operator to sponsor transmission upgrades expressly incorporated the Tariff, including the Billing Procedure's time bar provision).

Intervenors assert that they entered into agreements with the Regional Operator that obligate the Regional Operator to provide transmission upgrade cost credits, and that the Commission's determination here violates that separate contractual obligation. Int. Br. 17-19. But while Petitioner Oklahoma Gas and another party below raised a similar argument regarding their agreements with the Regional Operator in their requests for Commission rehearing of the

Remand Order, none of the intervenors here sought rehearing of that order. *See* Remand Rehearing Order PP 7, 43-52, JA ___, ___-__. And the petitioners here do not raise that contractual claim on appeal. So intervenors' contractual claim is not properly before the Court. *See E. Ky. Power Coop. v. FERC*, 489 F.3d 1299, 1305 (D.C. Cir. 2007) ("absent extraordinary circumstances, intervenors may join only on a matter that has been brought before the court by a petitioner") (internal quotation omitted).

In any event, the Commission found that the two agreements raised to it on rehearing included language establishing that they were subject to the Billing Procedure's time limit. Remand Rehearing Order PP 50-51, JA ___-__. Even though the Commission found that fact dispositive in the Remand Order, intervenors do not claim that their agreements did not contain similar language. *See* Int. Br. 17-19. Instead, intervenors assert only that their agreements either provided estimates of the credits that could result from transmission upgrade sponsorship or identified transmission upgrade payments that could be eligible for credits. Int. Br. 17-18. Intervenors' contention that they are entitled to transmission upgrade credits under their respective

agreements with the Regional Operator does not overcome the Commission's determination that the Billing Procedure's time limit is part of the Regional Operator's filed rate. *See* Remand Rehearing Order P 50, JA ___. Nor does it establish that there was sufficient notice here, to satisfy the filed rate doctrine and the rule against retroactive ratemaking, that the time limit would not apply to transmission upgrade charges. *See id.*

The Regional Operator and Oklahoma Gas cite to several earlier orders in which the Commission waived the Billing Procedure. Br. 32-33. But the cited orders were decided based on the four-factor waiver test the Commission originally applied in the Waiver Orders. *See supra* p. 8. None of those orders addressed the filed rate doctrine and the rule against retroactive ratemaking matters that *Old Dominion* and other Court and Commission precedent establish must be addressed in tariff waiver cases, and which the Commission addressed in the Remand Orders. *See* Remand Rehearing Order P 40, JA ___ (explaining that cases in which the Commission previously waived the Billing Procedure did not address whether there was adequate notice to satisfy the filed rate doctrine).

C. The Commission Reasonably Determined That Transmission Customers Did Not Have Adequate Notice That They Might Be Charged Retroactively, Beyond The Billing Procedure's One-Year Time Limit, For Transmission Upgrade Costs

The Regional Operator and Oklahoma Gas contend that transmission customers were provided adequate notice that they could be retroactively charged, beyond the Billing Procedure's one-year time limit, for transmission upgrade costs from: (1) the Tariff's Crediting Procedure (Attachment Z2); (2) the stakeholder process regarding the Regional Operator's efforts to develop Crediting Procedure processes and software; and (3) notations in the Regional Operator's study reports. Br. 33-46; *see also id.* at 5-7, 8, 41, 44 (discussing stakeholder process); *id.* at 41 (discussing study report notations); Int. Br. 13-14. The Commission reasonably found otherwise. *See* Remand Order PP 51-54, JA ___-__; Remand Rehearing Order PP 35-37, 41, JA ___-__, ___.

First, the Tariff's Crediting Procedure (Addendum at A10) did not provide adequate notice, since it did not contain any language notifying transmission customers that the Regional Operator intended to waive or adjust the Billing Procedure's explicit one-year time limit to

retroactively adjust invoices. Remand Rehearing Order P 35, JA ___ (citing Federal Power Act section 205(d), 16 U.S.C. § 824d(d) (requiring a public utility seeking to change its filed rate to "fil[e] with the Commission and keep[] open for public inspection new schedules stating plainly the change or changes in the schedule or schedules then in force and the time when the change or changes go into effect.")); *id.* P 36, JA ___; Remand Order P 52, JA ___.

And while customers may have been aware from the stakeholder proceedings or study report notations that the Regional Operator ultimately intended to implement the Crediting Procedure retroactively for the historical period, those stakeholder proceedings and notations could not provide notice sufficient to satisfy the filed rate doctrine and the rule against retroactive ratemaking because they were not on file with the Commission—a necessary predicate to changing the Billing Procedure's one-year time limit. Remand Rehearing Order P 36, JA ___ (citing *Old Dominion*, 892 F.3d at 1232; *West Deptford*, 766 F.3d at 24); Remand Order P 52, JA ___. As this Court explained in *Old Dominion*, a statement by a regional system operator can provide the legally required notice to change a filed rate only if the statement is filed with

the Commission. 892 F.3d at 1232. "That is required for all rate changes." *Id.* (citing Federal Power Act section 205(d), 16 U.S.C. § 824d(d); *West Deptford*, 766 F.3d at 23-24; *City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979)).

The Regional Operator and Oklahoma Gas cite on appeal (but did not cite on rehearing to the Commission) *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999), and *Pub. Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996), asserting that notice in those cases did not turn on whether there was language in the tariff. Br. 43-45. But those cases found that parties had adequate notice as of when proceedings were filed with the Commission raising the challenges at issue. *See Exxon*, 182 F.3d at 49-50 (finding that settlement rates should apply as of 1993, when all parties were on notice that valuations upon which rates were based were contested in a FERC proceeding); *Pub. Serv. Co. of Colo.*, 91 F.3d at 1481-82, 1488-90 (finding that refunds should extend back to October 1983, when all interested parties were given notice in the Federal Register that the issue there was being challenged in a FERC proceeding); *see also* Remand Order P 54, JA ___

(noting that this Court has found sufficient notice where a proceeding is pending judicial review).

So under *Exxon* and *Pub. Serv. Co. of Colo.*, interested parties here would have had adequate notice that they could not reasonably rely on the Tariff's one-year time limit for billing adjustments as of April 2016, when the Regional Operator submitted its request for a Tariff waiver and the Commission provided public notice of that filing. That notice, provided in 2016, would not enable the Regional Operator to retroactively charge transmission customers for transmission upgrade costs back to 2008.

Next, the Regional Operator and Oklahoma Gas claim that the Remand Orders did not repudiate the Waiver Orders' finding that the Regional Operator proceeded diligently and in good faith. Br. 25. But as this Court reaffirmed in *Old Dominion*, "[t]he filed rate doctrine and the rule against retroactive ratemaking leave the Commission no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations." *Old Dominion*, 892 F.3d at 1230. Thus, whether the Regional Operator acted diligently and in good faith was irrelevant to

the Commission's filed rate doctrine and rule against retroactive ratemaking determination here. Remand Order P 55, JA ___; Remand Rehearing Order P 6 & n.14, JA ___.

In any case, the Remand Order explained that the Regional Operator could have taken action to avoid the filed rate doctrine and rule against retroactive ratemaking problem here. Remand Order P 53 & n.151, JA ___-__. For example, it could have sought a delay of the effective date of the applicable tariff provisions until it was able to invoice transmission customers for transmission upgrade costs; alternatively, it could have added language to its Tariff, like that in the New York regional operator's Tariff, allowing the Commission to order the reopening of an invoice after it is considered final pursuant to a time bar provision. *Id.*

Finally, on this point, the Regional Operator and Oklahoma Gas assert that the Commission needed to address how its determination was consistent with the cost causation principle, which requires that the beneficiaries of a service be allocated the costs to provide that service. Br. 33, 47; *see also* Int. Br. 19-22. But the Commission explained that cost causation did not bear on its determination here

because the filed rate doctrine prohibited it from waiving the Billing Procedure. Remand Order P 55, JA ___; Remand Rehearing Order P 6 & n.14, JA ___-__. As this Court has found, when the filed rate doctrine prevents "reach[ing] backwards through time" to allocate costs "in a truly equitable manner," it is appropriate to depart from traditional cost causation principles. *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1186 (D.C. Cir. 1996).

III. The Commission Appropriately Exercised Its Broad Remedial Discretion In Determining That The Regional Operator Should Refund Historical Period Transmission Upgrade Costs

The Regional Operator began invoicing transmission upgrade charges for the 2008-2016 historical period in November 2016, after the Waiver Orders issued. *See* Remand Order P 58 & n.162, JA ___-__. The Commission determined, following voluntary remand of the Waiver Orders, that the Regional Operator should refund those charges, except those that were issued within the Billing Procedure's one-year time limit. *Id.* at P 58, JA ___-__.

The Regional Operator and Oklahoma Gas challenge the Commission's refund determination. Br. 48-55; *see also* Int. Br. 21-22. But as the record shows, the Commission reasonably exercised its broad

remedial discretion in ordering refunds here.[2] Remand Rehearing Order PP 24, 35, 50-51, 59-60, JA ___, ___, ___-__, ___.

After it balanced the equities in the "less-than-ideal circumstances" here, the Commission found that refunds were appropriate to protect the core principles of adequate advance notice and rate certainty underlying the Federal Power Act's rate provisions and the Billing Procedure's time bar provision. Remand Rehearing Order P60, JA __; *see also id.* ("Customers and interested parties must be able to rely on duly-filed and Commission-accepted tariff provisions, even under the most complex of circumstances."). As the Commission explained, the Billing Procedure is part of the Regional Operator's filed rate, so all parties had notice that the Billing Procedure's invoicing and time limit provisions would apply whenever invoicing was required, including invoicing related to transmission upgrade credits. Remand Rehearing Order PP 24, 35, 50-51, JA ___, ___, ___-__.

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[2] The Regional Operator and Oklahoma Gas contend that the Commission's remedial determination here was "arbitrary and capricious." Br. 49, 52. But as discussed in the Standard of Review Section above, the applicable standard of review for their challenge to the Commission's remedial determination here is the more stringent "abuse of discretion" standard. *See, e.g.*, *La. Pub. Serv. Comm'n*, 522 F.3d at 393.

The Commission acknowledged that the Crediting Procedure was also part of the Regional Operator's filed rated (*see* Pet. Br. 50-51, 54-55), and that Oklahoma Gas advanced substantial funds in reliance on being able to receive credits pursuant to that provision (*see* Pet. Br. 51). Remand Rehearing Order PP 35, 51, JA ___, ___. But the Commission found that, while the Crediting Procedure states that transmission upgrade sponsors "shall be eligible to receive revenue credits . . . recoverable from new transmission service using the facility," it did not contain any language indicating that the Billing Procedure's invoicing and timing provisions did not apply. Remand Rehearing Order P 3 n.5, P 35, JA ___, ___; Remand Order P 4 & n.10, JA ___. Thus, transmission upgrade sponsors could not reasonably have expected that their upgrade costs would be reimbursed through charges to transmission customers invoiced outside of the Billing Procedure's one-year time limit. *See* Remand Rehearing Order PP 24, 35, 50-51, JA ___, ___, ___-__.

The Regional Operator and Oklahoma Gas assert that a proper balancing of the equities here would not have resulted in refunds. Br. 50-52, 54-55. But as this Court has repeatedly held, "the breadth of

agency discretion is, if anything, at [its] zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions." *La. Pub. Serv. Comm'n v. FERC*, 866 F.3d 426, 429 (D.C. Cir. 2017) (quoting *La. Pub. Serv. Comm'n*, 522 F.3d at 393, and *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)); *see also La. Pub. Serv. Comm'n*, 174 F.3d at 224 (explaining that "the words 'necessary or appropriate' in [Federal Power Act] § 309, 16 U.S.C. § 825h, evince Congress' intent to leave refund determinations to the Commission's 'expert judgment'") (quoting *Towns of Concord, Norwood, and Wellesley, Mass. v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992)). The Commission's determination here that refunds were appropriate in light of the filed rate doctrine concerns and equities presented fits well within its broad remedial discretion.[3]

[3] The Regional Operator and Oklahoma Gas point to two statements by Commissioners concurring with the Remand Order, expressing concerns about the equities here. *See* Br. 51-52 (citing Remand Order Concurring Statements, JA ___-__). But no Commissioner expressed the opinion that the equities presented should override the Billing Procedure that is part of the filed rate. Indeed, in the Remand Rehearing Order all Commissioners joined in the Commission's determination that refunds were appropriate, with no concurring statements issued. *See* Remand Rehearing Order, JA ___-__.

Finally, the Regional Operator and Oklahoma Gas argue that the Commission's refund determination is inconsistent with cost causation. Br. 52-54. But as already discussed, *supra* pp. 33-34, the Commission appropriately may depart from traditional cost causation principles in light of filed rate doctrine concerns. *See United Distrib. Cos.*, 88 F.3d at 1186; *see also* Remand Rehearing Order P 59, JA ___ (Federal Power Act section 309 "'permits FERC to advance remedies not expressly provided for by the Federal Power Act as long as they are consistent with the Act.") (quoting *Verso Corp. v. FERC*, 898 F.3d 1, 10 (D.C. Cir. 2018)); Remand Order P 57 & n.161, JA ___ (same).

The Commission appropriately exercised its broad remedial discretion in determining that the Regional Operator should refund transmission upgrade charges invoiced in violation of its Tariff's one-year time limit. That determination deserves "great deference," *La. Pub. Serv. Comm'n*, 522 F.3d at 393, and should be upheld.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied, and the Commission's orders should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,206 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the type-face 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 Century Schoolbook 14-point font using Microsoft Word 2013.

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ADDENDUM

Statutory And Tariff Provisions

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§ 703. Form and venue of proceeding

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

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

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

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

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

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

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

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

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

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

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

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

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

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

(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—

(A) necessary because of an imminent threat to health or safety or other emergency;

(B) necessary for the enforcement of criminal laws;

(C) necessary for national security; or

(D) issued pursuant to any statute implementing an international trade agreement.

(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

(A) in the case of the Senate, 60 session days, or

(B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same

§ 824c. Issuance of securities; assumption of liabilities

(a) Authorization by Commission

No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after August 26, 1935.

(b) Application approval or modification; supplemental orders

The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) Compliance with order of Commission

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Notes or drafts maturing less than one year after issuance

Subsection (a) shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78*l*, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

(g) Inaction of Commissioners

(1) In general

With respect to a change described in subsection (d), if the Commission permits the 60-

day period established therein to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum—

(A) the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 825*l*(a) of this title; and

(B) each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.

(2) Appeal

If, pursuant to this subsection, a person seeks a rehearing under section 825*l*(a) of this title, and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum, such person may appeal under section 825*l*(b) of this title.

(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; Pub. L. 115–270, title III, § 3006, Oct. 23, 2018, 132 Stat. 3868.)

AMENDMENTS

2018—Subsec. (g). Pub. L. 115–270 added subsec. (g).

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 re-

day period established therein to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum—

(A) the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 825*l*(a) of this title; and

(B) each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.

(2) Appeal

If, pursuant to this subsection, a person seeks a rehearing under section 825*l*(a) of this title, and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum, such person may appeal under section 825*l*(b) of this title.

(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; Pub. L. 115–270, title III, § 3006, Oct. 23, 2018, 132 Stat. 3868.)

AMENDMENTS

2018—Subsec. (g). Pub. L. 115–270 added subsec. (g).

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

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§ 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 re-

funds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

[1] See References in Text note below.

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–473, § 4, Oct. 6, 1988, 102 Stat. 2300, provided that: ''The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such complaints may be withdrawn and refiled without prejudice.''

LIMITATION ON AUTHORITY PROVIDED

Pub. L. 100–473, § 3, Oct. 6, 1988, 102 Stat. 2300, provided that: ''Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)) shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act [16 U.S.C. 791a et seq.] to issue an order that (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company. For purposes of this section, the terms 'electric utility companies' and 'registered holding company' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].''

STUDY

Pub. L. 100–473, § 5, Oct. 6, 1988, 102 Stat. 2301, directed that, no earlier than three years and no later than four years after Oct. 6, 1988, Federal Energy Regulatory Commission perform a study of effect of amendments to this section, analyzing (1) impact, if any, of such amendments on cost of capital paid by public utilities, (2) any change in average time taken to resolve proceedings under this section, and (3) such other matters as Commission may deem appropriate in public interest, with study to be sent to Committee on Energy and Natural Resources of Senate and Committee on Energy and Commerce of House of Representatives.

§ 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

(June 10, 1920, ch. 285, pt. II, § 207, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

(b) Request for inventory and cost statements

Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 10, 1920, ch. 285, pt. II, § 208, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

§ 824h. References to State boards by Commission

(a) Composition of boards; force and effect of proceedings

The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Cooperation with State commissions

The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Availability of information and reports to State commissions; Commission experts

The Commission shall make available to the several State commissions such information and

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.

§ 825j. Investigations relating to electric energy; reports to Congress

In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the

SPP Tariff Attachment Z2[1]

An Upgrade Sponsor will receive revenues from revenue crediting described in Sections I, II, and III of this Attachment Z2 unless the Upgrade Sponsor selects and qualifies for candidate ILTCRs in accordance with Section IV of this Attachment Z2.

I. Creditable Upgrades

A. Any Network Upgrade which was paid for, in whole or part, through revenues collected from a Transmission Customer, Network Customer, or Generation Interconnection Customer through Directly Assigned Upgrade Costs shall be considered a Creditable Upgrade where the Upgrade Sponsor is eligible to receive revenue credits in accordance with Section II of this Attachment Z2.

B. A Sponsored Upgrade is not automatically a Creditable Upgrade nor is it automatically eligible to receive revenue credits since Sponsored Upgrades are not built to satisfy a need identified by the Transmission Provider. For a Sponsored Upgrade to become a Creditable Upgrade, the Transmission Provider must determine that the Sponsored Upgrade is needed as part of the Transmission System. At the time the Sponsored Upgrade becomes a Creditable Upgrade, the Transmission Provider shall determine the direction of flow which caused the Creditable Upgrade to be needed and the capability in the opposite direction.

C. A Creditable Upgrade shall cease being a Creditable Upgrade when: (1) the facility is permanently removed from service, (2) all the Upgrade Sponsors have been fully compensated, or (3) the costs have been fully included in rates in accordance with Section III of this Attachment Z2.

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[1] Consistent with Regional Operator and Oklahoma Gas's Addendum (*see* Note, Pet. Br. Addendum Table of Contents), this Addendum includes Tariff Attachment Z2 as it was in effect on the date of the Waiver Request, April 1, 2016.

II. Revenue Crediting

An Upgrade Sponsor shall be eligible to receive revenue credits in accordance with this Attachment Z2. The Directly Assigned Upgrade Costs are recoverable, with interest calculated in accordance with 18 CFR §35.19a(a)(2), from new transmission service using the facility as defined below until the amount owed the Upgrade Sponsor is zero. The provisions of this Attachment Z2 are applicable to Transmission Owners subject to the provisions of Section 39.1 of this Tariff.

A. New Point-To-Point Transmission Service:

Revenues from new Point-to-Point Transmission Service that could not be provided but for the Creditable Upgrade(s) will be used, in whole or in part, for crediting purposes. For each new point-to-point reservation that could not be provided but for one or more Creditable Upgrades, made after (i) the commitment for such Creditable Upgrade by an Upgrade Sponsor or (ii) the request causing the need for such Creditable Upgrade, with service commencing after or extending beyond the date the Creditable Upgrade is completed, the Upgrade Sponsor for each affected Creditable Upgrade shall receive a portion of the transmission service charge equal to the positive response factor of such new reservation on the Creditable Upgrade times the portion of the new reservation capacity that could not be provided but for the Creditable Upgrade times the rate applicable to such new reservation. For crediting purposes, the Transmission Provider shall perform a one-time calculation of the response factor of such new reservation on the Creditable Upgrade. This allocation from new service shall continue until the Upgrade Sponsor has been fully compensated. Revenue credits will be paid to Upgrade Sponsors in accordance with Section II.D of this Attachment Z2.

B. New Network Integration Transmission Service and Service to Transmission Owners Taking Service Under Non-Rate Terms and Conditions:

Revenue for credits will be provided from (i) new Long-Term Network Integration Transmission Service, and (ii) new transmission service taken under the non-rate terms and conditions of this Tariff by Transmission Owners subject to Section 39.1 of this Tariff, that could not be provided but for one or more Creditable Upgrades to

accommodate designation of new Network Loads or Transmission Owner's(s') loads, new Designated Resources or increases in the designation of existing Designated Resources above previously designated levels. Revenue credits shall be determined based upon the subsequent incremental use of each affected Creditable Upgrade for such new or increased Network Load or Transmission Owner load or Network Resource.

The annual revenue credit amount to be paid monthly by a Network Customer, or included in rates, for each such new or increased use of a Creditable Upgrade shall be the product of the total annual revenue requirement associated with the Creditable Upgrade and the ratio of the incremental impact placed on the Creditable Upgrade by each such new or increased use to the total of the incremental impacts placed on the Creditable Upgrade by all currently and previously identified incremental Network Integration Transmission Service and Long-Term Firm Point-To-Point Transmission Service uses of the Creditable Upgrade.

For the calculation of such revenue credits to be given to an Upgrade Sponsor for subsequent use of a Creditable Upgrade, the incremental use assigned to such Upgrade Sponsor shall be the capacity of the Creditable Upgrade minus all currently and previously identified incremental Network Integration Transmission Service and Long-Term Firm Point-To-Point Transmission Service uses. The cost of such revenue credit amount shall be paid by the Network Customer making such new or increased use of the Creditable Upgrade, or included in rates pursuant to the Base Plan and Balanced Portfolio funding formulas in Attachment J, in addition to all other applicable charges under this Tariff. Revenue credits will be paid to Upgrade Sponsors in accordance with Section II.D of this Attachment Z2.

C. Power Controlling Devices:

1. New Network Integration Transmission Service:

Revenue credits will be provided for new Long-Term Network Integration Transmission Service using the device in either direction to accommodate designation of new Network Loads, new Designated Resources or increases in the designation of existing Designated

Resources above previously designated levels. Revenue credits shall be determined based upon the subsequent additional incremental use of the device by any such new or increased use.
The annual revenue credit amount to be paid monthly by a Network Customer, or included in rates, for each such new or increased use of a Creditable Upgrade shall be the product of the annual revenue requirement associated with the device and the ratio of the incremental impact placed on the device by each such new or increased use to the total of the incremental impacts placed on the device by all currently and previously identified incremental Network Integration Transmission Service and Long-Term Firm Point-To-Point Transmission Service uses
of the device in both directions.

For the calculation of such revenue credits to be given to an Upgrade Sponsor for subsequent use of the device, the incremental use assigned to such Upgrade Sponsor shall be the capacity of the device in both directions minus all currently and previously identified incremental Network Integration Transmission Service and Long-Term Firm Point-To-Point Transmission Service uses of the device in both directions. The cost of such revenue credit amount shall be paid by the Network Customer making such new or increased use of the device, or included in rates pursuant to the Base Plan and Balanced Portfolio funding formulas in Attachment J, in addition to all other applicable charges under this Tariff. Revenue credits will be paid to Upgrade Sponsors in accordance with Section II.D of this Attachment Z2.

2. New Point-To-Point Transmission Service:
Crediting for Long-Term Firm Point-To-Point Transmission Service using the power controlling device in either direction shall be a portion of the transmission service charge equal to the positive response factor of such new reservation on the device times the new reservation capacity times the rate applicable to such new reservation less any revenue credits applicable to other Network Upgrades on the transmission path. Crediting for Short-Term Firm Point-To-Point Transmission Service and Non-Firm Point-To-Point Transmission Service using the device in either direction shall be the percent usage of the total revenue received by the Transmission Provider that is not

required for other transmission funding obligations. Revenue credits will be paid to Upgrade Sponsors in accordance with Section II.D of this Attachment Z2.

D. Distribution of Revenue Credits

1. For use of Creditable Upgrades which are also Service Upgrades, such revenue credits shall be given to the original Upgrade Sponsor and to all previously identified Upgrade Sponsors from incremental Network Integration Transmission Service and Long-Term Firm Point-To-Point Transmission Service uses, including prior incremental Network Integration Transmission Service uses that resulted in the obligation to pay revenue credits. The grant of such revenue credits shall be in proportion to the fraction of the annual revenue requirement associated with the Creditable Upgrade for which each Upgrade Sponsor is responsible, net of any revenue credits previously applied.

2. For use of Sponsored Upgrades that qualify as Creditable Upgrades, such revenue credits shall be given first to the Project Sponsor from new transmission service using the Creditable Upgrade until the revenue credit due to the Project Sponsor for that Creditable Upgrade is zero. Then such revenue credits shall be given to all Upgrade Sponsor(s) of the Creditable Upgrade. The grant of such revenue credits shall be in proportion to the fraction of the annual revenue requirement associated with the Creditable Upgrade for which each Upgrade Sponsor is responsible, net of any revenue credits previously applied.

3. For use of Creditable Upgrades associated with a Generator Interconnection Agreement, revenue credits from new transmission service using the Creditable Upgrade shall be given first to the Generation Interconnection Customer(s) associated with the Creditable Upgrade until the revenue credit due is zero. Then such revenue credits shall be given to all other Upgrade Sponsors of the Creditable Upgrade. The grant of such revenue credits shall be in proportion to the fraction of the annual revenue requirement associated with the Creditable Upgrade for which each Upgrade Sponsor is responsible, net of any revenue credits previously applied.

III. Future Roll-In

When a facility upgrade being paid for pursuant to the provisions of Attachment Z1 to this Tariff is rolled into the revenue requirements used for the development of generally applicable transmission service rates, the Transmission Owner that constructed the facility upgrade shall pay the remaining balance of each customer's unrecovered payments described in Sections VI.A and VI.B of Attachment Z1 that are applicable to that facility upgrade. All customers who have upgraded facilities and have remaining balances subject to cost recovery pursuant to Section VI of Attachment Z1, shall be paid in full. The customer shall continue to pay the charges specified in the customer's transmission service agreement for the transmission service initially reserved.

IV. Incremental LTCRs

A. For Network Upgrades with Directly Assigned Upgrade Costs, the Upgrade Sponsor may elect to be paid for such upgrade through receipt of candidate ILTCRs. In order to be eligible to receive candidate ILTCRs, the Upgrade Sponsor must request the Transmission Provider perform an analysis for the purposes of determining available candidate ILTCRs. If so requested, the Transmission Provider shall perform the following analysis:

a) The Upgrade Sponsor may request that up to three source-to-sink paths be evaluated by the Transmission Provider to determine the amount of incremental ATC created on these paths as a result of the portion of the upgrade associated with the Directly Assigned Upgrade Cost.

b) The Transmission Provider shall determine the minimum increase in ATC on each of the requested paths over a ten-year period and communicate the MW results to the Upgrade Sponsor. The Upgrade Sponsor may then decide to select one of the requested paths on which candidate ILTCRs are desired and the increase in ATC on that selected path shall be equal to the candidate ILTCRs on that path. Such selection shall be documented in the applicable executed agreements as specified under Section V of Attachment J of this Tariff. If the Upgrade Sponsor does not confirm selection of ILTCRs in the applicable executed agreement, then the Upgrade Sponsor shall be eligible for

revenue credits in accordance with Sections I and II of this Attachment Z2.

c) The Transmission Provider will consider all awarded ILTCRs in all planning studies on a going forward basis once the Upgrade Sponsor executes the applicable agreements as specified under Attachment J of this Tariff.

d) The Transmission Provider's costs associated with studies for potential ILTCRs shall be the responsibility of the Upgrade Sponsor requesting such studies.

B. When one or more Transmission Customers request to receive candidate ILTCRs for a Service Upgrade which was funded in whole or in part through Directly Assigned Upgrade Costs, the Transmission Provider will allocate the available candidate ILTCRs to each Transmission Customer in the same proportion as each Transmission Customer's pro-rata share of the total cost of the upgrade allocated in accordance with Section IV of Attachment Z1 of this Tariff.

If multiple Transmission Customers fund a Service Upgrade through Directly Assigned Upgrade Costs, each Transmission Customer may choose a different source-to-sink path for the candidate ILTCR and each Transmission Customer's candidate ILTCR allocation will be in proportion to the total cost of the upgrade.

Oklahoma Gas and Electric Company, et al. v. FERC Docket No. ER16-1341
D.C. Cir. Nos. 20-1062 and 20-1101 (consolidated)

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 25th day of September 2020, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

/s/ Beth G. Pacella
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