ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 19-1091 & 20-1039 (consolidated)

PUBLIC SERVICE ELECTRIC AND GAS CO., *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

David L. Morenoff
Acting General Counsel

Robert H. Solomon
Solicitor

Elizabeth E. Rylander
Attorney

For Respondent Federal Energy
Regulatory Commission
Washington, D.C. 20426

FINAL BRIEF: October 30, 2020

Certificate as to Parties, Rulings, and Related Cases

A. Parties

All parties and intervenors appearing before this Court are identified in the Briefs of Petitioners and Intervenors.

B. Rulings

1. *Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C. and Certain Transmission Owners*, 164 FERC ¶ 61,035 (July 19, 2018) ("2018 Rehearing Order"), R.132, JA 675;

2. *Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C. and Certain Transmission Owners*, 166 FERC ¶ 61,161 (Feb. 28, 2019) ("2019 Rehearing Order"), R.171, JA 877; and

3. *Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C. and Certain Transmission Owners*, 169 FERC ¶ 61,234 (Dec. 19, 2019), R.176, JA 900.

C. Related cases

This case has not previously been before this or any other court. Two other cases, *Consolidated Edison Co., et al. v. FERC*, Case Nos. 15-1183 *et al*. (filed June 25, 2015) (agency proceedings complete; motion to govern future proceedings pending), and *Long Island Power Authority, et al. v. FERC*, Case Nos. 20-1033 *et al.* (filed Feb. 13, 2020) (agency proceedings complete; petitioners' opening brief due December 7, 2020), concern the allocation of electric transmission facilities costs using the same cost allocation formula that is at issue in this case, but as to different transmission facilities.

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander

FINAL BRIEF: October 30, 2020

Table of Contents

Page

Statement of the Issue 1

Statutes and Regulations.. 4

Background.. 4

I. Statutory and regulatory background... 4

A. Federal Power Act.. 4

B. The Commission's transmission planning and transmission cost allocation policies 5

C. PJM's transmission planning and transmission cost allocation processes 8

II. Factual background... 10

A. Electric grid stability 10

B. The Artificial Island Project 12

III. The proceeding under review 16

A. PJM's initial cost allocation filing, and the Delmarva State Commissions' complaint 16

B. The Commission's initial rulings... 19

C. Project suspension and the PJM White Paper 21

D. The 2018 Rehearing Order 23

E. The 2019 Rehearing Order 25

Table of Contents

Page

Summary of Argument 27

Argument 30

I. Standard of review 30

II. The Commission reasonably held that the Artificial Island Project required a different cost allocation than other reliability projects 32

A. The record demonstrated that the Flow-Based Method does not accurately identify the beneficiaries of stability projects 32

B. The Commission reasonably departed from its prior approval of the Flow-Based Method 42

III. The Commission's determination does not conflict with Order No. 1000 45

Conclusion 49

Table of Authorities

Court cases: **Page**

Alcoa, Inc. v. FERC,
564 F.3d 1342 (D.C. Cir. 2009) 31

Ass'n of Oil Pipe Lines v. FERC,
876 F.3d 336 (D.C. Cir. 2017) 31-32

Atl. City Elec. Co. v. FERC,
295 F.3d 1 (D.C. Cir. 2002) 9

BP Energy Co. v. FERC,
828 F.3d 959 (D.C. Cir. 2016) 44

Cities of Batavia v. FERC,
672 F.2d 64 (D.C. Cir. 1982) 38

Cities of Bethany v. FERC,
727 F.2d 1131 (D.C. Cir. 1984) 38

Colo. Interstate Gas Co. v. FPC,
324 U.S. 581 (1945) 38

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 31, 40

FERC v. Elec. Power Supply Ass'n,
136 S. Ct. 760 (2016) 31, 40

FPC v. Conway Corp.,
426 U.S. 271 (1976) 46-47

---

* Cases chiefly relied upon are marked with an asterisk.

Table of Authorities

Court cases: **Page**

* *Ill. Comm. Comm'n v. FERC*,
576 F.3d 470 (7th Cir. 2009) 36, 38-39, 43, 45

* *Ill. Comm. Comm'n v. FERC*,
756 F.3d 556 (7th Cir. 2014) 9-10, 37, 38

Midwest ISO Transmission Owners v. FERC,
373 F.3d 1361 (D.C. Cir. 2004) 7, 36, 38, 43

Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1,
554 U.S. 527 (2008) 5, 31

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,
463 U.S. 29 (1983) 30

N. Va. Elec. Coop. v. FERC,
945 F.3d 1201 (D.C. Cir. 2019... 42, 45

New England Power Generators Ass'n v. FERC,
881 F.3d 202 (D.C. Cir. 2018) 39, 44

New York v. FERC,
535 U.S. 1 (2002) 4

NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n,
558 U.S. 165 (2010) 5

Old Dominion Elec. Coop. v. FERC,
898 F.3d 1254 (D.C. Cir. 2018) 42

Sithe/Indep. Power Partners, L.P. v. FERC,
165 F.3d 944 (D.C. Cir. 1999) 30

Table of Authorities

Court cases: **Page**

* *S.C. Pub. Serv. Auth. v. FERC*,
762 F.3d 41 (D.C. Cir. 2014) 6-7, 31, 39, 43, 46

Town of Norwood v. FERC,
962 F.2d 20 (D.C. Cir. 1992) 31

Wisc. Gas Co. v. FERC,
770 F.2d 1144 (D.C. Cir. 1985) 39

W. Mass. Elec. Co. v. FERC,
165 F.3d 922 (1999) 8

Administrative cases:

Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C., and Certain Transmission Owners,
153 FERC ¶ 61,245 (2015) ("2015 Initial Order").........17, 19-20, 43

Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C., and Certain Transmission Owners,
155 FERC ¶ 61,090 (2016) ("2016 Complaint Order")............20, 21, 43-44

Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C. and Certain Transmission Owners,
164 FERC ¶ 61,035 (2018) ("2018 Rehearing Order").............23-24, 33, 35, 39-41, 44, 46-48

Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C. and Certain Transmission Owners,
166 FERC ¶ 61,161 (2019) ("2019 Rehearing Order")........15, 25-26 32, 33-37, 39-41, 44-45, 47-48

Table of Authorities

Administrative cases: **Page**

Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C and Certain Transmission Owners,
169 FERC ¶ 61,234 (2019) 26-27

PJM Interconnection, L.L.C.,
108 FERC ¶ 61,187 (2004) 40

PJM Interconnection, L.L.C.,
138 FERC ¶ 61,230 (2012) 9

* *PJM Interconnection, L.L.C.*,
142 FERC ¶ 61,214 (2013), *on reh'g*,
147 FERC ¶ 61,128 (2014), *on reh'g*,
150 FERC ¶ 61,038 (2015), *on reh'g*,
151 FERC ¶ 61,250 (2015) 8-9, 13

Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.,
Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *on reh'g*,
Order No. 1000-A, 139 FERC ¶ 61,132, *on reh'g*,
Order No. 1000-B, 141 FERC ¶ 61,044 (2012).............................. 6-7

Table of Authorities

Statutes: **Page**

Administrative Procedure Act

5 U.S.C. § 706 30

Federal Power Act

Section 201, 16 U.S.C. § 824 4

Section 205, 16 U.S.C. § 824d 4

Section 206, 16 U.S.C. § 824e 5, 17, 24

Section 313, 16 U.S.C. § 825*l* 41

Regulations:

18 C.F.R. § 39.1 11

18 C.F.R. § 385.206 5

18 C.F.R. § 385.713 40

Glossary

2015 Initial Order	*PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,245 (2015), R.56, JA 300
2016 Complaint Order	*Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C. and Certain Transmission Owners*, 155 FERC ¶ 61,090 (2016), R.98, JA 516
2018 Rehearing Order	*Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C. and Certain Transmission Owners*, 164 FERC ¶ 61,035 (July 19, 2018), R.132, JA 675, on review in this appeal
2019 Rehearing Order	*Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C. and Certain Transmission Owners*, 166 FERC ¶ 61,161 (Feb. 28, 2019), R.171, JA 877, on review in this appeal
Artificial Island Project or Project	Twelve interrelated upgrades to the interstate grid, approved through the PJM regional planning process, to improve stability around Artificial Island
Commission or FERC	Respondent Federal Energy Regulatory Commission

Glossary

Delmarva State Commissions	Delaware Public Service Commission and Maryland Public Service Commission
Flow-Based Method	Cost allocation tool with which PJM Interconnection, L.L.C. allocates half the cost of regionally beneficial high-voltage transmission upgrades, and the entire cost of low-voltage transmission upgrades, according to who receives flows of electricity from the new facilities. The orders on review and the Petitioners and Intervenors briefs call this the “Solution-Based DFAX” method.
New Jersey Agencies	Intervenors New Jersey Board of Public Utilities and New Jersey Division of Rate Counsel
New Jersey Transmission Owners	Petitioners Public Service Electric and Gas Company and PPL Electric Utilities Corporation
P	A paragraph in a Commission order or other record document
PJM	PJM Interconnection, L.L.C., the regional transmission organization that operates the FERC-jurisdictional transmission grid in the mid-Atlantic region

Glossary

PJM Transmission Owners	All utilities that own transmission assets under the operational control of PJM Interconnection, L.L.C.
PJM White Paper	Report titled "Alternative Approaches to Identification of Artificial Island Project Beneficiaries," JA 634
R.	An item in the record of this proceeding
Replacement Method	Cost allocation method that FERC selected in the 2019 Rehearing Order to replace the Flow-Based Method for stability projects within PJM. The orders on review and Petitioners brief call this the "Stability Deviation Method."
Violation Method	Previous cost allocation by which PJM Interconnection, L.L.C. allocates half the cost of regionally beneficial high-voltage transmission upgrades, and the entire cost of low-voltage transmission upgrades, according to who caused a reliability violation requiring construction of new facilities

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

Nos. 19-1091 & 20-1039 (consolidated)

PUBLIC SERVICE ELECTRIC AND GAS CO., *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

Statement of the Issue

Petitioner Public Service Electric & Gas Company owns and operates three nuclear generators on Artificial Island, in southern New Jersey. The plants produce electricity that is transmitted through the interstate electric transmission grid in the mid-Atlantic region. But for years, there was not enough transmission infrastructure surrounding Artificial Island to ensure stability (an aspect of electric reliability). The nuclear plants and surrounding infrastructure had to be carefully

managed to ensure that the grid could respond appropriately to unexpected disturbances, and thereby maintain its reliability, while also carrying the nuclear generators' maximum output.

In accordance with its transmission planning procedures, PJM Interconnection, L.L.C. ("PJM"), the mid-Atlantic regional transmission organization, worked with stakeholders to identify grid upgrades that would solve the stability issue at Artificial Island. (PJM is not an acronym coined for this brief; it takes its name from the first three states in which it operated – Pennsylvania, New Jersey, and Maryland.) PJM eventually approved a group of upgrades, including construction of a transmission line from the nuclear plants in New Jersey to a substation in Delaware (the "Artificial Island Project"). This was the first time in at least 15 years that a transmission line built to address stability problems was included in PJM's regional transmission planning process.

The transmission cost allocation in PJM's electric transmission tariff – which is under the jurisdiction of Respondent Federal Energy Regulatory Commission ("Commission" or "FERC") – provided that the transmission zones within PJM to which power would flow over the new

line should pay for the upgrades. Accordingly, even though a reliability problem in New Jersey gave rise to the Artificial Island Project, PJM allocated 90 percent of the project costs to utilities in Delaware and Maryland, and less than one percent of the costs to New Jersey utilities.

In the orders on review, the Commission agreed with the Delaware Public Service Commission and the Maryland Public Service Commission ("Delmarva State Commissions") that the tariff's cost allocation was unreasonable as applied to the Artificial Island Project, and established a new, "just and reasonable" replacement method. Petitioners Public Service Electric and Gas Company and PPL Electric Utilities Corporation ("New Jersey Transmission Owners") and Intervenors New Jersey Board of Public Utilities and New Jersey Division of Rate Counsel ("New Jersey Agencies") argue that the tariff's preexisting cost allocation, which nearly exempts New Jersey entities from sharing the Project costs, is more appropriate here.

The issue on review is: Did the Commission reasonably conclude, based on the extensive record compiled in this proceeding, that it was not appropriate to allocate the cost of the Artificial Island

Project – a project built to resolve stability problems in New Jersey – primarily to ratepayers in Delaware and Maryland?

Statutes and Regulations

Pertinent statutes and regulations are reproduced in the Addendum.

Background

I. Statutory and regulatory background

A. Federal Power Act

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002). All rates for or in connection with jurisdictional sales and transmission service are subject to the Commission's review to assure that they are just and reasonable, and not unduly discriminatory or preferential. *See* Federal Power Act section 205, 16 U.S.C. §§ 824d(a), (b), (e).

"Rates may be examined by the Commission, upon complaint or on its own initiative, when a new or altered tariff or contract is filed or

after a rate goes into effect." *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 171 (2010) (citing Federal Power Act sections 205 and 206, 16 U.S.C. §§ 824d(e), 824e(a)). Section 206 of the Federal Power Act also authorizes the Commission, on its own initiative or based on a third-party complaint, to investigate whether existing rates for jurisdictional utilities are just and reasonable, and if they are not, to establish a new rate. 16 U.S.C. § 824e; *see also* 18 C.F.R. § 385.206 (procedural rules for filing and resolving a complaint).

B. The Commission's transmission planning and transmission cost allocation policies

The Commission has encouraged competition and reliability improvements in the wholesale electric power market through provision of non-discriminatory, efficient access to transmission over broad geographic areas, and the creation of regional transmission organizations. *See Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-37 (2008). These independent entities operate, but do not own, the transmission grid, and provide access for all "at rates established in a single, unbundled, grid-wide tariff." *NRG Power Mktg.*, 558 U.S. at 169 n.1 (quotation omitted).

PJM, the independent entity for the mid-Atlantic region, is responsible for coordinating and overseeing the process of planning expansions and enhancements to its grid, in accordance with requirements most recently revised in the Commission's Order No. 1000 rulemaking. *See Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014). Order No. 1000 requires transmission providers to participate in regional planning processes that produce regional transmission plans. Order No. 1000 P 148; *South Carolina*, 762 F.3d at 52. Through this process (called the Regional Transmission Expansion Process in PJM), transmission providers and stakeholders identify improvements that may better meet regional needs than projects that individual public utilities identify in their own, local planning processes. Order No. 1000 P 148; *South Carolina*, 762 F.3d at 56. Those regional needs may include improvements to electric grid reliability. *South Carolina*, 762 F.3d at 90.

Under Order No. 1000, each regional transmission planning process must include a method for allocating *ex ante* the costs of new transmission facilities that are included in the regional plan. *Id.* at 53 (citing Order No. 1000 P 558). The cost allocation method must follow the cost causation principle, "under which '[t]he cost of transmission facilities must be allocated to those within the transmission planning region that benefit from the facilities in a manner that is at least roughly commensurate with estimated benefits.'" *Id.* (quoting Order No. 1000 P 586); *see also, e.g.*, *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1369 (D.C. Cir. 2004) (courts and the Commission evaluate compliance with the cost-causation principle by "comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party"). Order No. 1000 does not prescribe a specific cost allocation for transmission projects; it "provides for general cost allocation principles," but requires "transmission providers to devise for themselves cost allocation methodologies and recovery mechanisms." *South Carolina*, 762 F.3d at 81.

C. PJM's transmission planning and transmission cost allocation processes

PJM uses a combination of two methods to allocate the costs of transmission projects built for reliability reasons. *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at PP 347-48 (2013), JA 921, *on reh'g*, 147 FERC ¶ 61,128 (2014), *on reh'g*, 150 FERC ¶ 61,038 (2015), *on reh'g*, 151 FERC ¶ 61,250 (2015). First, half the costs of the highest-voltage upgrades (called Regional Facilities and Necessary Lower Voltage Facilities) are allocated among all grid users. *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at PP 348, 412-15, JA 1069, 1099-1101. This cost allocation technique reflects the well-settled principle that improvements to the high-voltage grid benefit, to some extent, all users of the grid. *Id.*; *see also, e.g.*, *W. Mass. Elec. Co. v. FERC*, 165 F.3d 922, 927 (1999) ("When a system is integrated, any system enhancements are presumed to benefit the entire system."). It is not at issue in this appeal.

Second, PJM uses what it calls a "distribution factor," or "DFAX," analysis to allocate the other half of high-voltage project costs, and the entire cost of lower-voltage facilities. *See PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at PP 348, 412, JA 1069, 1099. Originally, PJM's

"distribution factor" formula apportioned costs among the entities that caused the need for a new reliability project (the "Violation Method"). *Id*. PP 348, 412 (Violation Method allocates costs according to the contribution of load and certain transmission facilities to electrical flows that create a need for transmission enhancement). This means that the entity or entities that contributed to a transmission problem shared the costs of resolving it. *See id.*; *PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,230, at P 23 (2012).

The PJM Transmission Owners, a group of utilities that includes Petitioners, is responsible for developing and proposing cost allocation methods in PJM. *See Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9-10 (D.C. Cir. 2002). In 2012, as part of the process of implementing Order No. 1000 reforms in the PJM region, the PJM Transmission Owners proposed to replace the fault-based Violation Method with a new, beneficiary-based cost allocation (the "Flow-Based Method"). *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at P 348, JA 1069. The Flow-Based Method does not consider what caused the need for a new transmission project, but requires PJM to "calculate the relative *use* of a new facility from load in each zone[.]" *Id.* (emphasis added); *see also Ill.*

Commerce Comm'n v. FERC, 756 F.3d 556, 560 (7th Cir. 2014) (same). The Commission approved this cost allocation revision as just, reasonable, and compliant with Order No. 1000. *Id.* PP 411-12, 427 (finding the Flow-Based Method an improvement over the Violation Method).

II. Factual background

A. Electric grid stability

Stability is an aspect of electric system reliability; without it, the elements of the grid will not work properly together. It describes "the grid's ability to return to a stable operating point following a system fault or similar disturbance." Complaint at App. 2, PJM Artificial Island Project Recommendation White Paper at 9, R.1, JA 43. Stability is "a function of generator output, strength of the transmission outlets from the generation plant, and ability of plant to operate in an acceptable voltage range." Pre-Technical Conference Submittal of PJM Interconnection, L.L.C., Exh. A (PJM Matrix) at 3, R.61, JA 326. Stability problems "can be considered to be radial in nature, outward from a generator to the aggregate load of the grid." *Id.* They can be alleviated in two ways.

In the short term, utilities can impose limits on the generator from which the stability problems originate, and/or the surrounding transmission, to avoid straining the grid. *See* Federal Energy Regulatory Commission, *Reliability Primer* at 25, https://www.ferc.gov/sites/default/files/2020-04/reliability-primer_1.pdf (accessed Aug. 21, 2020); 18 C.F.R. § 39.1 (defining "Reliable Operation" of the grid to include keeping grid elements within certain limits, so that instability, cascading failures, or uncontrolled separation of grid elements will not occur as a result of an episode such as equipment failure). Such limits, which are expressed as the maximum amount of power that a transmission line can safely transfer at a given time, help maintain and preserve the grid's ability to respond to disruption. *Reliability Primer* at 25. Power (angle) stability limits ensure that a fault or the unplanned loss of a piece of grid equipment will not cause the remaining generators and loads to lose synchronism with one another. *Id.* Voltage stability limits are used to ensure that the unplanned loss of a line or a generator will not cause system voltage to fall to dangerously low levels, which can cause equipment to shut down in order to avoid damage. *Id.*

Over a longer term, utilities can alleviate stability problems by strengthening the transmission connections between a generator and the surrounding network – often by building new transmission. *See* PJM Matrix at 3, JA 326. As a general matter, there can be many potential solutions to individual stability problems. *See* Second Revised Transcript of the PJM DFAX Technical Conference at 136-37, R.79, JA 478-79. In cases where utilities build transmission lines to provide additional generator outlets, those lines will improve stability no matter what direction they go. *See id.*; Delmarva State Commissions' Request for Rehearing at 19-20, R.104, JA 572-73.

B. The Artificial Island Project

Artificial Island is home to three nuclear generating units — Salem Units 1 and 2, and Hope Creek Unit 1 — that belong to a subsidiary of Petitioner Public Service Electric and Gas Company. *See* Complaint at P 5, R.1, JA 4-5. Stability limitations on the area's electrical infrastructure, together with high-voltage conditions that emerge while the Salem and Hope Creek plants operate, have required limiting the plants' output in some circumstances. *Id.* at App. 2, PJM Artificial Island Project Recommendation White Paper at 9-10, JA 43-

44. When specific transmission lines go out of service, “generation output from Artificial Island has limited paths to the remainder of PJM.” *Id.*

Since 1987, the stability limitations around Artificial Island have been managed using an Operating Guide, which essentially “replaced the development of additional transmission system outlets that would have been needed for the generation to export power to other areas on the PJM grid.” Complaint P 5, JA 4-5. The Operating Guide specifies how the Salem and Hope Creek generators must be operated to permit maximum output, and “requires PJM to adjust other components of the transmission system to accommodate” the Operating Guide’s requirements. *Id.* This has made it hard for PJM to maintain system voltages within limits, and so “the Operating Guide itself has become a limiting constraint.” *Id.*; *see also PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,128, n.601 (2014) (operating procedures have become more difficult to implement while maintaining other operational limits on the system).

In 2013, PJM sought proposals to improve operational performance on bulk electric facilities in the Artificial Island area.

Complaint P 7, JA 5. "Specifically, the request sought proposals to eliminate Artificial Island Operating Guide complexity regarding stability limitations," minimum reactive power output requirements, and previously-identified high-voltage reliability issues. *Id.* P 9, JA 6. The project would make it easier to transmit the full output of the Salem and Hope Creek plants to the rest of PJM. Complaint at Att. 7 (Affidavit of John M. Marcezewski) P 14, JA 247.

PJM received 26 project proposals, including a variety of different facility types and technologies, that ranged in cost from $100 million to $1.55 billion. Artificial Island Project Recommendation White Paper at 1, JA 35. The proposed projects "covered a varied geographical area generally between southern New Jersey, eastern Pennsylvania, northern Delaware, and northeastern Maryland." Marcezewski Aff. P 8, JA 244. They "spanned many PJM [Transmission Owner] zones, including Public Service Electric and Gas, Jersey Central Power and Light, Atlantic City Electric, PECO, Delmarva Power and Light, and Baltimore Gas and Electric." *Id.*

The $246 million project ultimately approved through the PJM Regional Transmission Expansion Process in July 2015 consisted of

interrelated transmission enhancements including a new high-voltage transmission line from the Salem plant in New Jersey to a new substation in Delaware. Complaint P 9, JA 6. The project included Regional Facilities that would be subject to the hybrid cost allocation approved in 2013, and lower-voltage facilities whose costs would be allocated entirely under the Flow-Based Method. *Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C. and Certain Transmission Owners*, 166 FERC ¶ 61,161, at P 6 (2019), R.171, JA 881-82 ("2019 Rehearing Order"). Under PJM's initial estimate, the Delmarva transmission zone would bear nearly 90 percent of the costs of the Artificial Island Project. Complaint P 10, JA 7. New Jersey utilities would incur less than one percent of total costs. Alternative Approaches to Identification of Artificial Island Project Beneficiaries at 11 ("PJM White Paper"), R.124, JA 647; Transmittal Letter, Att. A, Docket No. ER15-2563-000 (Aug. 28, 2015) (providing cost allocation estimates for the 12 upgrades).

In a letter to members announcing the project selection, PJM noted "valid concerns" that Intervenors Delaware Public Service Commission and Maryland Public Service Commission ("Delmarva

State Commissions") and other entities had raised concerning cost allocation. Complaint at Exh. 1 (Letter from Terry Boston, PJM, to PJM Members Committee (July 29, 2015)), JA 30. It stated that it "must follow its Tariff," and that it would "continue to provide technical analysis and information to affected stakeholders in order to help FERC with its ruling on this this particular cost allocation and its cost allocation rules in general." *Id.*

III. The proceeding under review

A. PJM's initial cost allocation filing, and the Delmarva State Commissions' complaint

PJM filed cost responsibility assignments for the Artificial Island Project in August 2015, following the revised hybrid cost allocation methodology that the Commission approved in 2013. Transmittal Letter at 3-4, Docket No. ER15-2563-000 (Aug. 28, 2015), JA 1352-53. The filing specified that each of the 12 facilities to be built or upgraded as part of the project was in response to "Criteria Violation: Stability issues in the Artificial Island area," and provided cost and cost allocation information for each facility. *Id.* at Att. A, JA 1358-69. In each case, "DPL" – meaning the Delmarva Zone – was to pay 99.98 percent of costs allocated via the Flow-Based Method. *Id.*

Separately, PJM filed an amended cost allocation for the Bergen-Linden Corridor Project in northern New Jersey, which is at issue in one of the related cases, D.C. Cir. Nos. 15-1183, *et al.* (agency proceedings complete; motion to govern future proceedings pending). Transmittal Letter, Docket No. ER15-2562-000 (Aug. 28, 2015). Parties protested the "dramatic changes" in cost allocation for this project. *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,245, at P 10 (2015) ("2015 Initial Order"), R.56, JA 304-05.

On the same day PJM filed the cost allocations, Delmarva State Commissions challenged them in a complaint before the Commission under Federal Power Act section 206, 16 U.S.C. § 824e. Delmarva State Commissions alleged that PJM's "sole reliance" on the Flow-Based Method to allocate the costs of the Artificial Island Project resulted "in a grossly disproportionate financial impact to customers within the Delmarva transmission zone when compared with the limited benefits to consumers within that area." Complaint at 2, JA 2. They added that the Delmarva Zone would receive 10 percent of the benefits of the Artificial Island Project, while bearing 90 percent of the costs – a result inconsistent with the requirement that transmission project costs must

be allocated in a way that is roughly commensurate with the project's benefits. *Id.* PP 3, 23, JA 3-4, 14-15. Delmarva State Commissions argued that the assumption underlying the Flow-Based Method – i.e., that power flows across a new transmission facility show who benefits from that facility – does not hold up in the case of the Artificial Island Project. *Id.* P 17, JA 10-11. They explained that the zone that PJM selects as the terminus of the new transmission line will bear the costs, regardless of the benefits involved. *Id.* PP 28, 32 JA 17-18, 19-20. Delmarva State Commissions asked the Commission to find that the Flow-Based Method was unjust and unreasonable as applied to the Artificial Island cost allocation. *Id.* P 35, JA 21.

In response, PJM Transmission Owners argued that the focus of cost allocation in PJM is not the reason the project was built, but rather its ultimate use, and that the Delmarva Zone's use of the Artificial Island Project is properly calculated under the PJM Tariff. Transmission Owners Answer at 20, R.50, JA 289. They added that Order No. 1000 required an *ex ante* cost allocation process, and that up-front certainty is superior to an *ad hoc*, project-by-project analysis. *Id.* at 5, JA 274.

PJM itself took no position on the propriety of applying the Flow-Based Method to allocate costs of the Artificial Island Project. PJM Answer at 2, R.35, JA 260. But the regional entity observed that using the Flow-Based Method to allocate costs, "although producing reasonable results in the overwhelming number of applications involving typical reliability upgrades, may result in cost allocations that appear disproportionate depending upon the projects evaluated and their unique attributes." *Id.* at 3, JA 261.

B. The Commission's initial rulings

In an order that addressed the Artificial Island and the Bergen-Linden Corridor Project cost allocations, together with complaints attacking each cost allocation, the Commission observed that the protests to the filings "raise a concern regarding the justness and reasonableness of the [Flow-Based Method] for transmission enhancements and expansions to address reliability violations that are not related to flow on the planned transmission facility." 2015 Initial Order P 33, JA 313. Finding that the two cost allocations had not been shown to be just and reasonable, the Commission accepted them for filing, subject to further order. *Id.* P 34, JA 313. It directed its staff to

hold a technical conference "to explore both whether there is a definable category of reliability projects within PJM for which the [Flow-Based Method] may not be just and reasonable . . . and whether an alternative just and reasonable *ex ante* cost allocation method can be established for any such category of projects." *Id.* P 35, JA 313. Commission staff conducted the technical conference in January 2016. *See* Second Revised Transcript of Technical Conference, R.79, JA 342.

In April 2016, the Commission denied the relief requested in Delmarva State Commissions' complaint, and accepted the Artificial Island cost allocation for filing. *Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C., and Certain Transmission Owners*, 155 FERC ¶ 61,090 (2016) ("2016 Complaint Order"), R.98, JA 516. The Commission held that Delmarva State Commissions had not shown that the Flow-Based Method was unjust, unreasonable, unduly discriminatory, or preferential. *Id.* P 65, JA 539. "[W]here a cost allocation method is accurate in a very high percentage of circumstances to which it applies, then that is a strong indicator that the cost allocation method is just and reasonable." *Id.* P 66, JA 539-40. Comments from the technical conference had identified concerns with

the cost allocation in just two of 1,200 projects that PJM identified in a pre-conference filing. *Id.* (citing a simultaneously-issued order, now underlying D.C. Cir. Nos. 15-1183, *et al.*, that denied challenges to the Bergen-Linden Corridor Project cost allocation).

Commissioner LaFleur dissented from the 2016 Complaint Order (and from the orders underlying D.C. Cir. Nos. 15-1183, *et al.*), finding that the record showed that the Flow-Based Method did not properly identify the beneficiaries of some projects. *Id.* (LaFleur, C., dissenting at 2), JA 549. "As a result, entities that use the lines may grossly overpay, while entities that benefit from resolution of the underlying violation underpay." *Id.* at 3, JA 550.

C. Project suspension and the PJM White Paper

Delmarva State Commissions requested rehearing of the 2016 Complaint Order. Request for Rehearing, R.104, JA 554. But before the Commission ruled on their request, PJM suspended the Project. Informational Filing, R.115, JA 604. PJM explained that the Project's projected costs had significantly increased, and that it wanted to further analyze "the project's scope, configuration, and cost estimates." *Id.* at Exhibit B p.2, JA 611.

When PJM lifted the suspension, it reaffirmed that the Project was "essential to maintaining reliability of the bulk transmission system in southern New Jersey," and development activities should resume. Informational Filing, R.122, Exh. A at 1, JA 616. But the cost allocation debate over the Project had become so polarized that it "threatens to impede PJM in discharging its reliability responsibilities." *Id.* PJM noted that the Flow-Based Method can produce cost allocations that "seem anomalous" for projects that do not resolve problems rooted in power flows. *Id.* (Artificial Island Project is "unique in nature"). It promised to provide data and analysis to help stakeholders "devise a different cost allocation proposal for stability projects such as Artificial Island." *Id.*

That data and analysis came in the form of a report that the Delmarva State Commissions and supporting commenters sought to lodge with the Commission. Motion to Reopen the Record and Lodge, R.124, JA 618 (attaching report titled "Alternative Approaches to Identification of Artificial Island Project Beneficiaries" (June 9, 2017), JA 634 ("PJM White Paper")). PJM explained that "cost allocation disputes often center on identification of the 'beneficiaries' of a given

project." PJM White Paper at 1, JA 637. As there are multiple ways to identify the beneficiaries of a stability-based project like Artificial Island, PJM presented alternative cost allocation scenarios. *Id.*; *see also id.* at 6, JA 642 (noting that the Artificial Island Project is "the first new line" included in the Regional Transmission Expansion Plan to address a stability issue, and that using an analytical method to identify beneficiaries of projects built for other reliability reasons may not work for a stability project). Both alternative cost allocations that PJM described sharply decreased the cost share that would be allocated to Delaware and Maryland utilities, and increased the amount that New Jersey utilities would pay. *Id.* at 7-11, JA 643-47.

D. The 2018 Rehearing Order

The Commission granted Delmarva State Commissions' motion to lodge the PJM White Paper, and their request for rehearing of the 2017 Complaint Order. *Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C. and Certain Transmission Owners*, 164 FERC ¶ 61,035 (2018) ("2018 Rehearing Order"). The Commission agreed with PJM's representations that "stability is analytically unique compared to voltage or thermal overload problems." *Id.* P 38, JA 691-92

(citing Technical Conference Tr. 116-20, JA 458-62). New transmission addresses stability problems by providing additional outlets for power, not necessarily by delivering power to load; consequently, the Flow-Based Method would not necessarily capture the beneficiaries of stability-related projects. *Id.* PP 40-41, JA 692-93. The Commission therefore found that solely relying on the Flow-Based Method to allocate the costs of stability projects was not just and reasonable, because that Method does not allocate the costs of such projects in a way that is roughly commensurate with benefits. *Id.* PP 38, 41, JA 691-92, 693-94. In light of this finding, the Commission noted its responsibility under Federal Power Act section 206, 16 U.S.C. § 824e, to establish a just and reasonable replacement rate. *Id.* P 42, JA 694. The Commission requested pleadings from the parties to help develop a replacement rate. *Id.*

PJM Transmission Owners, including both Petitioners Public Service Electric and Gas Company and PPL Electric Utilities Corporation (collectively, "New Jersey Transmission Owners"), and Intervenors New Jersey Board of Public Utilities and New Jersey Rate Counsel (collectively, "New Jersey Agencies") requested rehearing of the

2018 Rehearing Order. Request for Rehearing of the PJM Transmission Owners, R.139, JA 698; Request for Rehearing of the New Jersey Board of Public Utilities and New Jersey Division of Rate Counsel, R.140, JA 718. They and other groups also filed briefs concerning alternative cost allocations.

E. The 2019 Rehearing Order

The Commission denied the requests for rehearing of the 2018 Rehearing Order. 2019 Rehearing Order PP 36-42, JA 890-93. Quoting PJM, the agency explained that the Flow-Based Method measures changes in power flows, which usually are "consistent with the intended solution and the beneficiaries of a solution" to a reliability problem. *Id.* P 37, JA 890. But stability is "analytically unique compared to voltage or thermal overload problems," and therefore requires a different cost-benefit analysis. *Id.* P 38, JA 890-91. The use of a stability project, measured through the Flow-Based Method, "is neither connected with the need for the project, nor provides benefits to the parties being assigned cost responsibility." *Id.*

As for the Artificial Island Project, the Commission found that local zones in New Jersey cause the need for, and will benefit from, a

transmission project to increase stability. *Id.* P 39, JA 891-92. The Delmarva Zone would realize some reliability benefits from having a more robust interstate transmission system, but the excessive costs allocated to that zone under the Flow-Based Method would not be roughly commensurate with those benefits. *Id.*

Turning to a just and reasonable replacement rate, the Commission found that one of the two alternative cost allocations presented in the PJM White Paper (the Stability Deviation Method, or "Replacement Method"), was an appropriate way to allocate all of the costs of Lower Voltage Facilities, and half the costs of Regional Facilities. *Id.* P 43, JA 893. The Replacement Method uses voltage changes at individual generators and at nearby facilities as a basis to identify the loads that would be most affected by a stability disturbance, and thus most likely to benefit from transmission projects that address that issue. *Id.* PP 44-45, JA 893-94.

PJM and certain PJM Transmission Owners sought rehearing of the 2019 Rehearing Order, but only to the extent that that order made small changes to the Replacement Method. *Del. Pub. Serv. Comm'n and Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C and Certain*

Transmission Owners, 169 FERC ¶ 61,234, at PP 15-17 (2019), R.177, JA 910-11. In the third order presented for review in this appeal, the Commission granted both requests for rehearing. *Id.* P 19, JA 912. On review, no party alleges errors in this order, and so this brief will not discuss it.

Summary of Argument

The issue in this appeal is limited to who should pay for the Artificial Island Project – a set of transmission enhancements meant to improve electric grid stability around Petitioner Public Service Electric and Gas's nuclear facilities in southern New Jersey. New Jersey Transmission Owners argue that utilities (and by extension their ratepayers) in Delaware and Maryland should pay for the Project; Delmarva State Commissions argue the opposite. Based on the extensive record compiled in this proceeding, the Commission reasonably found that the New Jersey utilities should bear some of the costs of this particular type of reliability upgrade, meant to improve the stability and efficiency of utility operations in New Jersey.

The Commission initially relied on its previous finding that the Flow-Based Method was a reasonable way to determine who benefited

most from the Project, and therefore must pay its costs; that Method would allocate Project costs primarily to Delaware and Maryland utilities. It later reasonably decided to follow a different cost allocation method, and understandably granted rehearing of its earlier determination, based on a thorough re-examination of the case record on rehearing. New Jersey Transmission Owners, and supporting New Jersey Agencies, dislike the outcome because it keeps more of the project costs in New Jersey, instead of assigning them to Delaware and Maryland. But that outcome is "just and reasonable" under the Federal Power Act in these special circumstances, where the recipients of electrical flows over transmission equipment added to improve stability are not the project's principal beneficiaries.

The orders on review reflect a careful reconsideration of the administrative record underlying the 2016 Complaint Order, and explain in detail how that record underpins the Commission's decision to depart from the Flow-Based Method. The Commission was persuaded that in the context of an electric stability project like the Artificial Island Project, power flows do not properly identify the beneficiaries of that project. The direction of power flow is not

important in solving a stability problem, except to the extent that the new facility carries power away from the generator causing the stability issue. So if project costs follow the flow of electrons, as they do under the Flow-Based Method, they will not attach to the entities that caused the stability problem (and benefit from its resolution), but to whatever "unlucky" rate zone is chosen as the terminus of the transmission line that relieves the stability problem.

Having determined that the Flow-Based Method does not properly identify the beneficiaries of a new transmission project built for stability purposes, the Commission reasonably departed from PJM's pre-approved cost allocation for reliability projects. It approved a new cost allocation – unchallenged on review – that identifies the parties (here, New Jersey utilities) most likely to benefit from a stability improvement, and directs the costs to them.

New Jersey Transmission Owners worry that the Commission's willingness to consider a new cost allocation for a single transmission project will invite a cascade of challenges to future projects, and thereby undermine the goals of the Commission's Order No. 1000 transmission development rulemaking. But the Commission's principal task is to

ensure that rates and services, and terms and conditions of service, are just and reasonable under the Federal Power Act. Order No. 1000 promotes the development of just and reasonable rates and service, and the Commission's determination here as to how to allocate the costs of the Project, based on an extensive administrative record, promotes the same objective.

Argument

I. Standard of review

The Court reviews Commission orders under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A); *see also, e.g.*, *Sithe/Indep. Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under this standard, the court may not substitute its judgment for the Commission's, but must uphold the agency's decision if the agency has examined the relevant considerations and given a satisfactory explanation for its action, "including a rational connection between the facts found and the choice made." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

"In matters of ratemaking, [the Court's] review is highly deferential, as '[i]ssues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission.'" *Alcoa, Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009) (quoting *Town of Norwood v. FERC*, 962 F.2d 20, 22 (D.C. Cir. 1992)); *South Carolina*, 762 F.3d at 54-55. "The Court owes the Commission 'great deference' in this realm because 'the statutory requirement that rates be "just and reasonable" is obviously incapable of precise judicial definition[.]'" *South Carolina*, 762 F.3d at 54-55 (quoting *Morgan Stanley*, 554 U.S. at 532).

The "breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate to its intensely practical difficulties." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968). If the agency's action marks a change in position, the agency must "display awareness that it *is* changing position," and "show that there are good reasons" for the shift; but the reasons for the new position need not be better than the reasons for the old one. *Ass'n of Oil Pipe Lines v. FERC*,

876 F.3d 336, 342 (D.C. Cir. 2017) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

II. The Commission reasonably held that the Artificial Island Project required a different cost allocation than other reliability projects.

New Jersey Transmission Owners and New Jersey Agencies principally contend that the Commission did not explain or support its grant of rehearing in the 2018 Rehearing Order, and that the Flow-Based Method is, in any event, the superior cost allocation approach. Petitioners Br. 40-47; Intervenors Br. 15-21. But the agency's rehearing determination drew upon substantial record evidence that the Artificial Island Project was the first stability-driven project subject to this cost allocation process, and that the Flow-Based Method did not accurately identify its beneficiaries. 2018 Rehearing Order PP 38-40, JA 691-93; 2019 Rehearing Order PP 37-40, JA 890-92. Under these record-specific circumstances, the Commission reasonably favored another approach.

A. The record demonstrated that the Flow-Based Method does not accurately identify the beneficiaries of stability projects.

In nearly all cases where the Flow-Based Method is used to allocate the costs of fixing a reliability violation, power flows from the

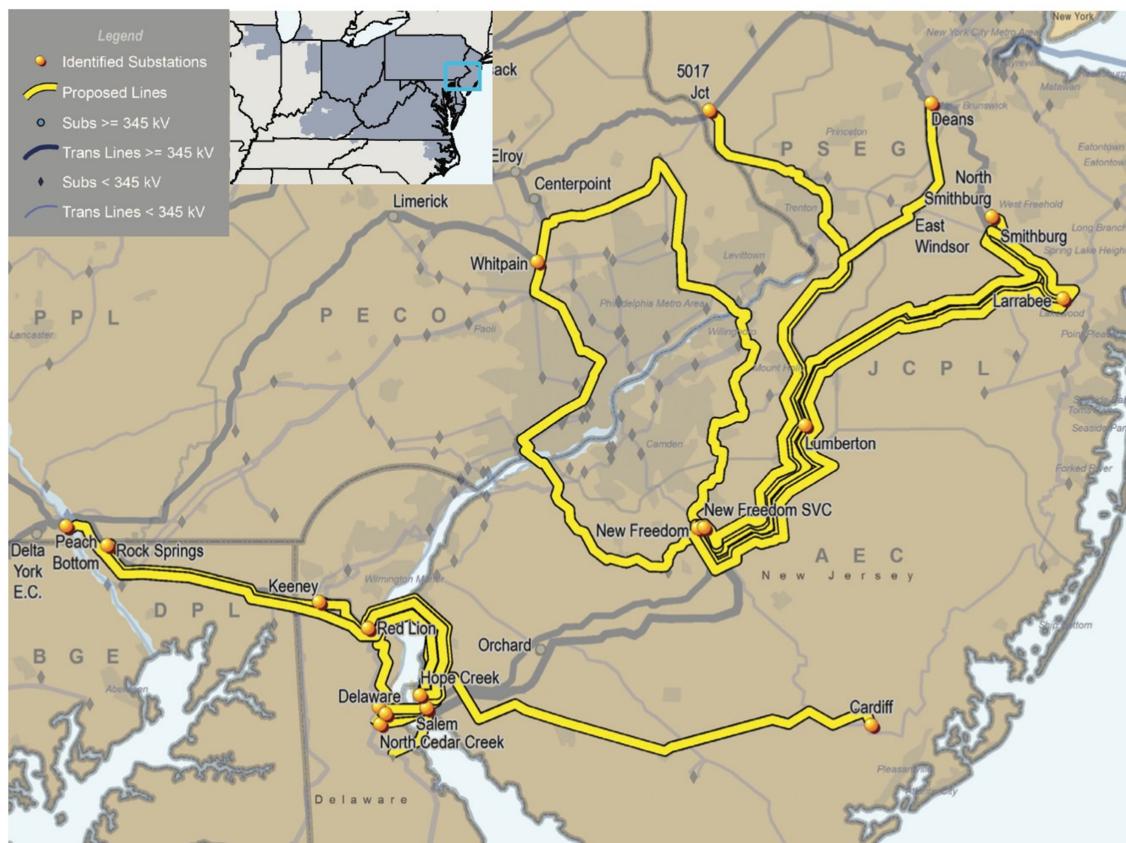
new facility are consistent with the necessary solution. 2018 Rehearing Order P 39, JA 692 (citing PJM Answer at 8, JA 266). This means that the flows identify the beneficiaries of the new facility. *Id.* As a PJM representative explained at the technical conference, if a reliability violation affects flow from A to B, "when you build the new line it's typically going to be in parallel with A to B and the people who caused the problem from A to B will now use the facility, so the causers and the users after the fact are largely the same." Technical Conference Tr. 136, JA 478. But a stability violation is different: "it's a function of the relationship between the generators and the strength of the transmission system." *Id.*; 2018 Rehearing Order P 40, JA 692-93. It is resolved by providing additional outlets for generation. 2019 Rehearing Order P 40, JA 892.

PJM listed five objectives for the Artificial Island Project, which included generating maximum power from the nuclear units, reducing operational complexity, and improving stability – but not bringing additional power to the Delmarva Zone. *See* Artificial Island Project Recommendation White Paper at 9, JA 43; 2019 Rehearing Order P 6, JA 881-82. PJM selected the Project from the various responsive

proposals, finding that this configuration provided a well-balanced way to improve technical performance and a "least-risk constructible solution under a reasonable cost commitment.'" 2019 Rehearing Order P 39, JA 891-92 (quoting PJM Answer at 6, JA 264).

The record indicates that PJM reasonably could have chosen one of the other proposals. 2019 Rehearing Order P 39, JA 891-92 ("Any one of those transmission projects could have resolved the stability violation."). A map of the 26 initial proposals shows potential transmission lines terminating in several different PJM pricing zones:

Map 1.2: Artificial Island Window Proposals



Artificial Island Project Recommendation White Paper at 2, fig. 1.2, JA 36. This would have produced a different cost allocation, because the Flow-Based Method considers the recipients of power flows to be the beneficiaries of the project. PJM Answer at 6, JA 264; 2019 Rehearing Order P 39 & n.40, JA 891-92. As PJM's representative explained: "You could have also built a line to Philadelphia or you could have built a line to Allentown or you could have built a line to Newark, New Jersey, and you would have solved the stability problem, and the users of that new line would have been noticeably different, okay." Technical Conference Tr. 136-37, JA 478-79; 2019 Rehearing Order P 39 n.40, JA 891-92 (citing Technical Conference).

The disjunction between the solutions to stability problems and the direction that power flows means that studying the use of the project in order to identify its beneficiaries does not necessarily yield accurate results. 2018 Rehearing Order PP 40-41, JA 692-93; 2019 Rehearing Order PP 39-40, JA 891-92. A different project selection would have produced an entirely different cost allocation, depending on the terminus of the new transmission line, with no necessary nexus between the benefits of the project and the allocation of its costs. 2019

Rehearing Order P 39, JA 891-92; *see also id.* n.40, JA 891 (the Project "could be described as the project to anywhere with the [Flow-Based Method] allocating costs to the unlucky zone that happened to end up as the sink point for the project.").

Here, the "unlucky zone" – the Delmarva Zone – would pay about 90 percent of the Project costs under the Flow-Based Method, while receiving what Delmarva State Commissions estimated as only 10 percent of economic benefits. Complaint P 31, JA 19 (citing PJM Market Efficiency Study, Complaint Att. 7, JA 252). The record shows that Delaware and Maryland entities will receive some benefits from the Project, but those benefits are the widely-distributed improvements that come with having a more robust transmission system. 2019 Rehearing Order P 40, JA 892 (quoting *Ill. Commerce Comm'n*, 576 F.3d 470, 477 (7th Cir. 2009) ("No doubt there will be *some* benefit . . . just because the network *is* a network")); *see also, e.g.*, *Midwest ISO Transmission Owners*, 373 F.3d at 1371 (distinguishing the costs of having a system from the costs of using the system).

The Commission noted that Delaware and Maryland utilities would use the Project as measured by the Flow-Based Method. 2019

Rehearing Order P 40, JA 892; *see also* Petitioners Br. 41 (alleging that the Commission ignored this evidence). But those parties did not cause the need for the line, and would not benefit enough from the power it delivers for the cost allocation under the Flow-Based Method to be "roughly commensurate" with those benefits. 2019 Rehearing Order P 40 (citing court cases); *see also Ill. Commerce Comm'n*, 756 F.3d at 564 (noting the "basic fallacy" in assuming that lines built in eastern PJM to address specific reliability problems are for the benefit of the entire grid, and will have more than incidental benefits elsewhere).

Conversely, the New Jersey transmission grid needed to be stronger in order to perform reliably, and so "it is the local zones in New Jersey that both contribute to the need for, and will benefit from, a transmission project that will increase stability performance." 2019 Rehearing Order P 39, JA 891. Despite this, under the Flow-Based Method, New Jersey utilities would bear only about 1 percent of the total costs of the Project – about the same amount allocated to a utility located four states away. PJM White Paper at 5, JA 641 (total of 0.83 percent allocated to Atlantic City Electric, Jersey Central Power & Light, Rockland Electric, and Petitioner Public Service Electric and

Gas; 0.91 percent for Illinois-based Commonwealth Edison). *See Ill. Commerce Comm'n*, 756 F.3d at 562 (criticizing projected cost allocation for a reliability project in northern New Jersey, in which New Jersey utilities would pay 12 percent of the project costs, and an Illinois utility (Commonwealth Edison) 16 percent); *see also Ill. Commerce Comm'n*, 576 F.3d at 476 (cost allocation in which a utility would contribute $480 million in costs and realize $1 million in benefits concededly is unjust and unreasonable).

The Commission is not required to match the costs and benefits of a new transmission project with "exacting precision." *Midwest ISO Transmission Owners*, 373 F.3d at 1369; *see, e.g.*, *Colo. Interstate Gas Co. v. FPC*, 324 U.S. 581, 589 (1945) ("[a]llocation of costs is not a matter for the slide-rule," but "involves judgment on a myriad of facts"). The application of the just and reasonable standard to a proposed cost allocation method "involves important policy choices about how costs of services should be allocated among customers." *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984); *see also, e.g.*, *Cities of Batavia v. FERC*, 672 F.2d 64, 83 (D.C. Cir. 1982) (court defers to Commission "policy decision about how system-wide costs ought to be

distributed among customer groups”). But the agency is “not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members.” *Ill. Commerce Comm’n*, 576 F.3d at 476.

Based on its re-examination of the evidence, which demonstrated that the Flow-Based Method does not accurately identify the beneficiaries of a transmission project built for stability, and therefore does not properly match the costs and benefits of the project, the Commission reasonably held on rehearing that the cost allocation was not just and reasonable for that narrow category of projects. 2018 Rehearing Order PP 38-41, JA 691-94; 2019 Rehearing Order PP 37-40, JA 890-92. The agency’s thorough explanation of its rehearing decision – made over the course of two detailed orders – easily satisfies the requirement that it identify the evidence on which it relied, and explain how that evidence supports its conclusion. *See New England Power Generators Ass’n v. FERC*, 881 F.3d 202, 210-11 (D.C. Cir. 2018); *South Carolina*, 762 F.3d at 76 (citing *Wisc. Gas Co. v. FERC*, 770 F.2d 1144, 1156 (D.C. Cir. 1985)). It further shows all the necessary awareness

that the Commission was changing its position from the 2016 Complaint Order. *See FCC v. Fox Television Stations*, 556 U.S. at 514-15; 2018 Rehearing Order P 37, JA 691 ("On further consideration, we grant rehearing for the reasons discussed below.").

The Commission generally may not consider new evidence in the rehearing phase, so it properly reached its rehearing decision based on the record it had before it in 2016, and the requests for rehearing of that order. 2019 Rehearing Order P 41 & n.44, JA 892-93 (citing *PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,187, at P 49 (2004); 18 C.F.R. § 385.713(c)(3)). *See* Petitioners Br. 40; Intervenors Br. 15-16. The record developed to that point – the Complaint and answers; evidence submitted before, during, and after the technical conference; and the arguments presented on rehearing – was more than sufficient to inform and justify the Commission's rehearing determinations. *See* 2018 Rehearing Order PP 38-41, JA 691-94 (citing record sources); 2019 Rehearing Order PP 37-41, JA 890-93 (same); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (Court's appellate role is to determine whether Commission "weighed competing views, selected [a result] with

adequate support in the record, and intelligibly explained the reasons for making that choice.”).

New Jersey Transmission Owners and New Jersey Agencies claim that the Commission ignored their opposition to the motion to lodge the PJM White Paper. Petitioners Br. 49-50; Intervenors Br. 22. The Commission admitted the PJM White Paper into evidence to help it determine a just and reasonable replacement rate, not to inform its rehearing determination – which is all that is at issue in this appeal. *See* 2018 Rehearing Order PP 36, 42-46, JA 690, 694-97; 2019 Rehearing Order P 42, JA 893 (reopening the record was necessary because the Commission needed more information). The Commission did consider and respond to New Jersey Transmission Owners' arguments concerning selection of the Replacement Method. 2019 Rehearing Order P 45-50, JA 894-97. New Jersey Transmission Owners now disparage the Commission's replacement choice in the background section of their brief, but they admit that they did not seek agency rehearing of this decision, as they must in order to appeal. Petitioners Br. n.8, 22-24; *see also* 16 U.S.C. § 825*l*(a) (rehearing

required before appeal); *N. Va. Elec. Coop. v. FERC*, 945 F.3d 1201, 1205 (D.C. Cir. 2019) (same).

B. The Commission reasonably departed from its prior approval of the Flow-Based Method.

New Jersey Transmission Owners criticize the Commission's rejection of the Flow-Based Method for Artificial Island as inconsistent with previously-set expectations. Petitioners Br. 25 ("PJM understood perfectly well what the rules provided, as did the Commission when it approved PJM's cost allocation for the Artificial Island Project" in the 2016 Complaint Order). New Jersey Agencies argue that the agency improperly departed from precedent. Intervenors Br. 16-18.

Certainly, this Court has prohibited changes to an approved cost allocation when the revision would ignore significant and unquestioned benefits. *See Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1261 (D.C. Cir. 2018) (rejecting tariff amendment that restricted cost sharing for certain high-voltage projects, and thereby produced a "severe misallocation" of costs and benefits). But in cases like this one, where a regional cost allocation does not yield just and reasonable results for a specific project, courts have upheld the Commission's departure from the regional allocation. *See N. Va. Elec. Coop.*, 945 F.3d at 1207-08

(upholding FERC's exemption of North Carolina customers from certain construction costs from which they had not been shown to benefit).

PJM, the regional system operator, warned the Commission throughout the proceeding that the Flow-Based Method usually produces just and reasonable results, but also sometimes leads to cost responsibility assignments that appear disproportionate. 2015 Initial Order P 16, JA 307; 2016 Complaint Order P 36, JA 530. Similarly, the determinations of the 2016 Complaint Order focused on the Flow-Based Method's broad effectiveness rather than its function in this specific case. *See* 2016 Complaint Order PP 65-66, JA 539-40 (explaining that the Commission had already accepted the Flow-Based Method, and that this Court had elsewhere approved the use of a beneficiary-based cost allocation) (citing *South Carolina*, 762 F.3d 41). The Commission explained that the Flow-Based Method "is accurate in a very high percentage of circumstances," and therefore likely to be just and reasonable. *Id.* P 66, JA 539-40 (citing *Ill. Commerce Comm'n*, 576 F.3d at 476-77; *Midwest ISO Transmission Owners*, 373 F.3d at 1369). The 2016 Complaint Order did not directly respond to arguments that complainants did not cause the need for the Artificial Island Project, but

merely identified a preference for a beneficiary-based cost allocation over a violation-based version. *Id.* PP 68-71, JA 541-42; *see also id.* (LaFleur, C., dissenting, at 2, JA 549) (relying solely on use of new facilities does not properly allocate the costs of projects built to address stability problems, like the Artificial Island Project).

The Commission must explain why factual distinctions among individual cases justify different results. *New England Power Generators Ass'n*, 881 F.3d at 211 (citing *BP Energy Co. v. FERC*, 828 F.3d 959, 968 (D.C. Cir. 2016)). It did that here. *See supra* pp. 32-42. The Commission's findings were expressly limited to stability-related projects – currently a category of one. 2018 Rehearing Order P 41, JA 693-94; 2019 Rehearing Order PP 37-38, JA 890-91; PJM Matrix at 3, JA 326. The agency nowhere suggested that it was overturning the use of the Flow-Based Method for all purposes, as New Jersey Transmission Owners and New Jersey Agencies allege. Petitioners Br. 40; Intervenors Br. 15-16. It continued to support the Flow-Based Method as effective in most circumstances. 2018 Rehearing Order P 38, JA 691-92. But in light of the evidence that the Flow-Based Method did not allocate costs properly in this case, the Commission's limited

departure from it here "*maintained* consistency with the broader cost causation principle[.]" *N. Va. Elec. Coop.*, 945 F.3d at 1207 (emphasis in original). "[M]ore than substantial" evidence shows that New Jersey utilities escape cost responsibility under the Flow-Based Method, and that costs shift to the Delmarva Zone by virtue of PJM's project selection. *Id.*; *see also* 2019 Rehearing Order P 39, JA 891-92; Technical Conference Tr. 136-37. Continued reliance on the Flow-Based Model may be advantageous for New Jersey Transmission Owners, but it is not just and reasonable under the Federal Power Act. *See Ill. Commerce Comm'n*, 576 F.3d at 477 (the "fact that one group of utilities desires to be subsidized by another is no reason in itself for giving them their way").

III. The Commission's determination does not conflict with Order No. 1000.

New Jersey Transmission Owners argue that the rehearing orders conflict with the Commission's Order No. 1000 transmission planning rule (*see supra* pp. 6-7), because they supposedly create an exception to the rule's requirement that transmission providers have an *ex ante* cost allocation in their tariffs. Petitioners Br. 28-38. New Jersey Transmission Owners are mistaken; there is no conflict.

The Commission's orders here advance the same objectives as its rulemaking – to promote transmission rates and terms and conditions, and underlying transmission planning decisions, that are just and reasonable to utilities and utility ratepayers in the circumstances presented. *See supra* pp. 4-5 (explaining statutory responsibilities). And here, the Commission found that it was inconsistent with the Federal Power Act to allocate the costs of the Artificial Island Project using the Flow-Based Method. 2018 Rehearing Order P 41, JA 693-94.

The Order No. 1000 rule attempts to increase transparency, certainty, and fairness in the transmission planning process by requiring transmission providers like PJM to have transmission planning processes, and an *ex ante* cost allocation method, in their tariffs. *See South Carolina*, 762 F.3d at 52-53. But the rule does not prescribe a particular cost allocation method; it leaves the details to individual transmission providers to propose to the Commission, subject to general principles identified in the rule. *Id.* at 57-58, 81. Any number of alternative *ex ante* cost allocation approaches that comply with these general principles may be just and reasonable. *See, e.g.*, *FPC*

v. Conway Corp., 426 U.S. 271, 277-78 (1976) (ratemaking is not an "exact science," and so there is a zone of statutory reasonableness).

And the orders on review expressly find that – but for the very narrow exception they articulate for stability-based projects such as the Artificial Island Project – PJM's *ex ante* cost allocation continues to match the costs and benefits of new transmission in a way that is at least roughly commensurate. 2018 Rehearing Order P 38, JA 691-92. Moreover, the Replacement Method that the Commission approved is also a beneficiary-based cost allocation. 2019 Rehearing Order PP 13, 44, JA 883-84, 893-94. Significantly, New Jersey Transmission Owners and New Jersey Agencies nowhere claim that the Commission's decision to adopt a case-specific cost allocation approach that differs from the conventional approach affected decisions about whether to develop the Artificial Island Project or the price of that project.

Finally, New Jersey Transmission Owners worry that the orders on review create an incentive for dissatisfied parties to litigate the cost allocation for every new transmission project, creating a series of *ad hoc* cost allocations. Petitioners Br. 35-38. Their claims are largely speculative, and the Commission could address such circumstances in

the future if they were to arise. Moreover, the New Jersey Transmission Owners understate the significance of the Commission's determination as to the highly unusual characteristics of stability-focused projects such that the Artificial Island Project (a rare example of such a project) is deserving of an exception to the previously-approved cost allocation method. Petitioners Br. 36 (citing 2018 Rehearing Order P 41, JA 693-94; 2019 Rehearing Order P 38, JA 890-91).

Conclusion

For the foregoing reasons, the Court should deny the petitions for review.

Respectfully submitted,

David L. Morenoff
Acting General Counsel

Robert H. Solomon
Solicitor

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander
Attorney

Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
Phone: (202) 502-8466
Fax: (202) 273-0901
elizabeth.rylander@ferc.gov

FINAL BRIEF: October 30, 2020

Certificate of Compliance

In accordance with Fed. R. App. P. 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,903 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 it has been prepared using Century Schoolbook 14-point font, in Microsoft Word for Office 365.

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander

Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
Phone: (202) 502-8466
Fax: (202) 273-0901
elizabeth.rylander@ferc.gov

FINAL BRIEF: October 30, 2020

ADDENDUM
Statutes & Regulations

Table of Contents

Statutes: **Page**

Administrative Procedure Act

5 U.S.C. § 706 ....A-1

Federal Power Act

Section 201, 16 U.S.C. § 824 ....A-2

Section 205, 16 U.S.C. § 824d A-3

Section 206, 16 U.S.C. § 824e A-4

Section 313, 16 U.S.C. § 825*l* A-7

Regulations:

18.C.F.R. § 39.1 ....A-8

18 C.F.R. § 385.206 ....A-9

18 C.F.R. § 385.713 ....A-12

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

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 statu-tory review proceeding is applicable, the action for ju-dicial review may be brought against the United States, the agency by its official title, or the appro-priate 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

Sec.
801. Congressional review.
802. Congressional disapproval procedure.
803. Special rule on statutory, regulatory, and judicial deadlines.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

[1] See References in Text note below.

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

LIMITATION ON AUTHORITY PROVIDED

Section 3 of Pub. L. 100–473 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

Section 5 of Pub. L. 100–473 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 reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may upon request from a State make available to such State as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement to the Commission by such State of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 10, 1920, ch. 285, pt. II, § 209, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first sec-tion of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

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

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

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

SOURCE: Order 672, 71 FR 8736, Feb. 17, 2006, unless otherwise noted.

§ 39.1 Definitions.

As used in this part:

Bulk-Power System means facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof), and electric energy from generating facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy.

Cross-Border Regional Entity means a Regional Entity that encompasses a part of the United States and a part of Canada or Mexico.

Cybersecurity Incident means a malicious act or suspicious event that disrupts, or was an attempt to disrupt, the operation of those programmable electronic devices and communications networks including hardware, software and data that are essential to the Reliable Operation of the Bulk-Power System.

Electric Reliability Organization or ''*ERO*'' means the organization certified by the Commission under § 39.3 the purpose of which is to establish and enforce Reliability Standards for the Bulk-Power System, subject to Commission review.

Electric Reliability Organization Rule means, for purposes of this part, the bylaws, a rule of procedure or other organizational rule or protocol of the Electric Reliability Organization.

Interconnection means a geographic area in which the operation of Bulk-Power System components is synchronized such that the failure of one or more of such components may adversely affect the ability of the operators of other components within the system to maintain Reliable Operation of the facilities within their control.

Regional Advisory Body means an entity established upon petition to the Commission pursuant to section 215(j) of the Federal Power Act that is organized to advise the Electric Reliability Organization, a Regional Entity, or the Commission regarding certain matters in accordance with § 39.13.

Regional Entity means an entity having enforcement authority pursuant to § 39.8.

Regional Entity Rule means, for purposes of this part, the bylaws, a rule of procedure or other organizational rule or protocol of a Regional Entity.

Reliability Standard means a requirement approved by the Commission under section 215 of the Federal Power Act, to provide for Reliable Operation of the Bulk-Power System. The term includes requirements for the operation of existing Bulk-Power System facilities, including cybersecurity protection, and the design of planned additions or modifications to such facilities to the extent necessary to provide for Reliable Operation of the Bulk-Power System, but the term does not include any requirement to enlarge such facilities or to construct new transmission capacity or generation capacity.

Reliable Operation means operating the elements of the Bulk-Power System within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a Cybersecurity Incident, or unanticipated failure of system elements.

Transmission Organization means a regional transmission organization, independent system operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

§ 39.2 Jurisdiction and applicability.

(a) Within the United States (other than Alaska and Hawaii), the Electric Reliability Organization, any Regional Entities, and all users, owners and operators of the Bulk-Power System, including but not limited to entities described in section 201(f) of the Federal Power Act, shall be subject to the jurisdiction of the Commission for the purposes of approving Reliability Standards established under section 215 of the Federal Power Act and enforcing compliance with section 215 of the Federal Power Act.

(b) All entities subject to the Commission's reliability jurisdiction under

each tariff or rate filing must include, as appropriate:

(1) If known, the reference numbers, docket numbers, or other identifying symbols of any relevant tariff, rate, schedule, contract, application, rule, or similar matter or material;

(2) The name of each participant for whom the filing is made or, if the filing is made for a group of participants, the name of the group, provided that the name of each member of the group is set forth in a previously filed document which is identified in the filing being made;

(3) The specific authorization or relief sought;

(4) The tariff or rate sheets or sections;

(5) The name and address of each person against whom the complaint is directed;

(6) The relevant facts, if not set forth in a previously filed document which is identified in the filing being made;

(7) The position taken by the participant filing any pleading, to the extent known when the pleading is filed, and the basis in fact and law for such position;

(8) Subscription or verification, if required;

(9) A certificate of service under Rule 2010(h), if service is required;

(10) The name, address, and telephone number of an individual who, with respect to any matter contained in the filing, represents the person for whom filing is made; and

(11) Any additional information required to be included by statute, rule, or order.

(b) *Requirement for any initial pleading or tariff or rate filing.* The initial pleading or tariff or rate filing submitted by a participant or a person seeking to become a party must conform to the requirements of paragraph (a) of this section and must include:

(1) The exact name of the person for whom the filing is made;

(2) The location of that person's principal place of business; and

(3) The name, address, and telephone number of at least one, but not more than two, persons upon whom service is to be made and to whom communications are to be addressed in the proceeding.

(c) *Combined filings.* If two or more pleadings, or one or more pleadings and a tariff or rate filing are included as items in a single filing each such item must be separately designated and must conform to the requirements which would be applicable to it if filed separately.

(d) *Form of notice.* If a pleading or tariff or rate filing must include a form of notice suitable for publication in the FEDERAL REGISTER, the company shall submit the draft notice in accordance with the form of notice specifications prescribed by the Secretary and posted under the Filing Procedures link at *http://www.ferc.gov* and available in the Commission's Public Reference Room.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 647, 69 FR 32439, June 10, 2004; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006; Order 714, 73 FR 57538, Oct. 3, 2008]

§ 385.204 Applications (Rule 204).

Any person seeking a license, permit, certification, or similar authorization or permission, must file an application to obtain that authorization or permission.

§ 385.205 Tariff or rate filings (Rule 205).

A person must make a tariff or rate filing in order to establish or change any specific rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation established by and for the applicant.

§ 385.206 Complaints (Rule 206).

(a) *General rule.* Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.

(b) *Contents.* A complaint must:

(1) Clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements;

(2) Explain how the action or inaction violates applicable statutory standards or regulatory requirements;

(3) Set forth the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant;

(4) Make a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction;

(5) Indicate the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction, including, where applicable, the environmental, safety or reliability impacts of the action or inaction;

(6) State whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party, and if so, provide an explanation why timely resolution cannot be achieved in that forum;

(7) State the specific relief or remedy requested, including any request for stay or extension of time, and the basis for that relief;

(8) Include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits;

(9) State

(i) Whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used;

(ii) Whether the complainant believes that alternative dispute resolution (ADR) under the Commission's supervision could successfully resolve the complaint;

(iii) What types of ADR procedures could be used; and

(iv) Any process that has been agreed on for resolving the complaint.

(10) Include a form of notice of the complaint suitable for publication in the FEDERAL REGISTER in accordance with the specifications in § 385.203(d) of this part. The form of notice shall be on electronic media as specified by the Secretary.

(11) Explain with respect to requests for Fast Track processing pursuant to section 385.206(h), why the standard processes will not be adequate for expeditiously resolving the complaint.

(c) *Service.* Any person filing a complaint must serve a copy of the complaint on the respondent, affected regulatory agencies, and others the complainant reasonably knows may be expected to be affected by the complaint. Service must be simultaneous with filing at the Commission for respondents. Simultaneous or overnight service is permissible for other affected entities. Simultaneous service can be accomplished by electronic mail in accordance with § 385.2010(f)(3), facsimile, express delivery, or messenger.

(d) *Notice.* Public notice of the complaint will be issued by the Commission.

(e) [Reserved]

(f) *Answers, interventions and comments.* Unless otherwise ordered by the Commission, answers, interventions, and comments to a complaint must be filed within 20 days after the complaint is filed. In cases where the complainant requests privileged treatment for information in its complaint, answers, interventions, and comments are due within 30 days after the complaint is filed. In the event there is an objection to the protective agreement, the Commission will establish when answers will be due.

(g) *Complaint resolution paths.* One of the following procedures may be used to resolve complaints:

(1) The Commission may assign a case to be resolved through alternative dispute resolution procedures in accordance with §§ 385.604–385.606, in cases where the affected parties consent, or the Commission may order the appointment of a settlement judge in accordance with § 385.603;

(2) The Commission may issue an order on the merits based upon the pleadings;

(3) The Commission may establish a hearing before an ALJ;

(h) *Fast Track processing.* (1) The Commission may resolve complaints using Fast Track procedures if the complaint requires expeditious resolution. Fast Track procedures may include expedited action on the pleadings by the Commission, expedited hearing before an ALJ, or expedited action on requests for stay, extension of time, or other relief by the Commission or an ALJ.

(2) A complainant may request Fast Track processing of a complaint by including such a request in its complaint, captioning the complaint in bold type face "COMPLAINT REQUESTING FAST TRACK PROCESSING," and explaining why expedition is necessary as required by section 385.206(b)(11).

(3) Based on an assessment of the need for expedition, the period for filing answers, interventions and comments to a complaint requesting Fast Track processing may be shortened by the Commission from the time provided in section 385.206(f).

(4) After the answer is filed, the Commission will issue promptly an order specifying the procedure and any schedule to be followed.

(i) *Simplified procedure for small controversies*. A simplified procedure for complaints involving small controversies is found in section 385.218 of this subpart.

(j) *Satisfaction*. (1) If the respondent to a complaint satisfies such complaint, in whole or in part, either before or after an answer is filed, the complainant and the respondent must sign and file:

(i) A statement setting forth when and how the complaint was satisfied; and

(ii) A motion for dismissal of, or an amendment to, the complaint based on the satisfaction.

(2) The decisional authority may order the submission of additional information before acting on a motion for dismissal or an amendment under paragraph (c)(1)(ii) of this section.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 602, 64 FR 17097, Apr. 8, 1999; Order 602–A, 64 FR 43608, Aug. 11, 1999; Order 647, 69 FR 32440, June 10, 2004; Order 769, 77 FR 65476, Oct. 29, 2012]

§ 385.207 Petitions (Rule 207).

(a) *General rule*. A person must file a petition when seeking:

(1) Relief under subpart I, J, or K of this part;

(2) A declaratory order or rule to terminate a controversy or remove uncertainty;

(3) Action on appeal from a staff action, other than a decision or ruling of a presiding officer, under Rule 1902;

(4) A rule of general applicability; or

(5) Any other action which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading.

(b) *Declarations of intent under the Federal Power Act*. For purposes of this part, a declaration of intent under section 23(b) of the Federal Power Act is treated as a petition for a declaratory order.

(c) Except as provided in § 381.302(b), each petition for issuance of a declaratory order must be accompanied by the fee prescribed in § 381.302(a).

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 395, 49 FR 35357, Sept. 7, 1984]

§ 385.208 [Reserved]

§ 385.209 Notices of tariff or rate examination and orders to show cause (Rule 209).

(a) *Issuance*. (1) If the Commission seeks to determine the validity of any rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation established by and for the applicant which is demanded, observed, charged, or collected, the Commission will initiate a proceeding by issuing a notice of tariff or rate examination.

(2) The Commission may initiate a proceeding against a person by issuing an order to show cause.

(b) *Contents*. A notice of examination or an order to show cause will contain a statement of the matters about which the Commission is inquiring, and a statement of the authority under which the Commission is acting. The statement is tentative and sets forth issues to be considered by the Commission.

(c) *Answers*. A person who is ordered to show cause must answer in accordance with Rule 213.

§ 385.210 Method of notice; dates established in notice (Rule 210).

(a) *Method*. When the Secretary gives notice of tariff or rate filings, applications, petitions, notices of tariff or rate examinations, and orders to show cause, the Secretary will give such notice in accordance with Rule 2009.

(b) *Nature of briefs on exceptions and of briefs opposing exceptions.* (1) Any brief on exceptions and any brief opposing exceptions must include:

(i) If the brief exceeds 10 pages in length, a separate summary of the brief not longer than five pages; and

(ii) A presentation of the participant's position and arguments in support of that position, including references to the pages of the record or exhibits containing evidence and arguments in support of that position.

(2) Any brief on exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A short statement of the case;

(ii) A list of numbered exceptions, including a specification of each error of fact or law asserted; and

(iii) A concise discussion of the policy considerations that may warrant full Commission review and opinion.

(3) A brief opposing exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A list of exceptions opposed, by number; and

(ii) A rebuttal of policy considerations claimed to warrant Commission review.

(c) *Oral argument.* (1) Any participant filing a brief on exceptions or brief opposing exceptions may request, by written motion, oral argument before the Commission or an individual Commissioner.

(2) A motion under paragraph (c)(1) of this section must be filed within the time limit for filing briefs opposing exceptions.

(3) No answer may be made to a motion under paragraph (c)(1) and, to that extent, Rule 213(a)(3) is inapplicable to a motion for oral argument.

(4) A motion under paragraph (c)(1) of this section may be granted at the discretion of the Commission. If the motion is granted, any oral argument will be limited, unless otherwise specified, to matters properly raised by the briefs.

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver.* If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver.* If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver.* Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule.* If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument.* When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review.* After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability.* (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file.* A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request.* Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled ''Statement of Issues,'' listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers.* (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay.* Unless otherwise ordered by the Commission, the filing of a request for rehearing does not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification under this section does not suspend the proceeding.

VerDate Mar<15>2010 11:37 May 24, 2012 Jkt 226058 PO 00000 Frm 01168 Fmt 8010 Sfmt 8010 Y:\SGML\226058.XXX 226058

Pub. Serv. Elec. & Gas Co., et al. v. FERC **Docket No. EL15-95**
D.C. Cir. Nos. 19-1091, *et al.*

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 30th day of October 2020, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander
Attorney

Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426
Tel.: (202) 502-8466
Fax: (202) 273-0901
elizabeth.rylander@ferc.gov