

**In the United States Court of Appeals  
for the Ninth Circuit**

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PACIFIC GAS AND ELECTRIC COMPANY, *ET AL.*,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

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

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

---

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November 12, 2024

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## GLOSSARY

|                               |                                                                                                                                                                                                                                                              |
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| AB 209                        | Assemb. B. 209, Ch. 251, Statutes of 2022 (Cal. eff. Sept. 6, 2022)                                                                                                                                                                                          |
| <i>California 2018</i>        | <i>Cal. Pub. Utils. Comm’n v. FERC</i> , 879 F.3d 966 (9th Cir. 2018)                                                                                                                                                                                        |
| <i>California 2022</i>        | <i>Cal. Pub. Utils. Comm’n v. FERC</i> , 29 F.4th 454 (9th Cir. 2022)                                                                                                                                                                                        |
| Commission or FERC            | Respondent Federal Energy Regulatory Commission                                                                                                                                                                                                              |
| ER                            | Excerpts of Record page(s)                                                                                                                                                                                                                                   |
| Incentives Rule               | Together, 18 C.F.R. § 35.35 and <i>Promoting Transmission Investment Through Pricing Reform</i> , Order No. 679, 116 FERC ¶ 61,057, <i>on reh’g</i> , Order No. 679-A, 117 FERC ¶ 61,345 (2006), <i>on reh’g</i> , Order No. 679-B, 119 FERC ¶ 61,062 (2007) |
| [Independent] System Operator | California Independent System Operator Corporation, which operates transmission facilities in California and Nevada (called CAISO in the Commission orders and Petitioners’ opening brief)                                                                   |
| Other Utilities               | Petitioners Southern California Edison Company and San Diego Gas & Electric Company                                                                                                                                                                          |
| P                             | Paragraph in a FERC order                                                                                                                                                                                                                                    |

## GLOSSARY

|                                 |                                                                                                                                                                                                                                                                         |
|---------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Participation Adder<br>or Adder | The 50 basis point adder to a base return on equity provided under the Incentives Rule for participation in a regional transmission organization (called the RTO Adder in the Commission orders on review)                                                              |
| PG&E                            | Petitioner Pacific Gas and Electric Company                                                                                                                                                                                                                             |
| R.                              | Record item                                                                                                                                                                                                                                                             |
| <i>Rate Order</i>               | Order Rejecting in Part, and Accepting and Suspending in Part, Proposed Formula Rate Filing, and Establishing Hearing and Settlement Judge Procedures, <i>Pacific Gas &amp; Electric Co.</i> , FERC Docket No. ER24-96, 185 FERC ¶ 61,243 (Dec. 29, 2023), R. 25, ER 34 |
| <i>Rehearing Order</i>          | Order Addressing Arguments Raised on Rehearing, <i>Pacific Gas &amp; Electric Co.</i> , FERC Docket No. ER24-96, 187 FERC ¶ 61,167 (June 12, 2024), R. 49, ER 3                                                                                                         |
| State Regulators                | California Public Utilities Commission (called CPUC in the Commission orders and Transmission Owners’ opening brief)                                                                                                                                                    |
| TO Br.                          | Transmission Owners’ opening brief                                                                                                                                                                                                                                      |
| Transmission Owners             | Collectively, Petitioners PG&E, San Diego Gas & Electric Company, and Southern California Edison Company                                                                                                                                                                |

**In the United States Court of Appeals  
for the Ninth Circuit**

**Nos. 24-2527 and 24-3786 (consolidated)**

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PACIFIC GAS AND ELECTRIC COMPANY, *ET AL.*,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

---

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

---

**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**STATEMENT OF THE ISSUES**

This case follows from an earlier agency proceeding that came before this Court in 2018 and 2022. In the first of those cases, this Court interpreted Respondent Federal Energy Regulatory Commission's (Commission or FERC) regulation allowing electric utilities to collect higher rates — via an adder in the return-on-equity component of their

transmission rates — as an incentive for joining and remaining as members of a regional transmission organization (the Participation Adder or the Adder). The Court concluded that a utility is not eligible for the Adder incentive if its participation is mandated by state law. *See Cal. Pub. Utils. Comm’n v. FERC*, 879 F.3d 966, 970 (9th Cir. 2018) (*California 2018*). In the second case, this Court upheld the Commission’s determination that, under California law then in effect, Petitioner Pacific Gas and Electric Company’s (PG&E) participation in a regional transmission organization was voluntary. *See Cal. Pub. Utils. Comm’n v. FERC*, 29 F.4th 454 (9th Cir. 2022) (*California 2022*).

A few months after the *California 2022* decision, California amended its law to require certain transmission-owning utilities to participate in a regional transmission organization. In doing so, the California legislature stated its intent to clarify that a utility’s ongoing participation is not voluntary. Section 24, Assemb. B. 209, Ch. 251, Statutes of 2022 (Cal. eff. Sept. 6, 2022) (amending Cal. Pub. Utils. Code § 362).

In the follow-on proceeding now before this Court, the Commission found that PG&E’s participation in a regional transmission

organization is not voluntary, based on California’s revision of its law.

In accordance with this Court’s *California* decisions, therefore, the

Commission determined that PG&E is no longer eligible to include the

Participation Adder in its rates. *Pac. Gas & Elec. Co.*, 185 FERC

¶ 61,243 (2023), R. 25, ER 34 (*Rate Order*), *on reh’g*, 187 FERC ¶ 61,167

(2024), R. 49, ER 3 (*Rehearing Order*).

This appeal presents the following issues for review:

(1) Whether the Commission reasonably determined that, under its incentives regulation and this Court’s precedents, PG&E is not eligible to collect the Participation Adder because California law mandates its ongoing participation in a transmission organization; and

(2) Whether the Commission appropriately declined to determine whether the relevant California statute is preempted by federal law.

## **STATUTORY AND REGULATORY PROVISIONS**

Pertinent statutes and regulations are contained in the attached Addendum.

## STATEMENT OF THE CASE

### I. STATUTORY AND REGULATORY BACKGROUND

#### A. Rate Approvals Under The Federal Power Act

Section 201 of the Federal Power Act (“FPA”), 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale 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) (discussing statutory framework and FERC jurisdiction).

Section 205 of the Federal Power Act, 16 U.S.C. § 824d, provides that all rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. 16 U.S.C. § 824d(a), (b), (e). Section 206 of the Federal Power Act, 16 U.S.C. § 824e, authorizes the Commission, on its own initiative or on a third-party complaint, to investigate whether existing rates are lawful. In such a proceeding, the complainant bears “the burden of proof to show that any rate . . . is unjust, unreasonable, unduly discriminatory, or preferential . . . .” FPA § 206(b), 16 U.S.C. § 824e(b); *see also, e.g., Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (stating

complainant's burden of proof). If the Commission finds that the burden has been met, it must determine and set the new just and reasonable rate. FPA § 206(a), 16 U.S.C. § 824e(a).

## **B. Rate Incentives**

### **1. 1992 Policy Statement On Incentives**

In 1992, soon after the Commission began to allow some regulated pipelines and electric utilities to depart from traditional cost-of-service regulation and to set market-based rates,<sup>1</sup> the Commission issued a policy statement setting guidelines for incentive rate proposals.

*Incentive Ratemaking for Interstate Natural Gas Pipelines, Oil Pipelines, and Electric Utilities*, 61 FERC ¶ 61,168 (1992) (*1992 Policy Statement*). The Commission explained that “[i]ncentive ratemaking must simultaneously protect customers’ interests and offer potential rewards to the utility for good performance.” *Id.* at 61,589. To that end, the Commission’s first standard for incentive ratemaking was that it “must be prospective.” *Id.* Specifically, “[i]ncentive regulation is not

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<sup>1</sup> The rate provisions of the Natural Gas Act, under which the Commission regulates interstate natural gas pipeline rates, are “substantially identical” to rate provisions in the Federal Power Act, so courts cite decisions interpreting the pertinent sections of both statutes “interchangeably.” *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (citation omitted).

designed to reward past efficient, cost-saving behavior. To do so would violate the objective of benefitting customers.” *Id.* See generally *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 137-38 (D.C. Cir. 2019) (discussing Commission’s incentive policy).

## **2. Federal Power Act Section 219**

In 2005, Congress passed the Energy Policy Act to, among other things, increase transmission efficiency and innovation. See *N.C. Utils. Comm’n v. FERC*, 741 F.3d 439, 443 (4th Cir. 2014) (citing Pub. L. 109-58, 119 Stat. 594 (2005)). As part of that legislation, Congress added Section 219 to the Federal Power Act. See 16 U.S.C. § 824s. Section 219(a) directed the Commission to establish, by rule, incentive-based rate treatments for transmission infrastructure, “for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.” *Id.* § 824s(a). Among other provisions, section 219(c) specified that “the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization.” *Id.* § 824s(c). Section 219(d) provided that “[a]ll rates approved under the rules

adopted pursuant to this section” are subject to the Federal Power Act’s requirements “that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.” *Id.* § 824s(d) (citing *id.* §§ 824d, 824e).

### **3. The Commission’s Incentives Rulemaking**

Pursuant to new Federal Power Act section 219, the Commission issued such a rule, codified at 18 C.F.R. § 35.35. *See Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *on reh’g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *on reh’g*, Order No. 679-B, 119 FERC ¶ 61,062 (2007)<sup>2</sup>; *see also S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 179 (D.C. Cir. 2013) (“[p]ursuant to the Energy Policy Act of 2005, the Commission has also established incentive-based rate treatments to further encourage the construction of transmission facilities”); *Conn. Dep’t of Pub. Util. Control v. FERC*, 593 F.3d 30, 33 (D.C. Cir. 2010) (noting that the Commission issued the Incentives Rule to comply with newly-added section 219 of the Federal

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<sup>2</sup> This Brief will refer to the Incentives Rule to mean, collectively, 18 C.F.R. § 35.35 and the Commission’s orders issued in the rulemaking proceeding. This Brief will refer to Order Nos. 679 and 679-A when citing paragraphs in those orders.

Power Act). The Commission explained that “[t]he purpose of our Rule is to benefit customers by providing real incentives to encourage new infrastructure, not simply increasing rates in a manner that has no correlation to encouraging new investment.” Order No. 679 P 6; *see also* Order No. 679-A P 1 (“These incentives are intended to benefit consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.”).

To that end, the Commission enumerated a variety of incentives that it would consider on a case-by-case basis. *See, e.g.*, Order No. 679 PP 1, 5, 43, 93. The rule does not automatically grant any incentive-based rate treatment to any utility; each utility must demonstrate that it meets the Commission’s criteria for that incentive and that the overall return on equity is just and reasonable. *Id.* P 1; 18 C.F.R. § 35.35(c)-(e); *see generally San Diego Gas & Elec.*, 913 F.3d at 130-33 (discussing the Incentives Rule); *Int’l Transmission Co. v. FERC*, 988 F.3d 471, 473 (D.C. Cir. 2021) (same).

Several of the enumerated incentives increase a utility's return on equity.<sup>3</sup> *See, e.g.*, 18 C.F.R. § 35.35(d)(1)(i) (allowing “[a] rate of return on equity sufficient to attract new investment in transmission facilities”); *id.* § 35.35(d)(2)(i) (allowing a stand-alone transmission company to include an elevated return on equity “that both encourages [such companies’] formation and is sufficient to attract investment”); *see also* Order No. 679-A PP 6-7, 67 (each utility seeking an elevated return would be required to demonstrate the “nexus” between the incentive sought and the investment, and “to justify where in the zone of reasonableness [its] return should lie”); *cf. Int’l Transmission*, 988 F.3d at 474 (“FERC ties ‘adders’ to certain behaviors or characteristics of utilities, incentivizing needed actions by bumping up their returns on equity above the base level set by FERC.”).

The specific incentive at issue in this case (the Participation Adder) allows “public utilities that join a Transmission Organization” to

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<sup>3</sup> “As its name suggests, a FERC-authorized return on equity determines the extent to which a utility in the highly regulated electricity sector may earn a profit.” *Int’l Transmission*, 988 F.3d at 474.

receive “a return on equity that is higher than . . . the Commission might otherwise allow . . . .” 18 C.F.R. § 35.35(e).<sup>4</sup> *See infra* pp. 13-15.

## **II. BACKGROUND: INCENTIVE-BASED RATE TREATMENT FOR PARTICIPATION IN A TRANSMISSION ORGANIZATION**

### **A. Regional Transmission Organizations**

Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition among power suppliers. The expansion of vast regional grids and the possibility of long-distance transmission has enabled electric utilities to make large

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<sup>4</sup> This section provides:

(e) *Incentives for joining a Transmission Organization.* The Commission will authorize an incentive-based rate treatment, as discussed in this paragraph (e), for public utilities that join a Transmission Organization, if the applicant demonstrates that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. Applicants for the incentive-based rate treatment must make a filing with the Commission under section 205 of the Federal Power Act. For purposes of this paragraph (e), an incentive-based rate treatment means a return on equity that is higher than the return on equity the Commission might otherwise allow if the public utility did not join a Transmission Organization. . . .

18 C.F.R. § 35.35(e) (2022). “Transmission Organization” is defined to include Regional Transmission Organizations, Independent System Operators, and certain other entities “approved by the Commission for the operation of transmission facilities.” *Id.* § 35.35(b)(2).

transfers of electricity in response to market conditions, thereby creating opportunities for competition among suppliers. *See New York*, 535 U.S. at 7-8 (explaining evolution of competitive markets).

In the 1990s, the Commission furthered the development of such competition by ordering functional unbundling of wholesale generation and transmission services, requiring utilities to provide open, non-discriminatory access to their transmission facilities to competing suppliers. *See generally id.* at 11-13; *cf. Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536 (2008) (“the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity”).

The Commission’s efforts to foster wholesale electricity competition over broader geographic areas in recent decades have led to the creation of independent system operators and regional transmission organizations. *See Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999) (cross-referenced at 89 FERC ¶ 61,285), *on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) (cross-referenced at 90 FERC ¶ 61,201), *appeals dismissed*, *Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001);

*Morgan Stanley*, 554 U.S. at 536-37. These independent regional entities operate the transmission grid on behalf of transmission-owning member utilities and are required to maintain system reliability. See *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 155 (2016); *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 267-68 (2016); see also *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 558 U.S. 165, 169 & n.1 (2010) (explaining responsibilities of regional system operators).

One of those entities is the California Independent System Operator Corporation (Independent System Operator or System Operator). Established in 1997 as part of the restructuring of the California electric power industry, it provides transmission services in most of California and part of Nevada and operates the transmission facilities owned by utilities such as PG&E. See, e.g., *Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 823 (D.C. Cir. 2008); FERC, *Energy Primer: A Handbook of Energy Market Basics* at 94 (Dec. 2023), <https://www.ferc.gov/media/energy-primer-handbook-energy-market-basics>.

## **B. The Participation Adder**

### **1. The Incentives Rule**

As noted *supra* pp. 9-10, the package of rate incentives that the Commission developed in its Incentives Rule included a Participation Adder to return on equity for entities that joined regional transmission organizations. *See* Order No. 679 PP 326-33; Order No. 679-A PP 86-90; *see also California 2018*, 879 F.3d at 970 (“[Federal Power Act] section 219(c) required FERC to provide incentives to induce utilities to join regional transmission organizations. . . . FERC did so in 2006 through the adoption of Order [No.] 679 and the rehearing orders that followed.”) (citation omitted).

In that rulemaking, the Commission explained that “[t]he basis for the incentive is a recognition of the benefits that flow from membership in such organizations and the fact [that] continuing membership is generally voluntary.” Order No. 679 P 331; *see also* Order No. 679-A P 86 (Adder is “an inducement for utilities to join, and remain in, Transmission Organizations”). The Commission decided not to create “a generic adder” for such membership, concluding instead that it would “consider the appropriate [return-on-equity] incentive” on a case-by-case basis when an electric utility requested the incentive.

Order No. 679 P 326. The Commission further declined to “make a generic finding on the duration of incentives” for participation; it would presume eligibility if an entity could show that it had joined a transmission organization and that its membership “is on-going.” *Id.* P 327; *see also id.* P 331 (clarifying that utilities “that have already joined, and that remain members of,” a transmission organization are eligible for the Participation Adder).

Responding to arguments on rehearing, the Commission affirmed its decision to allow the Participation Adder for utilities that had already joined transmission organizations, emphasizing the “inducement” effect of incentives: “The stated purpose of [Federal Power Act] section 219 is to provide incentive-based rate treatments that benefit consumers by ensuring reliability and reducing the cost of delivered power. We consider an inducement for utilities to join, and remain in, Transmission Organizations to be entirely consistent with those purposes.” Order No. 679-A P 86; *see also id.* n.142 (“incentives are equally important in inducing utilities to join and remain”). To that end, the Commission declined to limit the incentive to utilities that had not yet joined such organizations, as that limitation would “offer[] no

inducement to stay in these organizations for members with the option to withdraw . . . .” *Id.*

## **2. The *California* Decisions**

No party sought judicial review of the orders promulgating the 2006 Incentives Rule. Only a handful of court decisions have reviewed Commission orders concerning any rate incentives requested or granted under the Incentives Rule. *See N.C. Utils. Comm’n v. FERC*, 741 F.3d 439 (4th Cir. 2014) (affirming Commission orders that approved various rate incentives for reliability projects); *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127 (D.C. Cir. 2019) (affirming Commission orders that granted an abandoned costs incentive only prospectively, excluding previously incurred costs); *Int’l Transmission Co. v. FERC*, 988 F.3d 471 (D.C. Cir. 2021) (affirming Commission orders that reduced the enhanced return-on-equity incentive for an independent transmission company, based on changes to its independence). Prior to the case now on review, only this Court (twice) and the Sixth Circuit have reviewed the Commission’s rulings on the Participation Adder. *See California 2018; California 2022; Dayton Power & Light Co. v. FERC*, 6th Cir. Nos. 21-4072, *et al.* (decision pending; argued May 8, 2024).

**a. *California 2018***

Beginning in 2007, after the Commission issued the Incentives Rule, PG&E regularly included the Participation Adder in its annual tariff filings establishing its transmission revenue requirement as a participant in the Independent System Operator. *See California 2018*, 879 F.3d at 971. Until 2014, those tariff filings were resolved by settlements. *See id.* at 972, 980. In 2014 and 2015, however, the California Public Utilities Commission (State Regulators) objected to PG&E's annual filing, arguing that state law, as interpreted in a state regulatory order, required PG&E to continue its participation in the transmission organization; accordingly, the Participation Adder would give PG&E an extra-high rate of return to do something that was mandatory and required no incentive. *See id.* at 972. Nevertheless, the Commission summarily granted the Participation Adder in both annual filings, based on PG&E's ongoing participation. *See id.*

On review, this Court concluded that the Commission had not reasonably interpreted its Incentives Rule. *Id.* at 973. First, Order No. 679 provides that a utility that remains in a transmission organization is "presumed to be eligible" for the Participation Adder. Order No. 679

P 327, *quoted in* 879 F.3d at 974. But “language throughout Order [Nos.] 679 and 679-A suggests that the presumption of eligibility may be rebutted . . . and that ongoing membership is not sufficient for an incentive adder.” 879 F.3d at 974; *see also id.* (“The orders commit FERC to case-by-case review of incentive adders even for utilities that have demonstrated ongoing membership in transmission organizations.”); *id.* at 979 (the Incentives Rule requires a “case-by-case analysis”).

The Court then focused on the Commission’s justification for the Participation Adder, based on “a recognition of the benefits that flow from membership in [transmission] organizations *and the fact that continuing membership is generally voluntary.*” *Id.* at 974 (quoting Order No. 679 P 331); *see also id.* at 976 (“By observing that transmission organization membership was ‘*generally* voluntary,’ FERC indicated that it knew some utilities could not voluntarily leave.”) (also quoting P 331). The Court further explained that the Commission had tied that justification to the purpose of Federal Power Act section 219, “describ[ing] incentive adders as ‘an *inducement* for utilities to join, and remain in, Transmission Organizations.’” 879 F.3d

at 974 (quoting Order No. 679-A P 86); *see also id.* (citing the Commission’s determination that the Adder should apply to continuing membership as an “inducement to stay” for those having “the option to withdraw”) (quoting Order No. 679-A P 86); *cf. id.* at 975 (also noting that a “prior contractual commitment or statute may have a bearing on [the Commission’s] nexus evaluation” of applications for incentives) (quoting Order No. 679-A P 122).

The Court thus concluded that parties may challenge the presumption of a utility’s eligibility for the Participation Adder and that ongoing membership “is not dispositive” as to eligibility. *Id.* at 975; *see also id.* at 977 (“this presumption is rebuttable”); *id.* (the Incentives Rule “permits challenges to incentives on the grounds that they will not induce continuing participation”). As to the merits of such a challenge, “the voluntariness of a utility’s membership in a transmission organization is logically relevant to whether it is eligible for an adder.” *Id.* at 975. Specifically, “[w]hen membership is not voluntary, the incentive is presumably not justified.” *Id.* at 974. That is, “[a]n incentive cannot ‘induce’ behavior that is already legally mandated.” *Id.*

Therefore, the Court found that the Commission had improperly granted the Participation Adder to PG&E by failing to address arguments that its continuing participation was not voluntary but mandated by state law. *Id.* at 977; *accord id.* at 979 (“FERC needed to inquire into PG&E’s specific circumstances, i.e., whether it could unilaterally leave the [organization] and thus whether an incentive adder could induce it to remain in the [organization]”). The Court remanded the matter to the Commission to consider whether PG&E could demonstrate that it was eligible for the Adder. *Id.* at 979, 980.

**b. Orders on Remand and *California 2022***

On remand, the Commission determined that California law did not mandate utilities’ participation in a transmission organization and that the Participation Adder induced PG&E to continue its membership in the California Independent System Operator. *See, e.g., Pac. Gas & Elec. Co.*, 168 FERC ¶ 61,038 P 2 (2019), *reh’g denied*, 170 FERC ¶ 61,194 PP 5, 21 (2020). The Commission found that no state statute required participation and that a state regulatory decision ruling that withdrawal from the System Operator was subject to State Regulators’ approval was not supported by California law. 168 FERC ¶ 61,038

PP 43-50. Therefore, the Commission affirmed its grant of the Adder. *Id.* P 52.

Back on judicial review, this Court affirmed the remand orders, holding that the Commission had followed the *California 2018* mandate, had correctly interpreted California law, and had reasonably awarded the Participation Adder based on voluntariness. *California 2022*, 29 F.4th at 462, 466-68. The Court also held that the Commission had appropriately interpreted the relevant state law, declining to defer to State Regulators' interpretation. *Id.* at 463. The Court agreed with the Commission's determination that state statutory provisions encouraged but did not mandate utilities' participation in the System Operator and that no case law required members to remain. *See id.* at 466. The Court further agreed that State Regulators' decision requiring approval for a utility to withdraw was neither binding on state courts nor consistent with the California Public Utilities Code. *See id.* at 466-67.

### **3. The *Dayton* (Sixth Circuit) Litigation**

Following this Court's interpretation of the Incentives Rule in *California 2018*, the Commission denied or removed the Participation

Adder for several Ohio utilities, based on its interpretation of an Ohio statute requiring their participation in a regional transmission organization. *Dayton Power & Light Co.*, 176 FERC ¶ 61,025 (2021) (denying one transmission owner’s Adder in a proposed rate filing), *on reh’g*, 178 FERC ¶ 61,102 (2022); *Office of the Ohio Consumers’ Counsel v. Am. Elec. Power Serv. Corp.*, 181 FERC ¶ 61,214 (2022) (removing the Adder from other Ohio transmission owners’ previously-approved rates), *on reh’g*, 183 FERC ¶ 61,034 (2023). In those cases, the utilities raised the same challenges to the Commission’s interpretation of Federal Power Act section 219 and the Incentives Rule and the same preemption arguments that Petitioners now present here.

The Sixth Circuit heard arguments on review of both sets of orders on May 8, 2024. *Dayton Power & Light Co. v. FERC*, 6th Cir. Nos. 21-4072, *et al.* Those consolidated appeals remain pending; the Commission will submit a letter under Fed. R. App. P. 28(j) when an opinion issues.

### **C. California Law On Participation In A Regional Transmission Organization**

Six months after *California 2022* issued, the California Assembly enacted revisions to state law, declaring that “[i]t is the intent of the

Legislature . . . [t]o reaffirm that an electrical corporation currently participating in the Independent System Operator is not a voluntary participant.” Sec. 1(b)(1), Assemb. B. 209, Ch. 251, Statutes of 2022 (Cal. eff. Sept. 6, 2022) (AB 209); *see also* AB 209, Legis. Counsel’s Dig. (7) (explaining that the bill “would expressly require” certain utilities “to participate in the Independent System Operator and [would] prohibit all electrical corporations from withdrawing their facilities from the operational control of the Independent System Operator without [State Regulators’] approval”).

The bill, which the Governor signed into law, also amended section 362 of the California Public Utilities Code, which now mandates that each of the Petitioners here “shall participate in the Independent System Operator.” Cal. Pub. Util. Code § 362(c) (as amended by Section 24, AB 209).<sup>5</sup> The statute also provides that “[a]n electrical corporation

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<sup>5</sup> Cal. Pub. Util. Code § 362(c) provides, in full:

Consistent with Section 851 and the commission’s regulation of transfers of operational control of electrical corporation facilities, an electrical corporation subject to commission Decision 98-01-053 (January 21, 1998), Joint Application of Pacific Gas and Electric Company (U 39-E), San Diego Gas and Electric Company (U 902-E), and Southern California Edison Company (U 388-E) for an Order under Public Utilities Code Section 853 Exempting Them

shall not withdraw a facility from the operational control of the Independent System Operator without [State Regulators’] approval pursuant to [Cal. Pub. Util. Code §] 851.” *Id.* § 362(d) (as amended)<sup>6</sup>; *see also id.* § 851 (requiring State Regulators’ approval for transfer or encumbrance of public utilities’ facilities).

### III. THE COMMISSION PROCEEDINGS AND ORDERS

#### A. *Rate Order*

In October 2023, PG&E submitted its annual tariff filing to revise its formula rate for costs associated with its transmission facilities operated by the California System Operator. R. 1. Two parties<sup>7</sup> moved for partial summary disposition as to the Participation Adder, arguing

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from the Provisions of Section 851 or in the Alternative for Authority to Convey Operational Control of Designated Transmission Lines and Associated Facilities to an Independent System Operator, shall participate in the Independent System Operator.

<sup>6</sup> Under California law, an “electrical corporation” is “every corporation or person owning, controlling, operating, or managing any electric plant for compensation within this state . . . .” Cal. Pub. Util. Code § 218.

<sup>7</sup> Those parties, the California Public Utilities Commission (State Regulators) and the California Department of Water Resources State Water Project, are Intervenor supporters of the Commission in these consolidated cases.

that California state law now mandates that PG&E continue participation in the California System Operator. *See Rate Order* PP 21-22, 27-29, 31, ER 42-43, 46-48 (summarizing parties’ arguments).

In December 2023, the Commission accepted PG&E’s tariff revisions in part and set the filing for hearing and settlement judge procedures,<sup>8</sup> but rejected the proposed Participation Adder. *Rate Order* PP 1, 35-43, ER 34, 49-51. Citing the Incentives Rule and this Court’s decision in *California 2018* (see *Rate Order* PP 36-38, ER 49-50), the Commission considered whether PG&E’s continued participation is voluntary and concluded that, under the amended state statute, “PG&E is required to participate in [the System Operator] and cannot unilaterally withdraw from [it].” *Id.* P 42, ER 51.

The Petitioners timely filed requests for agency rehearing. R. 34, ER 55 (PG&E Rehearing Request); R. 35, ER 97 (Rehearing Request of Southern California Edison Company and San Diego Gas & Electric Company). In February 2024, the Commission issued a Notice of Denial of Rehearing by Operation of Law and Providing for Future

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<sup>8</sup> Those agency procedures on the remainder of PG&E’s rate filing remain pending before the Commission. The ongoing proceeding does not affect the petitions before this Court.

Consideration, which stated that the Commission would address the Rehearing Requests in a future order. R. 41, ER 33. PG&E, Southern California Edison Company, and San Diego Gas & Electric Company (together, Transmission Owners) timely filed a petition for review in this Court in Case No. 24-2527, which this Court held in abeyance pending issuance of an order on rehearing. *See Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc) (Commission order may be deemed denied by operation of law where Commission does not act on a rehearing request within 30 days).

**B. *Rehearing Order***

In June 2024, the Commission reaffirmed and further explained its summary disposition of the Participation Adder. *See Rehearing Order* PP 15, 21-27, 36-40, 44-46, 48, 53-54, 57-58, ER 8, 11-15, 19-21, 23-26, 28-31. The Petitioner Transmission Owners filed a second petition, in Case No. 24-3786, seeking review of both Orders. This Court consolidated the petitions on July 5, 2024.

## SUMMARY OF ARGUMENT

This case concerns the Commission’s responsibility under the Federal Power Act to ensure that incentive-based rate treatments for transmission infrastructure investment, like all FERC-jurisdictional rates, are “just and reasonable.” To that end, the Commission ensures that incentives have the effect of inducing conduct — here, by limiting the Participation Adder incentive to utilities that voluntarily join and remain in transmission organizations.

In the challenged Orders, the Commission reasonably found that its Incentives Rule, as interpreted by this Court in the *California* cases, requires a utility requesting the Adder to show that it participates in a regional transmission organization voluntarily. Congress had directed the Commission (in Federal Power Act section 219, 16 U.S.C. § 824s) to establish incentives to benefit consumers, and the Commission had promulgated the Incentives Rule consistent with its longstanding view that incentives will benefit the consumers who pay for them only if the incentives are prospective and induce the desired behavior. In this case, the Commission appropriately followed this Court’s interpretation of the Incentives Rule in *California 2018*, grounded in the Rule’s

description of rate incentives as an inducement and its premise that membership in transmission organizations is generally voluntary.

Applying the California Public Utilities Code, the Commission found that PG&E's participation in transmission organizations is not voluntary but mandatory, rendering it ineligible for the Adder. Shortly after this Court held, in *California 2022*, that California law did not require PG&E to remain a member of the Independent System Operator, the California legislature amended state law to add a provision that expressly states that the Transmission Owners "shall participate" in the System Operator. In the challenged orders, the Commission properly interpreted the new statute as mandating PG&E's continued participation and rendering it ineligible for the Participation Adder. The Commission also reasonably declined to consider whether the California statute is preempted by federal law, finding that this individual adjudication under the Incentives Rule was not an appropriate procedural vehicle to litigate that constitutional question.

## ARGUMENT

### I. STANDARD OF REVIEW

The Court reviews Commission orders under the Administrative Procedure Act’s arbitrary and capricious standard; the “scope of review under [that] standard is narrow.” *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 292 (2016) (citation omitted); *Nat’l Parks Conservation Ass’n v. FERC*, 6 F.4th 1044, 1048 (9th Cir. 2021) (“Our review of Commission orders, governed by the [Federal Power Act], is highly deferential.”). The relevant inquiry is whether the agency has “articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); accord *Cal. Pub. Utils. Comm’n v. FERC*, 854 F.3d 1136, 1146 (9th Cir. 2017).

Though courts generally will not defer to agencies’ interpretation of federal statutes, the Supreme Court explained that deference remains appropriate under some statutes. *See Loper Bright Enters. v.*

*Raimondo*, 144 S. Ct. 2244, 2263 (2024).<sup>9</sup> In particular, the Court noted that “Congress has often enacted” statutes delegating discretionary authority to agencies and that terms “such as ‘appropriate’ or ‘reasonable’” provide “‘flexibility.’” *Id.* at 2263 (citations omitted).

The Commission’s governing statutes — including the Federal Power Act — are centered on such discretionary terms. *See, e.g., Bridgeport Hosp. v. Becerra*, 108 F.4th 882, 884 (D.C. Cir. 2024) (“Parts of the United States Code are notoriously short on details. . . . What can FERC allow companies to charge for electricity transmission? Rates that are ‘just and reasonable.’ 16 U.S.C. § 824d(a).”). Indeed, the Supreme Court previously explained that, because “[t]he statutory requirement [of the Federal Power Act] that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition,” courts give “great deference to the Commission in its rate decisions.” *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) (citing cases); *see also Permian Basin Area Rate Cases*, 390 U.S. 747,

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<sup>9</sup> The Commission’s interpretation of state law, however, is not entitled to deference. *California 2022*, 29 F.4th at 464.

790 (1968) (affording broad deference because of “the breadth and complexity of the Commission’s responsibilities”).

This is particularly true in cases, like this one, that involve “a technical area like electricity rate design[.]” *Elec. Power Supply Ass’n*, 577 U.S. at 292; *cf. Pub. Utils. Comm’n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) (“Because issues 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, our review of whether a particular rate design is just and reasonable is highly deferential.”) (internal quotation marks and citations omitted). The Commission’s policy assessments are similarly owed “great deference.” *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002); *see Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) (“We defer to the specific policy decisions of an administrative agency unless they are arbitrary, capricious or manifestly contrary to statute.”).

Applying the principles set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the Court gives an agency’s interpretation of an ambiguous regulation “a measure of deference proportional to the

thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.” *California 2018*, 879 F.3d at 976 (citations omitted). In particular, this Court affords deference to the Commission’s reasonable and authoritative interpretation of an ambiguous regulation that implicates its expertise. *Nat’l Parks Conservation Ass’n*, 6 F.4th at 1050-51; *see also Cal. Dep’t of Water Res. v. FERC*, 489 F.3d 1029, 1035 (9th Cir. 2007). The Court also gives deference to the Commission’s interpretation of its own orders. *Cal. Trout v. FERC*, 572 F.3d 1003, 1013 (9th Cir. 2009); *Cal. Dep’t of Water Res.*, 489 F.3d at 1036.

## **II. THE COMMISSION APPROPRIATELY CONSIDERED WHETHER PG&E’S CONTINUED MEMBERSHIP IN A TRANSMISSION ORGANIZATION IS VOLUNTARY.**

Transmission Owners argue that the Incentives Rule, as interpreted in the Orders, violates section 219 of the Federal Power Act, 16 U.S.C. § 824s. TO Br. 51-59. Specifically, they contend that the statute plainly entitles each member of a regional transmission organization to an incentive. TO Br. 51-53. The Commission, however, appropriately applied its rule implementing that statute, consistent

with this Court’s *California* decisions, requiring PG&E to show that its participation in the Independent System Operator is voluntary.

**A. The Commission Implemented Federal Power Act Section 219 Consistent With The Long-Established Premise That Incentives Benefit Consumers Only If They Induce Desired Behavior.**

As discussed *supra* at pp. 5-6, the Commission has long held that, to serve “the objective of benefitting consumers,” rate incentives must be prospective, inducing future behavior rather than rewarding past conduct. *1992 Policy Statement* at 61,589, *cited in Rehearing Order* P 23 n.50, ER 13; *see also California 2018*, 879 F.3d at 977 (quoting *1992 Policy Statement*); *San Diego Gas & Elec.*, 913 F.3d at 137-38 (same). Against that backdrop, Congress in 2005 directed the Commission to establish rate incentives to invest in transmission infrastructure. Federal Power Act section 219(a), 16 U.S.C. § 824s(a). Congress, too, specified “the purpose of benefitting consumers” as the foundation for such incentives. *Id.*; *see Rehearing Order* P 22, ER 12.

The Commission interpreted and implemented Congress’s directive in the Incentives Rule. *Rehearing Order* P 23, ER 12. There, the Commission did adopt a specific rate incentive — an elevated return on equity — for utilities that join, and remain in, a transmission

organization. Order No. 679 PP 326-33. As discussed *supra* at pp. 13-15, the premise of voluntary membership underpinned the Participation Adder from the outset: “The basis for the incentive is a recognition of the benefits that flow from membership in such organizations and the fact that continuing membership is generally voluntary.” *Id.* P 331, *cited in Rehearing Order* P 23, ER 12. Indeed, voluntariness is key to the function of an incentive in inducing action: If consumers received the “reliability and efficiency benefits noted in [section 219(a)] from a utility’s involuntary membership in [a transmission organization], the incentive could not induce those benefits.” *Rehearing Order* P 24, ER 13.

The Commission’s focus, in the Incentives Rule, on whether the Participation Adder induces voluntary conduct was consistent with the Commission’s longstanding policy that rate incentives must be prospective and connected to the relevant conduct. *Rehearing Order* P 23 & n.50, ER 13 (citing *California 2018*, 879 F.3d at 977, and the *1992 Policy Statement*); *see 1992 Policy Statement* at 61,599 (absent such connection, rate incentives “would raise customers’ cost without providing corresponding benefit”); *Dayton Power & Light Co.*, 178 FERC

¶ 61,102 P 35 (2022) (where a utility is mandated to participate in a transmission organization, “it would be inconsistent with Commission policy and [the Incentives Rule] to reward [the utility] with a windfall for an action that it has no choice but to take”).

Ignoring the well-established meaning of “incentives,” the Transmission Owners contend that Federal Power Act section 219(c) necessarily entitles utilities to higher consumer-paid rates, in perpetuity, as a reward for the past act of having joined a transmission organization. *See* Br. 52-53, 59-60. But the Commission, maintaining its focus on the connection between the incentive and prospective conduct, established the Adder not only as inducement for utilities to “join” transmission organizations, but also as “inducement for utilities to . . . *remain*” — an “inducement to *stay* in these organizations for members with the option to withdraw.” Order No. 679-A P 86 (emphases added); *see id.* n.142 (“incentives are equally important in inducing utilities to join and remain”); *California 2018*, 879 F.3d at 978 (2006 Incentives Rule was consistent with the longstanding “policy of awarding incentives to induce future conduct” — that is, conduct of choosing to remain); *cf. 1992 Policy Statement* at 61,599 (“A ‘reward’ for

past behavior does not induce future efficiency and benefit customers.”). And membership must be voluntary to be induced. *See Rehearing Order* P 24, ER 13 (“To the extent that customers continue to receive reliability and efficiency benefits . . . from a utility’s involuntary membership . . . , the incentive could not induce those benefits.”).

Moreover, an inducement to voluntary membership is “entirely consistent ” with the “stated purpose” of Federal Power Act section 219 “to provide incentive-based rate treatments that benefit consumers . . . .” Order No. 679-A P 86; *see also Rehearing Order* P 23, ER 12 (reaffirming that this focus on inducing voluntary conduct is consistent with “the directives of section 219, including its stated purpose”). Transmission Owners emphasize the statute’s purpose of encouraging utilities to invest in transmission infrastructure, TO Br. 53-55; the Commission, however, also considered “the increase in transmission rates” that consumers would pay. *Rehearing Order* P 24, ER 13.

**B. The Commission Reasonably Implemented Case-By-Case Consideration Of Incentives.**

In implementing Federal Power Act section 219, the Commission also reasonably chose to require case-by-case consideration of eligibility

for incentives. *See Rehearing Order* P 24, ER 13. The Commission made clear that no incentive would be automatically applicable — a utility that wished to take advantage of any of the “palette of incentive rate treatments” (*San Diego*, 913 F.3d at 137) must seek Commission approval. *See, e.g.*, Order No. 679 PP 80, 82. The Commission provided that it would consider such applications on a case-by-case basis, including where utilities sought packages of multiple incentives. *Id.* PP 43, 326; *see generally MPS Merch. Servs., Inc. v. FERC*, 836 F.3d 1155, 1170 (9th Cir. 2016) (formulation of procedures is left to agency’s discretion) (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)).

As to the Participation Adder, the Commission also declined to create a generic adder for all members of regional transmission organizations; every member would be required to file for Commission approval, even if other members of the same transmission organization already had received such approval. Order No. 679 PP 80 (“a [transmission organization] member will not automatically receive incentives granted to another . . . member”), 326 (“we are not persuaded that we should create a generic adder for such membership, but instead

will consider the appropriate . . . incentive when public utilities request this incentive”). Moreover, the Commission determined that a member would be presumed eligible for the Adder, but that the presumption would be rebuttable. *See id.* P 327; *see also California 2018*, 879 F.3d at 977. Rather than “a generic adder and the ensuing increase in transmission rates,” case-by-case applications would “better meet the purpose of section 219(a) of ‘benefitting consumers by ensuring reliability and reducing the costs of delivered power.’” *Rehearing Order* P 24, ER 13 (quoting 16 U.S.C. § 824s(a)).

**C. The Commission Appropriately Followed This Court’s *California* Precedents Interpreting The Incentives Rule.**

Relying on the Commission’s Incentives Rule is not, as Transmission Owners contend, “beside the point.” TO Br. 59. That Rule fulfilled the directive of Federal Power Act section 219: “[T]he Commission shall establish, by rule, incentive-based . . . rate treatments” for interstate transmission. 16 U.S.C. § 824s(a). Nor can Transmission Owners brush off this Court’s *California* decisions. *See* TO Br. 59. Those cases did not remake the substance of the Incentives Rule. Rather, the Court — the first to consider the Adder —

interpreted the Commission’s initially-stated rationale and requirements for the Adder, holding that the Commission’s approach to Adder approvals had strayed from the plain language of its Incentives Rule. *See California 2018*, 879 F.3d at 975-77; *supra* pp. 16-19.

Specifically, following from the Commission’s explanation that incentive adders act “as ‘an inducement for utilities to join, and remain in, Transmission Organizations,’” the Court concluded that voluntariness “is logically relevant to whether [a utility] is eligible for an adder.” *California 2018*, 879 F.3d at 974-75 (quoting Order No. 679-A P 86).

Put differently, by its own terms, an incentive cannot meet its purpose of inducing “behavior that is already legally mandated.” *Id.* at 974, cited in *Rehearing Order* P 25 & n.56, ER 14.

The Court further faulted the Commission for — having emphasized in 2006 in its Incentives Rule that the Participation Adder is neither automatically granted nor generically applicable (*see supra* pp. 8, 13-14) — later failing to consider whether a legal mandate rebuts the presumption of a utility’s eligibility. *See California 2018*, 879 F.3d at 974-75, 979; *Rehearing Order* P 25, ER 14.

Transmission Owners contend that this Court did not actually hold that the Incentives Rule requires voluntariness, but only that the Commission must provide an explanation if it grants the Participation Adder to a utility whose participation is mandatory. TO Br. 59. The Commission, however, found the Court's conclusions "clear": "[*California 2018*] treats voluntary participation in [a transmission organization] as a necessary consideration" for the Participation Adder "and a lack of voluntary participation sufficient to rebut the presumption of eligibility." *Rehearing Order* P 25, ER 14 (citing 879 F.3d at 974, 977).

Therefore, applying the Incentives Rule and this Court's precedents, the Commission appropriately requires a utility to show that its membership in a transmission organization is voluntary as a prerequisite to granting a Participation Adder. *Rehearing Order* P 15, ER 8.

### **III. THE COMMISSION REASONABLY FOUND THAT CALIFORNIA LAW MANDATES PG&E’S MEMBERSHIP IN A TRANSMISSION ORGANIZATION.**

#### **A. The Commission Properly Interpreted The New California Statute As Requiring PG&E To Continue Participating In The Independent System Operator.**

##### **1. Section 362(c) Of The California Public Utilities Code Mandates PG&E’s Continued Participation.**

In considering PG&E’s obligations under state law, the Commission appropriately began with the language of the newly-enacted section 362 of the California Public Utilities Code: certain utilities<sup>10</sup> “shall participate in” the Independent System Operator. *Rehearing Order* P 36, ER 19; *id.* P 37, ER 19 (“The operative words of section 362(c) are ‘shall participate.’”). The Commission further noted that “[t]he use of the present tense ‘participate’ implies an ongoing relationship.” *Id.* PP 37, ER 19-20; *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (use of present tense is “[o]ne of the most striking indicia of . . . prospective orientation”).

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<sup>10</sup> The Transmission Owners have not disputed that they are the identified utilities subject to that provision. *See id.* (noting that Transmission Owners did not dispute applicability to PG&E).

Moreover, the California legislature left no room for doubt as to its reason for adding that provision, stating its intent in the preamble, following *California 2022*, “[t]o reaffirm that an electrical corporation currently participating in [the System Operator] is not a voluntary participant.” AB 209, § 1(b)(1), *quoted in Rehearing Order* P 36, ER 19. The Transmission Owners dismiss the relevance of the legislature’s statement, TO Br. 35 & n.11, but the express statement of legislative intent only reinforces the statutory language — it does not contravene or “overturn” (TO Br. n.11) the text.

Indeed, the Commission found the “clear declaration of the California legislature’s will” to provide affirming context for its interpretation. *Rehearing Order* P 40, ER 21; *see Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (“statutory language cannot be construed in a vacuum”; “[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme”); *see also People v. Canty*, 32 Cal. 4th 1266, 1280, 90 P.3d 1168, 1175 (2004) (“In considering the purpose of legislation, statements of the intent of the enacting body contained in a preamble, while not conclusive, are

entitled to consideration. . . . Although such statements in an uncodified section do not confer power, determine rights, or enlarge the scope of a measure, they properly may be utilized as an aid in construing a statute.”); *accord Doe v. Superior Ct.*, 15 Cal. 5th 40, 69, 532 P.3d 1065, 1082 (2023), *reh’g denied* (Sept. 27, 2023).

Transmission Owners also claim that the legislature “rejected” this Court’s interpretation of state law in *California 2022* and revised state law merely to codify the State Regulators’ unsuccessful position in that case. TO Br. 36. The California legislature clearly chose to amend the law in response to this Court’s holding — indeed, that motivation further confirms the legislature’s intent to make the Transmission Owners’ continued participation mandatory in the new statute. *See Rehearing Order* P 40 & n.96, ER 21. The Commission, by applying new section 362 of the California Public Utilities Code in considering PG&E’s newer rate filings, did not question or contravene this Court’s previous decision that California law then in effect did not mandate participation.

## **2. Section 362 Does Not Provide For PG&E To End Its Participation With State Regulators' Approval.**

The Transmission Owners contend that their participation remains voluntary because they could seek State Regulators' approval to leave the Independent System Operator. *See* TO Br. 32-42. They also claim that the Commission agreed, in the *Rate Order*, that the California statute allows their withdrawal with such approval.

TO Br. 29; *see also id.* 32-38 (suggesting the *Rehearing Order* offered a different interpretation). The Commission, however, properly rejected the Transmission Owners' interpretation of California Public Utilities Code section 362 throughout the proceeding. *See Rate Order* PP 39-40, ER 50; *Rehearing Order* PP 37-38, ER 19-21.<sup>11</sup>

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<sup>11</sup> On rehearing, the Commission "clarif[ied] the discussion" of the statute, "[t]o the extent that" one sentence in the *Rate Order* may have been imprecise. *Rehearing Order* P 37, ER 19. Such clarification is just what the Federal Power Act contemplates; agency rehearing enables the Commission to reconsider its determinations and clarify its reasoning. *See, e.g., DTE Energy Co. v. FERC*, 394 F.3d 954, 960 (D.C. Cir. 2005) ("The mandatory requirement of filing a petition for rehearing is designed to afford the Commission an opportunity to invoke its expertise or to correct any errors prior to judicial review.") (discussing Federal Power Act section 313, 16 U.S.C. § 825*l*).

The Commission distinguished between two subsections of section 362. Separate from the participation mandate of section 362(c), section 362(d) requires State Regulators' approval for any utility to "withdraw a facility from the operational control of the Independent System Operator . . . ." Cal. Pub. Util. Code § 362(d); *see* AB 209, Legis. Counsel's Dig. (7) ("This bill would expressly require those specified electrical corporations to participate in the Independent System Operator and prohibit all electrical corporations from withdrawing their facilities from the operational control of the Independent System Operator without [State Regulators'] approval."). Section 362(d) addresses a utility's ability to withdraw a particular facility from the System Operator's control, but *not* whether or how the utility *itself* can withdraw from participating in the System Operator. *Rate Order* P 40, ER 50; *see also Rehearing Order* P 38, ER 20 (noting that the Transmission Owners did not challenge the Commission's interpretation of section 362(d)).

By contrast, Section 362(c), which mandates participation, does not address withdrawal at all, let alone provide for State Regulators' approval. *Rehearing Order* P 37, ER 19-20. Seeking an implicit

withdrawal condition, the Transmission Owners look to the opening phrase in section 362(c), which references an older statute governing regulator-approved transfers of utility property.<sup>12</sup> TO Br. 32-33; *see* Cal. Pub. Util. Code § 851; *Rehearing Order* P 37 & n.86, ER 20; *supra* pp. 22-23 note 5 (quoting the full text of section 362(c)). The clause also references State Regulators’ orders, pursuant to that statute, that approved the Transmission Owners’ initial applications to join the System Operator in 1998. *See supra* pp. 22-23 note 5. The Transmission Owners argue that “the ‘shall participate’ language is qualified by the introductory phrase,” in that they may invoke those 1998 orders to seek approval to withdraw. TO Br. 33.

The Commission, however, disagreed that the references to past authorizations imply an exit from the “shall participate” mandate. In the context of section 362(c), including the “clear directive” mandating current participation, the opening phrase “is better read as a recognition” of the origins of PG&E’s participation. *Rehearing Order* P 37, ER 20. Put differently, section 362(c) references the initial 1998

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<sup>12</sup> “Consistent with Section 851 and the commission’s regulation of transfers of operational control of electrical corporation facilities, . . .” Cal. Pub. Util. Code § 362(c).

entry — which was encouraged but not mandated under then-existing law — of the Transmission Owners, only as a preface to the new directive to continue their participation. It does not, however, provide any basis to request withdrawal from such participation. *See Rehearing Order P 37*, ER 20.

The Transmission Owners further argue that the Commission's contrary interpretation is "absurd" because a utility hypothetically could withdraw all of its facilities from the System Operator under section 362(d), with State Regulators' hypothetical approval, without technically ending its participation in the System Operator. TO Br. 37. This argument fails. First, the Transmission Owners did not raise this objection on agency rehearing, notwithstanding that the Commission offered the same interpretation of California law in the *Rate Order P 40*, ER 50. *See Rehearing Order P 38*, ER 20. Therefore, this argument is jurisdictionally barred by Federal Power Act section 313(b), 16 U.S.C. § 825l(b). *See, e.g., Cal. Dep't of Water Res. v. FERC*, 341 F.3d 906, 910-11 (9th Cir. 2003) (citing cases on obligation to preserve issue in application for agency rehearing). Furthermore, the Commission's interpretation of the statute more faithfully follows its language, as

section 362 says nothing about whether or how an electrical corporation can withdraw from participating in the System Operator. *See Rehearing Order* PP 37-38, ER 19-21; *Rate Order* P 40, ER 50.

**B. Applying The California Statute Is Not Unduly Discriminatory.**

The Transmission Owners argue that the Commission's application of California law, which applies only to them and not to other members of the Independent System Operator, is discriminatory. TO Br. 55. As the Commission explained, however, Transmission Owners' objection is to the California statute, not to the Commission's application itself. *See Rehearing Order* P 48, ER 25-26. The state legislature plainly defined the specific utilities subject to the participation mandate: "an electrical corporation subject to [California Public Utilities C]ommission Decision 98-01-053 (January 21, 1998), Joint Application of Pacific Gas and Electric Company (U 39-E), San Diego Gas and Electric Company (U 902-E), and Southern California Edison Company (U 388-E) for an Order under Public Utilities Code Section 853 Exempting Them from the Provisions of Section 851 or in the Alternative for Authority to Convey Operational Control of Designated Transmission Lines and Associated Facilities to an

Independent System Operator . . . .” Cal. Pub. Util. Code § 362(c). And the Commission “is not the correct forum” for Transmission Owners to challenge state law. *Rehearing Order* P 48, ER 26.

For purposes of the Commission’s analysis of voluntariness, the Commission found that, if other System Operator members requested a Participation Adder and were not subject to section 362(c), they would not be similarly situated to PG&E. *Id.* P 48, ER 25-26. This is not undue discrimination under the Federal Power Act. *See, e.g., Mo. Energy Servs. v. FERC*, 918 F.3d 954, 958 (D.C. Cir. 2019) (“mere difference in the treatment of two entities does not violate” the Federal Power Act; “instead, undue discrimination occurs only if the entities are ‘similarly situated,’ . . . such that ‘there is no reason for the difference’”) (citations omitted); *see also supra* p. 4 (explaining ratemaking provisions of the Federal Power Act).

**C. The Commission Appropriately Declined To Consider Whether The California Statute Is Preempted.**

In the challenged orders, the Commission found that the presumption of eligibility for the Participation Adder is rebutted, for PG&E, by the fact that its membership in a regional transmission organization is not voluntary. *Rate Order* P 42, ER 51; *Rehearing Order*

P 36, ER 19. As set forth in Part III.A.1, *supra*, California law mandates that certain utilities, including PG&E, “shall participate in the Independent System Operator.” Cal. Pub. Util. Code § 362(c).

Transmission Owners argue, however, that the Commission should have held that California’s newly-amended statute is preempted by federal law, either because Congress has occupied the field or because the statute conflicts with federal policy. *See* TO Br. 43-50. Failing that, they contend that this Court should find the statute preempted and remand the challenged orders to the Commission to determine whether Transmission Owners’ continued membership in the Independent System Operator is voluntary in the absence of the state law mandate. *Id.* 50-51.

The Commission noted that the question of preemption properly is left to a federal court, as “only a federal court has the ultimate authority to invalidate California Public Utilities Code sections 362(c) and (d).” *Rehearing Order* P 54, ER 29. That said, the Commission rightly concluded that these agency proceedings — concerning PG&E’s individual tariff filing — were “an inappropriate vehicle to address” the broad legal question of preemption. *Id.* P 53, ER 28; *accord* *Dayton*

*Power & Light*, 178 FERC ¶ 61,102 P 31; *see also Dayton Power & Light*, 176 FERC ¶ 61,025 P 71 (utility’s rate filing “is not an appropriate procedural vehicle to address the constitutionality of the [state] statute”), *quoted in Rehearing Order* P 53, ER 28.

By contrast, the preemption cases on which Transmission Owners rely (TO Br. 43-45, 47) did not arise on direct review of Commission orders. *See Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150 (2016) (utilities sought declaratory judgment against state regulators in federal district court); *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373 (2015) (natural gas customers’ antitrust claims against pipeline companies were removed to federal district court). Other leading cases on the preemptive effect of the Commission’s jurisdiction have arisen to the United States Supreme Court from state supreme court appeals of state regulators’ orders, in cases where parties disputed the states’ authority to act. *See, e.g., Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988); *Entergy La., Inc. v. La. Pub. Serv. Comm’n*, 539 U.S. 39 (2003).

In those cases, the preemption issue was squarely presented and fully litigated in lower courts. Here, the agency record is not sufficient

to consider preemption, nor have all relevant parties briefed the issue. In particular, the California Attorney General has not intervened as a party — before the agency or in this Court — to provide a defense of that state’s law. *Cf. Office of the Ohio Consumers’ Counsel*, 181 FERC ¶ 61,214 P 84 n.175. Thus, in this case as in the *Dayton* proceedings, the Commission lacked “a sufficient record . . . on this constitutional issue.” *Dayton Power & Light*, 176 FERC ¶ 61,025 P 71 (2021), *cited in Rehearing Order* P 54, ER 29 (incorporating “the reasoning outlined” therein).

Transmission Owners assert that Commission “routinely” addresses preemption. Br. 49-50 (citing cases). As a matter of discretion, the Commission has sometimes opined, in declaratory orders that squarely presented the issue, on whether a state law is preempted, particularly where the question is whether a state may effectively be trying to set wholesale rates. *See, e.g., Cal. Pub. Utils. Comm’n*, 132 FERC ¶ 61,047 (2010). But that does not mean that the Commission must always do so, or that declining to do so is unreasonable. *See United Power, Inc. v. FERC*, 49 F.4th 554, 560 (D.C. Cir. 2022) (“An agency has broad discretion to determine when and how to hear and

decide the matters that come before it.”) (quoting *Tenn. Valley Mun. Gas Ass’n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998)).

For these reasons, the Commission appropriately exercised its discretion not to address preemption in the challenged orders, and reasonably determined that, “[a]s the facts stand currently before us, section 362(c) is in place, rendering PG&E’s [System Operator] participation mandatory.” *Rehearing Order* P 54, ER 29.

## CONCLUSION

For all the reasons stated, the petitions for review should be denied and the challenged FERC orders should be affirmed.

Respectfully submitted,

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November 12, 2024

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FOR THE NINTH CIRCUIT**

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 12, 2024. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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# **ADDENDUM**

Statutes and Regulation

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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), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824o-1, 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, 824o, 824o-1, 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),<sup>1</sup> 824i, 824j, 824j-1, 824k, 824o, 824o-1, 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 commission's regulatory responsibilities affecting the provision of electric service.

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

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

(4) Nothing in this section shall—

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

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

<sup>1</sup>So in original. Section 824e of this title does not contain a subsec. (f).

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

(June 10, 1920, ch. 285, pt. II, §201, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 847; amended Pub. L. 95-617, title II, §204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102-486, title VII, §714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109-58, title XII, §§1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985; Pub. L. 114-94, div. F, §61003(b), Dec. 4, 2015, 129 Stat. 1778.)

### Editorial Notes

#### REFERENCES IN TEXT

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

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

#### AMENDMENTS

2015—Subsec. (b)(2). Pub. L. 114-94, §61003(b)(1), inserted “824o-1,” after “824o,” in two places.

Subsec. (e). Pub. L. 114-94, §61003(b)(2), inserted “824o-1,” after “824o,”.

2005—Subsec. (b)(2). Pub. L. 109-58, §1295(a)(1), substituted “Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title” for “The provisions of sections 824i, 824j, and 824k of this title” and “Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title” for “Compliance with any order of the Commission under the provisions of section 824i or 824j of this title”.

Subsec. (e). Pub. L. 109-58, §1295(a)(2), substituted “section 824e(e), 824e(f), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title” for “section 824i, 824j, or 824k of this title”.

Subsec. (f). Pub. L. 109-58, §1291(c), which directed amendment of subsec. (f) by substituting “political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year,” for “political subdivision of a state,” was executed by making the substitution for “political subdivision of a State,” to reflect the probable intent of Congress.

Subsec. (g)(5). Pub. L. 109-58, §1277(b)(1), substituted “2005” for “1935”.

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

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

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

### Statutory Notes and Related Subsidiaries

#### EFFECTIVE DATE OF 2005 AMENDMENT

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

#### STATE AUTHORITIES; CONSTRUCTION

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

#### PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

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

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

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

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

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

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after August 26, 1935.

**(b) Application approval or modification; supplemental orders**

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

**(c) Compliance with order of Commission**

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

**(d) Authorization of capitalization not to exceed amount paid**

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

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

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

issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

**(f) Public utility securities regulated by State not affected**

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

**(g) Guarantee or obligation on part of United States**

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

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

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

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

**Executive Documents**

**TRANSFER OF FUNCTIONS**

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

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

**(a) Just and reasonable rates**

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

**(b) Preference or advantage unlawful**

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

**(c) Schedules**

Under such rules and regulations as the Commission may prescribe, every public utility shall

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

**(d) Notice required for rate changes**

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

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

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

sion shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

**(g) Inaction of Commissioners**

**(1) In general**

With respect to a change described in subsection (d), if the Commission permits the 60-day period established therein to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the

change, as a result of vacancy, incapacity, or refusal on the Commission, or if the Commission lacks a quorum—

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

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

#### (2) Appeal

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

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95-617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142; Pub. L. 115-270, title III, § 3006, Oct. 23, 2018, 132 Stat. 3868.)

#### Editorial Notes

##### AMENDMENTS

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

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

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

#### Statutory Notes and Related Subsidiaries

##### STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or

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

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

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

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

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

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

**(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.)

**Editorial Notes**

**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, 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 Commis-

<sup>1</sup> See References in Text note below.

sion 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).

#### Statutory Notes and Related Subsidiaries

##### EFFECTIVE DATE OF 1988 AMENDMENT

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

##### LIMITATION ON AUTHORITY PROVIDED

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

##### STUDY

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

#### § 824f. Ordering furnishing of adequate service

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

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

#### § 824g. Ascertainment of cost of property and depreciation

##### (a) Investigation of property costs

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

##### (b) Request for inventory and cost statements

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

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

#### § 824h. References to State boards by Commission

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

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

##### (b) Cooperation with State commissions

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

of enactment of this section [Aug. 8, 2005] and after notice and an opportunity for comment, the [Federal Energy Regulatory] Commission shall by rule or order, implement section 217(b)(4) of the Federal Power Act [16 U.S.C. 824q(b)(4)] in Transmission Organizations, as defined by that Act [16 U.S.C. 791a et seq.] with organized electricity markets.”

**§ 824r. Protection of transmission contracts in the Pacific Northwest**

**(a) Definition of electric utility or person**

In this section, the term “electric utility or person” means an electric utility or person that—

(1) as of August 8, 2005, holds firm transmission rights pursuant to contract or by reason of ownership of transmission facilities; and

(2) is located—

(A) in the Pacific Northwest, as that region is defined in section 839a of this title; or

(B) in that portion of a State included in the geographic area proposed for a regional transmission organization in Commission Docket Number RT01–35 on the date on which that docket was opened.

**(b) Protection of transmission contracts**

Nothing in this chapter confers on the Commission the authority to require an electric utility or person to convert to tradable or financial rights—

(1) firm transmission rights described in subsection (a); or

(2) firm transmission rights obtained by exercising contract or tariff rights associated with the firm transmission rights described in subsection (a).

(June 10, 1920, ch. 285, pt. II, § 218, as added Pub. L. 109–58, title XII, § 1235, Aug. 8, 2005, 119 Stat. 960.)

**§ 824s. Transmission infrastructure investment**

**(a) Rulemaking requirement**

Not later than 1 year after August 8, 2005, the Commission shall establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

**(b) Contents**

The rule shall—

(1) promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities;

(2) provide a return on equity that attracts new investment in transmission facilities (including related transmission technologies);

(3) encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of the facilities; and

(4) allow recovery of—

(A) all prudently incurred costs necessary to comply with mandatory reliability standards issued pursuant to section 824o of this title; and

(B) all prudently incurred costs related to transmission infrastructure development pursuant to section 824p of this title.

**(c) Incentives**

In the rule issued under this section, the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization. The Commission shall ensure that any costs recoverable pursuant to this subsection may be recovered by such utility through the transmission rates charged by such utility or through the transmission rates charged by the Transmission Organization that provides transmission service to such utility.

**(d) Just and reasonable rates**

All rates approved under the rules adopted pursuant to this section, including any revisions to the rules, are subject to the requirements of sections 824d and 824e of this title that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.

(June 10, 1920, ch. 285, pt. II, § 219, as added Pub. L. 109–58, title XII, § 1241, Aug. 8, 2005, 119 Stat. 961.)

**§ 824s–1. Incentives for cybersecurity investments**

**(a) Definitions**

In this section:

**(1) Advanced cybersecurity technology**

The term “advanced cybersecurity technology” means any technology, operational capability, or service, including computer hardware, software, or a related asset, that enhances the security posture of public utilities through improvements in the ability to protect against, detect, respond to, or recover from a cybersecurity threat (as defined in section 650 of title 6).

**(2) Advanced cybersecurity technology information**

The term “advanced cybersecurity technology information” means information relating to advanced cybersecurity technology or proposed advanced cybersecurity technology that is generated by or provided to the Commission or another Federal agency.

**(b) Study**

Not later than 180 days after November 15, 2021, the Commission, in consultation with the Secretary of Energy, the North American Electric Reliability Corporation, the Electricity Subsector Coordinating Council, and the National Association of Regulatory Utility Commissioners, shall conduct a study to identify incentive-based, including performance-based, rate treatments for the transmission and sale of electric energy subject to the jurisdiction of the Commission that could be used to encourage—

(1) investment by public utilities in advanced cybersecurity technology; and

not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

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

**§ 825k. Publication and sale of reports**

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

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, § 1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

**Editorial Notes**

**CODIFICATION**

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

**Statutory Notes and Related Subsidiaries**

**CHANGE OF NAME**

“Director of the Government Publishing Office” substituted for “Public Printer” in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Documents.

“Government Publishing Office” substituted for “Government Printing Office” in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

**§ 825I. 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), 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) 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.)

**Editorial Notes**

**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".

**Statutory Notes and Related Subsidiaries**

**CHANGE OF NAME**

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

**§ 825m. Enforcement provisions**

**(a) Enjoining and restraining violations**

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

**(b) Writs of mandamus**

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

**(c) Employment of attorneys**

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

**(d) Prohibitions on violators**

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of


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### PUBLIC UTILITIES CODE - PUC

**DIVISION 1. REGULATION OF PUBLIC UTILITIES [201 - 3297]** ( *Division 1 enacted by Stats. 1951, Ch. 764.*  )

**PART 1. PUBLIC UTILITIES ACT [201 - 2120]** ( *Part 1 enacted by Stats. 1951, Ch. 764.*  )

**CHAPTER 2.3. Electrical Restructuring [330 - 400.3]** ( *Chapter 2.3 added by Stats. 1996, Ch. 854, Sec. 10.*  )

**ARTICLE 6. Requirements for the Public Utilities Commission [360 - 380.5]** ( *Article 6 added by Stats. 1996, Ch. 854, Sec. 10.*  )

**362.** (a) In proceedings pursuant to Section 455.5, 851, or 854, the commission shall ensure that facilities needed to maintain the reliability of the electric supply remain available and operational, consistent with maintaining open competition and avoiding an overconcentration of market power. In order to determine whether the facility needs to remain available and operational, the commission shall use standards that are no less stringent than the Western Electricity Coordinating Council and North American Electric Reliability Council standards for planning reserve criteria.

(b) The commission shall require that generation facilities located in the state that have been disposed of in proceedings pursuant to Section 851 are operated by the persons or corporations who own or control them in a manner that ensures their availability to maintain the reliability of the electric supply system.

(c) Consistent with Section 851 and the commission's regulation of transfers of operational control of electrical corporation facilities, an electrical corporation subject to commission Decision 98-01-053 (January 21, 1998), Joint Application of Pacific Gas and Electric Company (U 39-E), San Diego Gas and Electric Company (U 902-E), and Southern California Edison Company (U 388-E) for an Order under Public Utilities Code Section 853 Exempting Them from the Provisions of Section 851 or in the Alternative for Authority to Convey Operational Control of Designated Transmission Lines and Associated Facilities to an Independent System Operator, shall participate in the Independent System Operator.

(d) An electrical corporation shall not withdraw a facility from the operational control of the Independent System Operator without commission approval pursuant to Section 851.

(Amended by Stats. 2022, Ch. 251, Sec. 24. (AB 209) Effective September 6, 2022.)


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**PART 1. PUBLIC UTILITIES ACT [201 - 2120]** (*Part 1 enacted by Stats. 1951, Ch. 764.*)

**CHAPTER 4. Regulation of Public Utilities [701 - 939.5]** (*Chapter 4 enacted by Stats. 1951, Ch. 764.*)

### ARTICLE 6. Transfer or Encumbrance of Utility Property [851 - 857] (*Article 6 enacted by Stats. 1951, Ch. 764.*)

**851.** (a) A public utility, other than a common carrier by railroad subject to Part A of the Interstate Commerce Act (49 U.S.C. Sec. 10101 et seq.), shall not sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, or by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, without first having either secured an order from the commission authorizing it to do so for qualified transactions valued above five million dollars (\$5,000,000), or for qualified transactions valued at five million dollars (\$5,000,000) or less, filed an advice letter and obtained approval from the commission authorizing it to do so. If the advice letter is uncontested, approval may be given by the executive director or the director of the division of the commission having regulatory jurisdiction over the utility. The commission shall determine the types of transactions valued at five million dollars (\$5,000,000) or less, that qualify for advice letter handling. For a qualified transaction valued at five million dollars (\$5,000,000) or less, the commission may designate a procedure different than the advice letter procedure if it determines that the transaction warrants a more comprehensive review. Absent protest or incomplete documentation, the commission shall approve or deny the advice letter within 120 days of its filing by the applicant public utility. The commission shall reject any advice letter that seeks to circumvent the five million dollar (\$5,000,000) threshold by dividing a single asset with a value of more than five million dollars (\$5,000,000), into component parts, each valued at less than five million dollars (\$5,000,000). Every sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the advice letter and approval from the commission authorizing it is void. The permission and approval of the commission to the exercise of a franchise or permit under Article 1 (commencing with Section 1001) of Chapter 5, or the sale, lease, assignment, mortgage, or other disposition or encumbrance of a franchise or permit under this article shall not revive or validate any lapsed or invalid franchise or permit, or enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or waive any forfeiture.

(b) (1) Subdivision (a) shall apply to any transaction described in subparagraph (F) of paragraph (1) of subdivision (b) of Section 854.2.

(2) For any transaction described in subparagraph (F) of paragraph (1) of subdivision (b) of Section 854.2, as part of its review under subdivision (a), the commission shall determine whether the transaction is fair and reasonable to affected public utility employees, including both union and nonunion employees.

(c) This section does not prevent the sale, lease, encumbrance, or other disposition by any public utility of property that is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property that is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee, or encumbrancer dealing with that property in good faith for value, provided that this section does not apply to the interchange of equipment in the regular course of transportation between connecting common carriers.

(Amended by Stats. 2019, Ch. 409, Sec. 1. (SB 550) Effective January 1, 2020.)

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that an alternative proposal is consistent with or superior to satisfying such standards.

(i) The Regional Transmission Organization planning and expansion process must encourage market-driven operating and investment actions for preventing and relieving congestion.

(ii) The Regional Transmission Organization's planning and expansion process must accommodate efforts by state regulatory commissions to create multi-state agreements to review and approve new transmission facilities. The Regional Transmission Organization's planning and expansion process must be coordinated with programs of existing Regional Transmission Groups (See §2.21 of this chapter) where appropriate.

(iii) If the Regional Transmission Organization is unable to satisfy this requirement when it commences operation, it must file with the Commission a plan with specified milestones that will ensure that it meets this requirement no later than three years after initial operation.

(8) *Interregional coordination.* The Regional Transmission Organization must ensure the integration of reliability practices within an interconnection and market interface practices among regions.

(1) *Open architecture.* (1) Any proposal to participate in a Regional Transmission Organization must not contain any provision that would limit the capability of the Regional Transmission Organization to evolve in ways that would improve its efficiency, consistent with the requirements in paragraphs (j) and (k) of this section.

(2) Nothing in this regulation precludes an approved Regional Transmission Organization from seeking to evolve with respect to its organizational design, market design, geographic scope, ownership arrangements, or methods of operational control, or in other appropriate ways if the change is consistent with the requirements of this section. Any future filing seeking approval of such changes must demonstrate that the proposed changes

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will meet the requirements of paragraphs (j), (k) and (l) of this section.

[Order 2000–A, 65 FR 12110, Mar. 8, 2000, as amended by Order 679, 71 FR 43338, July 31, 2006]

### Subpart G—Transmission Infrastructure Investment Provisions

#### § 35.35 Transmission infrastructure investment.

(a) *Purpose.* This section establishes rules for incentive-based (including performance-based) rate treatments for transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

(b) *Definitions.* (1) *Transco* means a stand-alone transmission company that has been approved by the Commission and that sells transmission services at wholesale and/or on an unbundled retail basis, regardless of whether it is affiliated with another public utility.

(2) *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.

(c) *General rule.* All rates approved under the rules of this section, including any revisions to the rules, are subject to the filing requirements of sections 205 and 206 of the Federal Power Act and to the substantive requirements of sections 205 and 206 of the Federal Power Act that all rates, charges, terms and conditions be just and reasonable and not unduly discriminatory or preferential.

(d) *Incentive-based rate treatments for transmission infrastructure investment.* The Commission will authorize any incentive-based rate treatment, as discussed in this paragraph (d), for transmission infrastructure investment, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. A public utility's request for one or more incentive-based rate treatments, to be made in a filing

pursuant to section 205 of the Federal Power Act, or in a petition for a declaratory order that precedes a filing pursuant to section 205, must include a detailed explanation of how the proposed rate treatment complies with the requirements of section 219 of the Federal Power Act and a demonstration that the proposed rate treatment is just, reasonable, and not unduly discriminatory or preferential. The applicant must demonstrate that the facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion consistent with the requirements of section 219, that the *total* package of incentives is tailored to address the demonstrable risks or challenges faced by the applicant in undertaking the project, and that resulting rates are just and reasonable. For purposes of this paragraph (d), incentive-based rate treatment means any of the following:

(1) For purposes of this paragraph (d), incentive-based rate treatment means any of the following:

(i) A rate of return on equity sufficient to attract new investment in transmission facilities;

(ii) 100 percent of prudently incurred Construction Work in Progress (CWIP) in rate base;

(iii) Recovery of prudently incurred pre-commercial operations costs;

(iv) Hypothetical capital structure;

(v) Accelerated depreciation used for rate recovery;

(vi) Recovery of 100 percent of prudently incurred costs of transmission facilities that are cancelled or abandoned due to factors beyond the control of the public utility;

(vii) Deferred cost recovery; and

(viii) Any other incentives approved by the Commission, pursuant to the requirements of this paragraph, that are determined to be just and reasonable and not unduly discriminatory or preferential.

(2) In addition to the incentives in § 35.35(d)(1), the Commission will authorize the following incentive-based rate treatments for Transcos, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential:

(i) A return on equity that both encourages Transco formation and is sufficient to attract investment; and

(ii) An adjustment to the book value of transmission assets being sold to a Transco to remove the disincentive associated with the impact of accelerated depreciation on federal capital gains tax liabilities.

(e) *Incentives for joining a Transmission Organization.* The Commission will authorize an incentive-based rate treatment, as discussed in this paragraph (e), for public utilities that join a Transmission Organization, if the applicant demonstrates that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. Applicants for the incentive-based rate treatment must make a filing with the Commission under section 205 of the Federal Power Act. For purposes of this paragraph (e), an incentive-based rate treatment means a return on equity that is higher than the return on equity the Commission might otherwise allow if the public utility did not join a Transmission Organization. The Commission will also permit transmitting utilities or electric utilities that join a Transmission Organization the ability to recover prudently incurred costs associated with joining the Transmission Organization, either through transmission rates charged by transmitting utilities or electric utilities or through transmission rates charged by the Transmission Organization that provides services to such utilities.

(f) *Approval of prudently-incurred costs.* The Commission will approve recovery of prudently-incurred costs necessary to comply with the mandatory reliability standards pursuant to section 215 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential.

(g) *Approval of prudently incurred costs related to transmission infrastructure development.* The Commission will approve recovery of prudently-incurred costs related to transmission infrastructure development pursuant to section 216 of the Federal Power Act, provided that the proposed rates are just

and reasonable and not unduly discriminatory or preferential.

(h) *FERC-730, Report of transmission investment activity.* Public utilities that have been granted incentive rate treatment for specific transmission projects must file FERC-730 on an annual basis beginning with the calendar year incentive rate treatment is granted by the Commission. Such filings are due by April 18 of the following calendar year and are due April 18 each year thereafter. The following information must be filed:

(1) In dollar terms, actual transmission investment for the most recent calendar year, and projected, incremental investments for the next five calendar years;

(2) For all current and projected investments over the next five calendar years, a project by project listing that specifies for each project the most up-to-date, expected completion date, percentage completion as of the date of filing, and reasons for delays. Exclude from this listing projects with projected costs less than \$20 million; and

(3) For good cause shown, the Commission may extend the time within which any FERC-730 filing is to be filed or waive the requirements applicable to any such filing.

(i) *Rebuttable presumption.* (1) The Commission will apply a rebuttable presumption that an applicant has demonstrated that its project is needed to ensure reliability or reduces the cost of delivered power by reducing congestion for:

(i) A transmission project that results from a fair and open regional planning process that considers and evaluates projects for reliability and/or congestion and is found to be acceptable to the Commission; or

(ii) A project that has received construction approval from an appropriate state commission or state siting authority.

(2) To the extent these approval processes do not require that a project ensures reliability or reduce the cost of delivered power by reducing congestion, the applicant bears the burden of demonstrating that its project satisfies these criteria.

(j) *Commission authorization to site electric transmission facilities in interstate*

*commerce.* If the Commission pursuant to its authority under section 216 of the Federal Power Act and its regulations thereunder has issued one or more permits for the construction or modification of transmission facilities in a national interest electric transmission corridor designated by the Secretary, such facilities shall be deemed to either ensure reliability or reduce the cost of delivered power by reducing congestion for purposes of section 219(a).

[Order 679, 71 FR 43338, July 31, 2006, as amended by Order 679-A, 72 FR 1172, Jan. 10, 2007, Order 691, 72 FR 5174, Feb. 5, 2007]

## Subpart H—Wholesale Sales of Electric Energy, Capacity and Ancillary Services at Market-Based Rates

SOURCE: Order 697, 72 FR 40038, July 20, 2007, unless otherwise noted.

### § 35.36 Generally.

(a) For purposes of this subpart:

(1) *Seller* means any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act.

(2) *Category 1 Seller* means a Seller that:

(i) Is either a wholesale power marketer that controls or is affiliated with 500 MW or less of generation in aggregate per region or a wholesale power producer that owns, controls or is affiliated with 500 MW or less of generation in aggregate in the same region as its generation assets;

(ii) Does not own, operate or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid (or has been granted waiver of the requirements of Order No. 888, FERC Stats. & Regs. ¶31.036);

(iii) Is not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the Seller's generation assets;

(iv) Is not affiliated with a franchised public utility in the same region as the Seller's generation assets; and

## **Assembly Bill No. 209**

### **CHAPTER 251**

An act to amend Sections 2950, 2951, and 2954 of the Fish and Game Code, to amend Sections 6254.5, 7921.505, and 63048.93 of the Government Code, to add Section 18944.21 to the Health and Safety Code, to amend Sections 25545.7.4, 25545.10, 25792, 25794.2, 25794.3, 25794.5, 25794.6, and 26011.8 of, to add Section 25704.5 to, and to add Chapter 7.2 (commencing with Section 25625), Chapter 7.6 (commencing with Section 25660), Chapter 7.8 (commencing with Section 25685), and Chapter 15 (commencing with Section 25992) to Division 15 of, the Public Resources Code, to amend Sections 274, 314.5, 362, 379.6, 583, and 792.5 of, and to add Section 379.10 to, the Public Utilities Code, to amend Section 47100 of the Revenue and Taxation Code, and to amend Section 80710 of the Water Code, relating to energy, and making an appropriation therefor, to take effect immediately, bill related to the budget.

[Approved by Governor September 6, 2022. Filed with Secretary  
of State September 6, 2022.]

#### **LEGISLATIVE COUNSEL'S DIGEST**

AB 209, Committee on Budget. Energy and climate change.

(1) Existing law creates the Lithium Subaccount within the Salton Sea Restoration Fund and continuously appropriates moneys in the subaccount to the Natural Resources Agency for restoration projects and grants for community engagement, public amenity, capital improvement, or community-benefit projects at or around the Salton Sea and those communities impacted by the Salton Sea's restoration and development.

This bill would rename the subaccount as the Salton Sea Lithium Fund, which the bill would establish in the State Treasury.

(2) Existing law establishes an Independent System Operator (ISO) as a nonprofit public benefit corporation and requires the ISO to ensure efficient use and reliable operation of the electrical transmission grid.

The California Public Records Act requires a public agency, defined to mean a state or local agency, to make its public records available for public inspection and to make copies available upon request and payment of a fee, unless the public records are exempt from disclosure. The act makes specified records exempt from disclosure and provides that disclosure by a state or local agency of a public record that is otherwise exempt constitutes a waiver of the exemptions.

This bill would specify that a disclosure made through the sharing of information between the ISO and a state agency does not constitute a waiver of the exemptions.

upgrades, building infrastructure upgrades, efficient air conditioning systems, ceiling fans, and other measures to protect against extreme heat, where appropriate, and remediation and safety measures to facilitate the installation of new technologies; (E) a statewide incentive program for low-carbon building technologies; (F) a program to support offshore wind infrastructure improvements to advance the capabilities of California waterfront facilities to support the buildout of offshore wind facilities and maximize the economic and environmental benefits of an offshore wind industry in California; and (G) the Carbon Removal Innovation Program to provide financial incentives for eligible projects that advance technologies for direct air capture of atmospheric carbon.

This bill would require the Energy Commission to administer the Voluntary Offshore Wind and Coastal Resources Protection Program to support state activities that complement, and are in furtherance of, federal laws related to the development of offshore wind facilities, as provided. The bill would create the Voluntary Offshore Wind and Coastal Resources Protection Fund and the Private Donations Account in the fund. The bill would continuously appropriate moneys in the fund and the account for purposes of the program, thereby making an appropriation. The bill would authorize the Energy Commission to require a form to be submitted and signed under penalty of perjury to carry out the purposes of the program. By expanding the scope of a crime, the bill would impose a state-mandated local program.

(7) Existing law prohibits a public utility, other than certain common carriers, from selling, leasing, assigning, mortgaging, or otherwise disposing of its property that is necessary or useful in the performance of its duties to the public without first having secured authorization or approval from the PUC to do so, as specified. The PUC, by order, authorized specified electrical corporations to convey operational control of designated transmission lines and associated facilities to the Independent System Operator. Under existing law, the final orders and decisions of the PUC are conclusive in all collateral actions or proceedings.

This bill would expressly require those specified electrical corporations to participate in the Independent System Operator and prohibit all electrical corporations from withdrawing their facilities from the operational control of the Independent System Operator without commission approval.

Under existing law, a violation of the Public Utilities Act or any order, decision, rule, direction, demand, or requirement of the commission is a crime.

Because certain provisions of this bill are within the act and a violation of a commission action implementing the bill's requirements would be a crime, the bill would impose a state-mandated local program.

(8) Existing law requires the PUC to require the administration, until January 1, 2026, of a self-generation incentive program to increase the deployment of distributed generation resources and energy storage systems. Existing law authorizes the PUC, in consultation with the Energy Commission, to authorize an annual collection, not to exceed a specified

Appropriation: yes.

*The people of the State of California do enact as follows:*

SECTION 1. (a) The Legislature finds and declares both of the following:

(1) The transfer of control of an electrical corporation's property is generally prohibited without prior approval by the Public Utilities Commission pursuant to Section 851 of the Public Utilities Code.

(2) The amendments of Section 362 of the Public Utilities Code made by this act do not constitute a change in, but are declaratory of, existing law established in Public Utilities Commission Decision 98-01-053 (January 21, 1998), Joint Application of Pacific Gas and Electric Company (U 39-E), San Diego Gas and Electric Company (U 902-E), and Southern California Edison Company (U 388-E) for an Order under Public Utilities Code Section 853 Exempting Them from the Provisions of Section 851 or in the Alternative for Authority to Convey Operational Control of Designated Transmission Lines and Associated Facilities to an Independent System Operator, consistent with Section 1709 of the Public Utilities Code.

(b) It is the intent of the Legislature to do both of the following:

(1) To reaffirm that an electrical corporation currently participating in the Independent System Operator is not a voluntary participant.

(2) To reaffirm that, pursuant to Section 1709 of the Public Utilities Code, a final order or decision of the Public Utilities Commission, such as Decision 98-01-053, is conclusive in all collateral actions or proceedings.

SEC. 2. Section 2950 of the Fish and Game Code is amended to read:

2950. For purposes of this article, the following definitions apply:

(a) "Agency" means the Natural Resources Agency.

(b) "Disadvantaged community" has the same meaning as defined in Section 80002 of the Public Resources Code.

(c) "Nonprofit corporation" means a nonprofit corporation qualified to do business in California and exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.

(d) "Salton Sea Management Plan" means the Salton Sea Management Program Phase I: 10-Year Plan published in August 2018, or revised thereafter.

(e) "Secretary" means the Secretary of the Natural Resources Agency.

(f) "Severely disadvantaged community" has the same meaning as defined in Section 80002 of the Public Resources Code.

SEC. 3. Section 2951 of the Fish and Game Code is amended to read:

2951. (a) There is hereby created the Salton Sea Lithium Fund within the State Treasury to be administered by the Natural Resources Agency.

(b) Pursuant to Section 47100 of the Revenue and Taxation Code, moneys generated by the lithium extraction excise tax imposed pursuant to Section 47010 of the Revenue and Taxation Code, and any other moneys as directed by the Legislature, are deposited into the Salton Sea Lithium Fund.

purchase of tangible personal property of a project approved before January 1, 2026, shall continue to be excluded from sales and use taxes pursuant to Section 6010.8 of the Revenue and Taxation Code for the period of time set forth in the authority's resolution approving the project pursuant to this section.

SEC. 22. Section 274 of the Public Utilities Code is amended to read:

274. The commission may on its own order, whenever it determines it to be necessary, conduct audits or reviews of the revenues required to be collected and submitted to the commission for each of the funds specified in Section 270. The commission may on its own order, whenever it determines it to be necessary, conduct audits or reviews on the compliance with commission orders with regard to each program subject to this chapter. The commission shall apply a risk-based methodology to conduct audits or reviews of program-related costs and activities. This section does not limit the commission's authority to initiate an audit or review when circumstances warrant doing so. The commission may contract with the California State Auditor's Office, the Department of Finance, or another qualified audit or consulting firm for any necessary auditing or review services if the commission's own auditing services are not available. All costs for audits or reviews shall be paid from the fund that supports the activities of the board audited or reviewed and shall be subject to the availability of money in that fund.

SEC. 23. Section 314.5 of the Public Utilities Code is amended to read:

314.5. (a) (1) The commission shall apply a risk-based methodology to conduct audits or reviews of the books and records of electrical, gas, telephone, water, and sewer corporations.

(2) The commission shall conduct a review or audit of the books and records of every electrical or gas corporation at least once every five years.

(3) The commission shall conduct an audit or review of the books and records of every high-risk telephone, water, or sewer corporation, as determined by the commission, during the regular regulatory review of those entities, at least once every 10 years.

(b) An audit or review conducted pursuant to Section 274 or 792.5 shall be deemed to fulfill the requirements of subdivision (a).

(c) The commission shall post reports of reviews and audits and other pertinent information on its internet website.

SEC. 24. Section 362 of the Public Utilities Code is amended to read:

362. (a) In proceedings pursuant to Section 455.5, 851, or 854, the commission shall ensure that facilities needed to maintain the reliability of the electric supply remain available and operational, consistent with maintaining open competition and avoiding an overconcentration of market power. In order to determine whether the facility needs to remain available and operational, the commission shall use standards that are no less stringent than the Western Electricity Coordinating Council and North American Electric Reliability Council standards for planning reserve criteria.

(b) The commission shall require that generation facilities located in the state that have been disposed of in proceedings pursuant to Section 851 are

operated by the persons or corporations who own or control them in a manner that ensures their availability to maintain the reliability of the electric supply system.

(c) Consistent with Section 851 and the commission's regulation of transfers of operational control of electrical corporation facilities, an electrical corporation subject to commission Decision 98-01-053 (January 21, 1998), Joint Application of Pacific Gas and Electric Company (U 39-E), San Diego Gas and Electric Company (U 902-E), and Southern California Edison Company (U 388-E) for an Order under Public Utilities Code Section 853 Exempting Them from the Provisions of Section 851 or in the Alternative for Authority to Convey Operational Control of Designated Transmission Lines and Associated Facilities to an Independent System Operator, shall participate in the Independent System Operator.

(d) An electrical corporation shall not withdraw a facility from the operational control of the Independent System Operator without commission approval pursuant to Section 851.

SEC. 25. Section 379.6 of the Public Utilities Code is amended to read:

379.6. (a) (1) It is the intent of the Legislature that the self-generation incentive program increase deployment of distributed generation and energy storage systems to facilitate the integration of those resources into the electrical grid, improve efficiency and reliability of the distribution and transmission system, and reduce emissions of greenhouse gases, peak demand, and ratepayer costs. It is the further intent of the Legislature that the commission, in future proceedings, provide for an equitable distribution of the costs and benefits of the program.

(2) The commission, in consultation with the Energy Commission, may authorize the annual collection of not more than double the amount authorized for the self-generation incentive program in the 2008 calendar year, through December 31, 2024. The commission shall require the administration of the program for distributed energy resources originally established pursuant to Chapter 329 of the Statutes of 2000 until January 1, 2026. On January 1, 2026, the commission shall provide repayment of all unallocated funds collected pursuant to this section to reduce ratepayer costs.

(b) (1) Eligibility for incentives under the self-generation incentive program that are funded through the annual collection authorized pursuant to paragraph (2) of subdivision (a) shall be limited to distributed energy resources that the commission, in consultation with the State Air Resources Board, determines will achieve reductions in emissions of greenhouse gases pursuant to the California Global Warming Solutions Act of 2006 (Division 25.5 (commencing with Section 38500) of the Health and Safety Code).

(2) On or before July 1, 2015, the commission shall update the factor for avoided greenhouse gas emissions based on both the most recent data available to the State Air Resources Board for greenhouse gas emissions from electricity sales in the self-generation incentive program administrators' service areas and current estimates of greenhouse gas emissions over the