ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 25-1123

NIAGARA MOHAWK POWER CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Initial Brief: June 1, 2026

Certificate as to Parties, Rulings, and Related Cases

A. Parties:

The parties appearing before this Court are as stated in Petitioner's brief.

B. Rulings under review:

1. *Niagara Mohawk Power Corp.*, 190 FERC ¶ 61,012 (Jan. 10, 2025) (Incentive Order), R. 4, JA ____;

2. *Niagara Mohawk Power Corp.*, 192 FERC ¶ 61,237 (Sept. 22, 2025) (Rehearing Order), R. 8, JA ____.

C. Related cases:

This case has not previously been before this Court or any other court.

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June 1, 2026

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Glossary

Application	Niagara Mohawk's November 13, 2024 Request For Order Authorizing Abandoned Plant Incentive, R. 2, JA ____
Br.	Brief of Petitioner
Challenged Orders	
Incentive Order	*Niagara Mohawk Power Corp.*, 190 FERC ¶ 61,012 (2025), R. 4, JA ____
Rehearing Order	*Niagara Mohawk Power Corp.*, 192 FERC ¶ 61,237 (2025), R. 8, JA ____
Commission or FERC	Respondent Federal Energy Regulatory Commission
Incentives Rule	Collectively, 18 C.F.R. § 35.35 and *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 (2006), *on reh'g,* Order No. 679-A, 117 FERC ¶ 61,345 (2006), *on reh'g,* Order No. 679-B, 119 FERC ¶ 61,062 (2007)
JA	Joint Appendix
Niagara Mohawk	Petitioner Niagara Mohawk Power Corporation d/b/a National Grid
Policy Statement	*Promoting Transmission Investment Through Pricing Reform,* Policy Statement, 141 FERC ¶ 61,129 (2012)
R.	Record item

Glossary

Rehearing Request	Niagara Mohawk's February 10, 2025 Motion For Clarification Or, In The Alternative, Request For Rehearing, R. 5, JA ____

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

No. 25-1123

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Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

Statement of Issue

Petitioner Niagara Mohawk Power Corporation d/b/a National Grid (Niagara Mohawk) applied for, and the Federal Energy Regulatory Commission (Commission) granted, a particular rate incentive. This case concerns the timing of that grant—Niagara Mohawk prefers an earlier date; the Commission granted a later date. The Commission explained, in the orders on review, that it did so for two principal reasons: (1) Niagara Mohawk's *choice* to base its request on *later* state

approval; and (2) the need to balance investor and consumer interests. *See Niagara Mohawk Power Corp.*, Order on Abandoned Plant Incentive, 190 FERC ¶ 61,012 (2025), R. 4, JA ____ (Incentive Order), *on reh'g*, 192 FERC ¶ 61,237 (2025), R. 8, JA ____ (Rehearing Order) (together, the Challenged Orders).

Specifically, Niagara Mohawk sought authorization to recover 100 percent of prudently incurred costs associated with yet-to-be-constructed transmission projects in New York if such projects are abandoned or cancelled for reasons beyond Niagara Mohawk's control. The Commission evaluated the request under its Incentives Rule—promulgated 20 years ago in Order No. 679 and codified at 18 C.F.R. § 35.35—and under the authority of a 2005 amendment to the Federal Power Act. *See* 16 U.S.C. § 824s (directing the Commission to engage in rulemaking to develop incentives to promote transmission infrastructure investment); *Promoting Transmission Inv. Through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 (adding 18 C.F.R. § 35.35), *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh'g*, Order No. 679-B, 119 FERC ¶ 61,062 (2007).

The Incentives Rule provides two paths to eligibility for the abandoned-plant incentive. An applicant may (1) affirmatively demonstrate upfront that the project will "benefit[] consumers by ensuring reliability and reducing the cost of delivered power," as 16 U.S.C. § 824s(a) requires; or (2) rely on a rebuttable presumption that those statutory predicates are satisfied if, as relevant here, the project later receives approval from a state authority.

Niagara Mohawk elected the latter, conditional path. Consistent with that election, the Commission logically made the incentive effective as of the date each project receives New York approval—i.e., when the statutory prerequisites demonstrating benefits to consumers are satisfied. Niagara Mohawk contends the effective date should instead be the earlier date of the Commission's conditional Incentive Order, even though the statutory showing of consumer benefits had not been satisfied when it issued.

The issue presented for review is: Did the Commission reasonably set the effective date for the abandoned-plant incentive as the date of New York's later approval, consistent with 16 U.S.C. § 824s and the

Incentives Rule's rebuttable-presumption framework, given that consumer benefits are demonstrated only at that later point?

Counterstatement on Jurisdiction

This Court twice has addressed the topic of standing in cases, like this one, dealing with the abandoned-plant incentive. In one, *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 136 (D.C. Cir. 2019), the Court found Article III standing where the utility challenged the denial of the incentive. In the other, *Indus. Energy Consumers of Am. v. FERC*, 125 F.4th 1156, 1161-63 (D.C. Cir. 2025), the Court recently found standing lacking where ratepayers challenged the grant of the incentive.

Niagara Mohawk has not yet established that its case looks more like *San Diego* than *Indus. Energy*. In the *San Diego* case, the issue involved costs that were incurred before the Commission order rather than, in the case of Niagara Mohawk, costs that will be incurred after the Commission order (and subject to Niagara Mohawk's control). *See San Diego*, 913 F.3d at 130 (reviewing orders that denied abandoned-plant incentive for costs incurred before the date of the Commission order granting the incentive).

Second, when addressing standing, Niagara Mohawk makes one reference to the record, asserting that its "cost exposure" has increased, which, it asserts, threatens its financial viability. *See* Br. 27 (citing Rehearing Request at 12, R. 5, JA ____). But the page cited by Niagara Mohawk merely highlights the magnitude of the costs at issue when compared to Niagara Mohawk's historical level of transmission capital spending. *See* Rehearing Request at 12, JA ____. Accordingly, Niagara Mohawk has not alleged, let alone supported, the link (relied on by this Court in *San Diego*) between risk and additional costs. *See San Diego*, 913 F.3d at 136 (citing petitioner's affidavit asserting that cancellation risk makes the project less attractive for outside investors, thereby "increasing costs").

Finally, as discussed (*see supra* Argument § II.C, pp. 35-37), Niagara Mohawk elected to invoke a rebuttable presumption tied to an event that had not yet occurred, rather than demonstrating its eligibility for the abandoned-plant incentive by establishing consumer benefits. Had Niagara Mohawk satisfied all statutory prerequisites in

its application, it could have obtained an earlier effective date. *See* Rehearing Order P 16, JA ____.

Statutes and Regulations

Pertinent statutes and regulations are reproduced in the Addendum.

Statement of Facts

I. Statutory and regulatory background

A. Rate approvals under the Federal Power Act

The Federal Power Act confers on the Commission exclusive jurisdiction over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. *See* 16 U.S.C. § 824(a)-(d). This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and Commission jurisdiction).

All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to ensure they are just and reasonable, and not unduly discriminatory or preferential. *See*

16 U.S.C. § 824d(a), (b), (e); *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 277 (2016). In addition, the Federal Power Act authorizes the Commission, on its own initiative or on a third-party complaint, to investigate whether existing rates are lawful. *See* 16 U.S.C. § 824e.

B. Rate incentives for investment in transmission infrastructure

1. Backdrop policy of 50/50 cost sharing between developer and ratepayers (Opinion No. 295)

Even where transmission projects are needed and would be beneficial, utilities may encounter significant risks to project development that stem from factors beyond their control. *See* Order No. 679 P 155. These problems are not new, and so, even before Congress enacted 16 U.S.C. § 824s (in 2005) and the Commission adopted the Incentives Rule (in 2006), the Commission has allowed utilities to share the costs of abandoned facilities with their customers. *See New Eng. Power Co.*, Opinion No. 295, 42 FERC ¶ 61,016, at 61,081-82 (1988) (adopting an "explicit 50-50 sharing of the loss"), *on reh'g*, Opinion No. 295-A, 43 FERC ¶ 61,285 (1988); *see also Town of Norwood v. FERC*, 80 F.3d 526, 529, 531-32 (D.C. Cir. 1996) (noting

that Opinion No. 295 limits recovery for abandoned facilities to half of prudently-incurred investments). Opinion No. 295, which still functions as the Commission's baseline framework, independently supports a utility's recovery of half of abandoned-facility costs. *See* Opinion No. 295, at p. 61,082; *see also* Incentive Order P 27 n.46, JA ____ (citing order relying on Opinion 295); Rehearing Order P 16 n.49 (same).

2. Enactment of 16 U.S.C. § 824s (Energy Policy Act of 2005)

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 a new section to the Federal Power Act that 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." 16 U.S.C. § 824s(a); *see also San Diego*, 913 F.3d at 130, 137 (describing enactment of Energy Policy Act and

recognizing consumer benefit purpose); *Dayton Power & Light Co. v. FERC*, 126 F.4th 1107, 1116 (6th Cir. 2025) (recognizing consumer-benefit purpose of 16 U.S.C. § 824s). Among other provisions, Congress directed that all rates approved under the new rule be 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." 16 U.S.C. § 824s(d) (referencing *id.* §§ 824d, 824e).

3. Commission's 16 U.S.C. § 824s rulemaking (Incentives Rule)

As directed by Congress, the Commission issued the Incentives Rule, which built on and expanded the Opinion No. 295 policy by creating, as relevant here, the modern abandoned-plant incentive. *See* Order Nos. 679, 679-A, and 679-B; *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) (stating that Commission issued Incentives Rule to

comply with newly-added § 824s); *Dayton Power*, 126 F.4th at 1116 (discussing Incentives Rule proceeding). The Commission explained that the purpose of the rule is to "benefit customers" by encouraging 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."). In November 2012, the Commission provided additional guidance on how it evaluates applications for transmission rate incentives under § 824s and the Incentives Rule. *See Promoting Transmission Inv. Through Pricing Reform*, 141 FERC ¶ 61,129 (2012) (Policy Statement).

The Incentives Rule enumerated a variety of incentives that it would consider on a case-by-case basis. *See* 18 C.F.R. § 35.35(d); *see also* Order No. 679 PP 155-67 (addressing recovery of costs of abandoned facilities). Each utility must demonstrate that it meets the Commission's criteria for that incentive and that the overall rate is, as the Federal Power Act requires, "just and reasonable." 18 C.F.R.

§ 35.35(c)-(e); *see generally San Diego*, 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).

The incentive at issue in this case (the abandoned-plant incentive) permits "[r]ecovery 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." 18 C.F.R. § 35.35(d)(1)(vi); *see also* Order No. 679 at PP 155-67. Consistent with 16 U.S.C. § 824s(d), all rates approved under § 35.35 are subject to the filing requirements of 16 U.S.C. §§ 824d, 824e, including the requirements that all rates, charges, terms and conditions be just and reasonable and not unduly discriminatory or preferential. *See* 18 C.F.R. § 35.35(c) (referencing 16 U.S.C. §§ 824d, 824e).

The Incentives Rule did not automatically confer any incentive or authorize recovery of any particular costs. *See* 18 C.F.R. § 35.35(d); *San Diego*, 913 F.3d at 139-40. Rather, a utility must justify any incentive through a three-part showing. Specifically, a utility must demonstrate: (1) that the project ensures reliability or reduces the cost of delivered

power by reducing transmission congestion; (2) that there is a nexus between the incentive sought and the planned investment; and (3) that the resulting rates will be just and reasonable, as the Federal Power Act requires. *See* Order No. 679 P 76.

As stated, applicants seeking incentive rate treatment must satisfy 16 U.S.C. § 824s by showing that any project provides consumer benefits by ensuring reliability or reducing delivered-power costs. *See* Order No. 679 P 76. However, the Commission sought to avoid duplicating work performed by, as relevant here, state authorities. *See* Order No. 679-A P 46. So, to avoid such duplication, the Incentives Rule established an optional rebuttable presumption process, whereby an applicant can establish that the statutorily required consumer-benefits standard is satisfied if, as relevant here, the project has received construction approval from an appropriate state authority. *See* Order No. 679 P 58. But behind the optional rebuttable presumption always remains a backstop: applicants need not wait for state authorization and "may nonetheless demonstrate that their project is

needed to maintain reliability or reduce congestion by presenting . . . a factual record that would support such findings." *Id.* P 57.

Although not at issue here, the Incentives Rule also requires an applicant to establish a nexus between the incentive sought and the investment at issue. *See* Order No. 679 P 26. The nexus requirement is satisfied when the applicant shows that the "total package" of requested incentives is "tailored to address the demonstrable risks or challenges faced by the applicant." Order No. 679-A P 27; *see also* 18 C.F.R. § 35.35(d); *N.C. Util. Comm'n*, 741 F.3d at 443-45 (discussing nexus test). Applicants must provide sufficient support to enable the Commission to assess each element of the incentive package and the interrelationship among all elements of that package. *See* Policy Statement P 10.

II. Agency proceedings and the Challenged Orders

A. Niagara Mohawk's request for order authorizing abandoned-plant incentive

In November 2024, Niagara Mohawk requested authorization to recover all prudently incurred costs if certain transmission projects are

abandoned for reasons outside its control. *See* Niagara Mohawk November 13, 2024 Request for Order Authorizing Abandoned Plant Incentive at 1 (Application), R. 2, JA ____. In its request, Niagara Mohawk chose to rely on the optional rebuttable presumption. *See* Application at 2 n.7 (explaining that "[f]ollowing receipt" of state approval, Niagara Mohawk "commits to submit compliance filings" demonstrating that state approval adequately considered and found that the projects "satisfy the Commission's rebuttable presumption standard"), and 8-9 (explaining how projects qualify for rebuttable presumption), JA ____-__, ____-__. Because Niagara Mohawk chose to rely on a rebuttable presumption contingent on an event that had not yet occurred (state approval), it did not develop a record showing that any of its New York projects satisfied the consumer-benefits criteria of 16 U.S.C. § 824s. *See id.* at 10, JA ____ (explaining that there was "no need for the Commission to duplicate the work" of the state process because the projects would be "subject to further review and approval" by the state in a proceeding that "will evaluate" benefits to consumers from ensuring reliability and reducing cost of delivered power).

Niagara Mohawk requested an effective date of January 13, 2025, which it asserted accords with Commission policy. *See* Application at 2, 14-15, n.72, JA ____, ____-__. In support, Niagara Mohawk cited two cases, where the predicate approval underlying the rebuttable presumption had already occurred. *See id.* at 14 n.72, JA ____ (citing *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,039 P 19 (2023) (finding that the relevant projects "were approved" through a process that identified projects that "enhance reliability and/or reduce congestion"); and *NextEra Energy Transmission Sw., LLC*, 180 FERC ¶ 61,032 P 17 (2022) (finding project entitled to rebuttable presumption because it "was approved" in regional planning process that meets requirement of § 824s to either ensure reliability or reduce the cost of delivered power by reducing transmission congestion)).

B. Incentive Order

In January 2025, FERC conditionally granted Niagara Mohawk's request. *See* Incentive Order P 1, JA ____. The Commission conditioned authorization of the abandoned-plant incentive on obtaining

state approval, and tied the incentive's effective date to the date on which the projects secure New York approval. *Id.*

C. Niagara Mohawk's request for rehearing

Niagara Mohawk requested rehearing of the Incentive Order, arguing that the effective date for its abandoned-plant incentive should be January 13, 2025—the date requested in its application—rather than a later date coinciding with receipt of state approval. *See* Rehearing Request at 1-2, JA ____; Application at 2, 14-15, JA ____, ____-__. In its view, setting the incentive's effective date to the later date of state approval improperly delayed the point at which it could begin recovering 100 percent of its abandoned-plant costs, and improperly prolonged the period during which it could recover only 50 percent of such costs under Opinion No. 295's default policy.

In support of rehearing, Niagara Mohawk contended that the Commission's approach was arbitrary and capricious because the effective-date determination departed from Commission policy and precedent without acknowledgment or explanation. *See* Rehearing Request at 7-9, JA ____-__. It maintained that the Commission had

consistently treated the date of its incentive order as the "separating point" for determining eligibility for abandoned-plant recovery and that similarly situated New York utilities had been granted effective dates aligned with the date of Commission action rather than the date of state approval. *See id.* 8-10, JA ____-__. Niagara Mohawk further asserted that the Commission failed to consider the significant costs of transmission development and the potential chilling effect on investment and state-policy objectives if utilities are exposed to risks for costs incurred before state approval. *See id.* 10-13, JA ____-__.

D. Rehearing Order

The Commission denied rehearing. *See* Rehearing Order PP 12-17, JA ____-__. For orders granting the abandoned-plant incentive conditioned (as here, at the applicant's election) on subsequent state approval, the Commission found that the "most reasonable approach" is to set an effective date that coincides with the date of state approval. *See id.* PP 12-13, JA ____-__ (explaining that its approach was "most consistent" with and "best interpretation" of 16 U.S.C. § 824s and the Incentives Rule).

The Commission reaffirmed that the effective date for the abandoned-plant incentive should be the date on which each project receives New York approval that demonstrates benefits to consumers as required by 16 U.S.C. § 824s and the Incentives Rule. *See* Rehearing Order P 12, JA ____. The Commission explained that the abandoned-plant incentive should not apply to costs incurred before a project satisfies the statutory criteria of consumer benefits. *See id.* P 13, JA ____. The Commission found that an effective date aligned with the date of state approval is most consistent with the Commission's statutory and regulatory framework, which requires that incentives only be granted to projects that have met all eligibility criteria. *See id.*

The Commission also found that its approach best balances consumer and investor interests by limiting the period for which consumers are at risk for all cost recovery to the period after the project has met the eligibility threshold, while still providing a meaningful incentive to the utility. *See* Rehearing Order P 14, JA ____. The Commission acknowledged that it has previously taken varied approaches to effective dates for conditionally granted abandoned-plant

incentives, but clarified that an effective date based on the date of state approval is most consistent with the statute and the agency's implementing rule. *See id.* P 12, 15, 17, JA ____, ____, ____.

The Commission rejected arguments that an effective date tied to state approval would chill investment, noting that pre-construction expenditures prior to state approval are typically a small part of total project costs and that utilities may still seek recovery of half their costs under the Opinion No. 295 policy for costs incurred before the state-approval effective date. *See* Rehearing Order P 16, JA ____. The Commission also noted that utilities can seek to make a direct evidentiary showing (rather than rely on the rebuttable presumption) if they want an earlier effective date. *See id.* Regarding Niagara Mohawk's charge that the Commission's determination would cause uncertainty, the Commission explained that it was advancing a clear approach to be applied in conditional orders going forward. *See id.* P 17, JA ____.

The Commission specifically responded to Niagara Mohawk's argument that it did not justify an effective-date policy here that

differed from the policy previously applied in *Rochester Gas & Elec. Corp.*, 188 FERC ¶ 61,001, *order on reh'g* 189 FERC ¶ 61,001 (2024), which addressed requests for abandoned-plant incentives for two other New York utilities (Rochester Gas & Electric and New York State Electric & Gas). *See* Rehearing Order P 10, 17, JA ____, ____ (describing and addressing argument). The Commission "acknowledge[d]" that it had taken "varied approaches in the past," but continued that the Rehearing Order "provide[s] a reasoned explanation as to why the state-approval effective date is most consistent" with the Incentives Rule and the "best approach to adopt going forward." *Id.* P 17, JA ____; *see also id.* P 15 (discussing selection of effective dates in earlier orders).

Summary of Argument

The Commission here acted entirely in accord with its statutory and regulatory responsibilities. Consistent with a 2005-added provision of the Federal Power Act, 16 U.S.C. § 824s, and the implementing Incentives Rule, the Commission reasonably determined that conditional orders invoking the rebuttable presumption—when based

on a state approval that has not yet occurred—should take effect once the project is approved by the state authority. This approach ensures that an applicant choosing to rely on the rebuttable presumption actually satisfies the statutory prerequisite that the project provides benefits to consumers. By contrast, Niagara Mohawk's preferred approach would make the incentive effective before there was any showing that the § 824s criteria had been satisfied.

The Commission's determination accords with both 16 U.S.C. § 824s and the Incentives Rule. The statutory and regulatory framework requires balancing the interests of consumers and investors, and full abandoned-plant protection is available only for projects that meet the § 824s consumer-benefits criteria. Niagara Mohawk does not grapple with those statutory constraints, nor does it dispute that it made no affirmative showing that its projects satisfy the statutorily required demonstration of benefits to consumers. Had Niagara Mohawk chosen to make that showing in its application to the Commission, it could have supported the earlier effective date it now seeks from this Court.

In the absence of demonstration of consumer benefits as required by § 824s, the Commission reasonably declined to tether the incentive's effective date to the date of its conditional approval. Instead, it logically conditioned effectiveness on the later event Niagara Mohawk identified as supplying the necessary predicate—state approval. That approach faithfully implements the statutory design: until the statutory prerequisites are met, the applicant remains subject to the Commission's longstanding baseline recovery framework under Opinion No. 295, which permits recovery of 50 percent of prudently incurred costs.

Niagara Mohawk's contrary arguments rest on the mistaken premise that the Commission has consistently treated the abandoned-plant incentive as effective upon issuance of a conditional approval order. The Commission identified no such consistent rule, and Niagara Mohawk has not established one. Many of the orders Niagara Mohawk cites addressed materially different circumstances, including projects that had already satisfied—or did not depend on—a rebuttable presumption contingent on a yet-to-be completed event. Although the

Commission acknowledged previous agency orders that supported Niagara Mohawk's preferred approach, the Commission identified orders that demonstrated the Commission's inconsistent treatment of the effective date determination, which Niagara Mohawk unsuccessfully distinguishes in its brief.

Ultimately, the Commission reasonably aligned the abandoned-plant incentive's effective date with satisfaction of the statutory consumer-benefits criteria and provided a rational explanation for its choice that best balances consumer and investor interests and addresses policy concerns. That determination readily satisfies arbitrary-and-capricious review.

Argument

I. Standard of review

This Court reviews Commission orders under the Administrative Procedure Act's arbitrary-and-capricious standard. 5 U.S.C. § 706(2)(A); *FERC v. Elec. Power Supply Ass'n*, 577 U.S. at 292. The scope of review under that standard is narrow, and the Court may not substitute its own judgment for that of the agency. *See Columbia Gulf*

Transmission, LLC v. FERC, 106 F.4th 1220, 1230 (D.C. Cir. 2024). 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)); *see also FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021) (explaining that "deferential" standard requires only that agency action "be reasonable and reasonably explained"); *Elec. Power Supply Ass'n*, 577 U.S. at 292 (explaining that question is not "whether a regulatory decision is the best one possible or even whether it is better than the alternatives"). The Court does not determine whether the Commission "made the better call." *Elec. Power Supply Ass'n*, 577 U.S. at 295. Rather, the court's "important but limited role" is to ensure reasoned decisionmaking. *Id.*; *see also Entergy Arkansas, LLC v. FERC*, 40 F.4th 689, 701-02 (D.C. Cir. 2022) (quoting *Elec. Power Supply Ass'n*, 577 U.S. at 295).

The Commission's decisions regarding rate issues are entitled to broad deference because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 532 (2008) (affording "great deference" to Commission's rate decisions). This is particularly true in cases, like this one, that involve "a technical area like electricity rate design," meaning the Court "'afford[s] great deference to the Commission'" in its assessment of "just and reasonable" rates. *Elec. Power Supply Ass'n*, 577 U.S. at 292 (quoting *Morgan Stanley*, 554 U.S. at 532); *see also Int'l Transmission*, 988 F.3d at 480 (explaining that judicial review is "particularly deferential because [rate-related] matters are either fairly technical or involve policy judgments that lie at the core of the regulatory mission" (cleaned up)).

This Court reviews questions of law de novo. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392 (2024). Nevertheless, words in a statute such as "reasonable" (or "appropriate") confer "a degree of discretion" and "leav[e] agencies with flexibility." *Id.* at 394-95.

Moreover, the Court defers to the Commission's reasonable interpretation of its own precedent. *See La. Pub. Serv. Comm'n v. FERC*, 10 F.4th 839, 845 (D.C. Cir. 2021); *NSTAR Elec. & Gas. Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007); *see also ANR Pipeline Co. v. FERC*, 863 F.2d 959, 963 (D.C. Cir. 1988) (noting "the Commission's superior capacity to construe its own decisions"). It also defers to the Commission's broad discretion regarding agency procedures and priorities. *Mobil Oil Expl. & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978)).

II. Limiting recovery of abandoned-plant costs to expenses incurred after benefits to consumers have been demonstrated best accords with 16 U.S.C. § 824s and the Incentives Rule.

A. Niagara Mohawk minimizes the consumer-focused purpose of 16 U.S.C. § 824s.

Niagara Mohawk's vision of 16 U.S.C. § 824s as an "all means all" mandate—insisting the statute requires recovery of "all" prudently incurred costs, not "some" of them—is nearsighted. Br. 30 (citing § 824s(b)(4)); *see also id.* 2, 7-8, 24 (emphasizing recovery of "all" costs).

As an initial matter, Niagara Mohawk did not cite § 824s(b)(4) in its request for agency rehearing, leaving this Court without statutory jurisdiction to address this argument. *See* 16 U.S.C. § 825*l*(b); *see also* Rehearing Request at 2 n.4, JA ____ (generally citing § 824s without referring to (or discussing) any subsections). But Niagara Mohawk makes no argument that § 824s(b)(4) even applies to the abandoned-plant incentive at issue here. *See* 16 U.S.C. § 824s(b)(4) (requiring recovery for certain costs for compliance with mandatory reliability standards under § 824*o* and for facilities developed under § 824p).

As discussed, the rate treatments Congress envisioned were intended "for the purpose of benefitting consumers." 16 U.S.C. § 824s(a); *see also San Diego*, 913 F.3d at 130 (referring to consumer benefits as "express purpose" of § 824s). Moreover, the incentives adopted as required by § 824s are "properly understood" in the context of traditional regulatory principles, which include the "longstanding rule" that rate regulation "must adequately balance both consumer and investor interests." Order No. 679 P 21.

For example, "all" costs include only prudently incurred costs that are incurred, at the earliest, after the effective date of a Commission order pursuant to § 824s. *See San Diego*, 913 F.3d at 137 (agreeing with Commission that, under 16 U.S.C. § 824s and Incentives Rule, nexus is lacking with respect to investments that pre-dated Commission approval); *Dayton Power*, 126 F.4th at 1124 (explaining that 16 U.S.C. § 824s did not write a "blank check" to applicants, but rather asked the Commission to "use a carefully calibrated tool to achieve . . . goals"). Picking up on this broad consumer-focused statutory context, the Commission recognized the consumer-benefits purpose of the Commission's incentives policy under § 824s. *See* Rehearing Order PP 14, 17 JA ____, ____.

Nothing in 16 U.S.C. § 824s supports the one-sided approach preferred by Niagara Mohawk. *See San Diego*, 913 F.3d at 139 (explaining that prospective only recovery "reasonably accounts for ratepayers' interests"). Congress demanded that, notwithstanding the need to encourage transmission infrastructure development, "[a]ll rates" approved under the rule are subject to the traditional Federal

Power Act requirement that "all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential." *Id.* § 824s(d) (referencing 16 U.S.C. §§ 824d and 824e). Just as in *Dayton Power* (affirming the Commission's reading of another type of rate incentive in § 824s), where the utility petitioners "place too heavy an emphasis on Congress's choice of one word" (there, "joins"), 126 F.4th at 1125, here too, the utility petitioner takes the single word "all" out of statutory context, ignoring Congress's focus on demonstrated consumer benefits.

B. The Commission's effective-date determination reflects the best reading of 16 U.S.C. § 824s and the Incentives Rule's rebuttable presumption.

Niagara Mohawk asserts that the Commission's approach "makes no sense." Br. 45-47. But there are good reasons for demanding establishment of statutory eligibility before allowing recovery of 100 percent of abandoned-plant costs. *See* Rehearing Order P 13, JA ____. The statutory language (16 U.S.C. § 824s) and the Incentives Rule support the Commission's analysis. *See* Rehearing Order P 13, JA ____.

The Commission reasonably found that the required demonstration of consumers benefits constitutes statutory "pre-requisites," not "merely conditions." Rehearing Order P 13, JA ____ (citing Order No. 679-A P 47 n.77); *see also* Order No. 679-B P 18 (characterizing demonstration of benefits to consumers as a "threshold" requirement under 16 U.S.C. § 824s) (cited by Rehearing Order P 13, JA ____). When an applicant like Niagara Mohawk invokes the Incentives Rule's rebuttable presumption, it has, by definition, not made the threshold, prerequisite demonstration that its facilities provide the reliability or cost benefits to consumers that the statute requires. Thus, permitting recovery of costs incurred before the statutorily required prerequisite showing is made would be "inconsistent with the best interpretation of Order No. 679." Rehearing Order P 13, JA ____.

The regulatory text adopted by the Incentives Rule further supports the Commission's analysis. *See* 18 C.F.R. § 35.35. The regulation provides that the rebuttable presumption applies when an applicant "has received" state siting approval. 18 C.F.R.

§ 35.35(i)(1)(ii). In addition, the regulation provides that the rebuttable presumption means that the applicant "has demonstrated" that the project meets the statutory consumer-benefits standard. *Id.* § 35.35(i)(1). Applied here, Niagara Mohawk could not yet assert that it "has received" state siting approval or that it "has demonstrated" entitlement to the rebuttable presumption. *See* Rehearing Order P 13, JA ____ (citing 18 C.F.R. § 35.35(i)).

Although Niagara Mohawk underemphasizes the § 824s focus on consumer benefits, the Commission appropriately balances consumer and investor interests. *See supra* section II.A; Rehearing Order P 14, JA ____; *see also* Order No. 679 PP 21 ("The longstanding rule is that utility rate regulation must adequately balance both consumer and investor interests.") and 76 (characterizing Incentives Rule proceeding as aiming to offer applicants flexibility while ensuring that resulting rates remain, as Federal Power Act requires, just and reasonable and not unduly discriminatory or preferential). Moreover, tying the abandoned-plant incentive's effective date to the date of state approval "best achieves that balance" because it excludes from full cost recovery

the period before that state approval—and thus before statutory eligibility—is satisfied. Rehearing Order P 14, JA ____.

Linking the effective date to the date of state approval reduces the risk shifted to consumers by ensuring that they are not exposed to costs incurred before eligibility is established. *See* Rehearing Order P 14, JA ___. Although reducing risk to consumers may place more risk on applicants, the balance the Commission struck still yields a reasonable incentive that achieves the statutory purpose. *See* Rehearing Order P 14, JA ____ (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 141 FERC ¶ 61,121 P 46 (2012)). On such determinations, the Commission's balance is entitled to deference. *See Consol. Edison Co. of New York, Inc. v. FERC*, 45 F.4th 265, 288 (D.C. Cir. 2022) (explaining that court "review[s] with deference" Commission's "reasonable considered judgment" when "balanc[ing] competing policy goals on a ratemaking matter").

Niagara Mohawk pieces together language from two paragraphs in Order No. 679-A that, it asserts, supports its position that the Commission once contemplated allowing recovery even if the project

fails to obtain siting approval. *See* Br. 12-13 (quoting Order No. 679-A PP 115-16), 31-32 (same). This Court, however, lacks statutory jurisdiction to consider that issue.

Niagara Mohawk's request for agency rehearing included only cursory, high-level references to the Incentives Rule proceedings. *See* Rehearing Request at 2 & n.5, 8, 10 n.34. It did not identify any specific rulemaking authority that compels its preferred effective date.

Because this is a new argument, this Court does not have jurisdiction to address it. *See* 16 U.S.C. § 825*l*(b) ("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."); *id.* § 825*l*(a) (requiring party seeking rehearing to "set forth specifically" the ground for rehearing); *see also, e.g., Xcel Energy Servs. Inc. v. FERC*, 77 F.4th 1057, 1067 (D.C. Cir. 2023).

In any event, the Order No. 679-A passages Niagara Mohawk invokes do not undermine the Commission's conclusion that tying the effective date to state approval—when the applicant has chosen to tie

demonstration of consumer benefits to later state siting approval—is the "most reasonable approach," is "most consistent with" 16 U.S.C. § 824s and the Incentives Rule, and reflects the Rule's "best interpretation." *See* Rehearing Order PP 12-13, JA ____-__; *see also id.* P 17 (candidly acknowledging "varied approaches in the past" and explaining that the approach adopted in the Challenged Orders is "most consistent with" Order No. 679 and thus the "best approach" going forward).

C. Niagara Mohawk could have obtained an earlier effective date by affirmatively demonstrating that its projects meet the threshold criteria of 16 U.S.C. § 824s—specifically, that its projects confer benefits to consumers.

As explained, the Commission's determination in the Challenged Orders reflected the best reading of the statute and the Incentives Rule's rebuttable presumption. *See supra* Argument § II.B, pp. 29-33. And although Niagara Mohawk states that the Commission had no statutory authority to limit recovery of prudently incurred costs, the Energy Policy Act of 2005 did not require the Commission to adopt the rebuttable-presumption framework. *See* Br. 31; 16 U.S.C. § 824s;

Rehearing Order P 5, JA ____. Rather, the Incentives Rule created the option for the rebuttable presumption to avoid duplicating effort. *See* Br. 11-12, 32. But § 824s still "require[s]" the Commission to make a finding that a project falls within its scope. Order No. 679 P 57. Accordingly, the Commission "chose[]" to rely on existing processes such as state approval "to the extent practicable." Order No. 679 P 57.

But applicants that cannot (or choose not to) demonstrate state approval, and therefore cannot (or choose not to) rely on the rebuttable presumption, "may nonetheless demonstrate that their project is needed" to provide consumer benefits by making a "factual record that would support such findings." Order No. 679 P 57; *see also* Rehearing Order P 16, JA ____ (explaining that applicants that make a "direct showing" of statutorily required benefits to consumers can, upon Commission approval, "receive an effective date based on the date of the Commission order"). For example, the Commission addressed this scenario in *Tallgrass Transmission, LLC*, 150 FERC ¶ 61,224 P 25 (2015), where the Commission "acknowledged that the projects had not been approved" by a regional planning process and therefore "did not

qualify for the rebuttable presumption." However, the Commission relied on the applicant's "choice" to pursue projects "recommended through independent assessments" of regional needs. *Id.* P 18. As a result of that choice, two on-the-record studies provided a "reasonable basis" for the Commission to conclude that the projects would provide consumer benefits. *Id.* PP 25, 27; *see also Desert Sw. Power, LLC*, 135 FERC ¶ 61,143 PP 21, 40-45 (2011) (explaining that applicant submitted a "detailed study" demonstrating statutorily required benefits to consumers, thereby making it unnecessary to "condition the grant of incentives" on subsequent approval by regional planning process).

Here, the record lacks the evidence necessary to support the findings the statute requires. Niagara Mohawk has asserted that its projects will be approved (emphasis on future tense) in a state process that meets the Commission's standards for the rebuttable presumption. But Niagara Mohawk has not met the rebuttable presumption standard until the state approval actually occurs. *See* Rehearing Order P 13, JA ____.

D. Niagara Mohawk's policy objections are unpersuasive.

Niagara Mohawk responds to the Commission's determination with several policy objections—objections the Commission reasonably rejected. *See* Br. 47-51; Rehearing Order PP 16-17, JA ____-__. Niagara Mohawk's myopic focus on utility investment disregards the statutory balance between ratepayers and investors that 16 U.S.C. § 824s requires the Commission to strike. *See supra* Argument § II.A, pp. 26-29. Moreover, any potential discouragement of investment resulting from the Commission's balanced approach is mitigated by factors the Commission identified and explained. *See* Rehearing Order P 16, JA ___.

First, expenditures incurred before state approval typically constitute only a minority of total project costs—something Niagara Mohawk's own evidence reflects. *See* Rehearing Order P 16, JA ____ (citing Rehearing Request at 7, Attachment A, Declaration of Andrew Byrne, JA ____). Second, under longstanding Commission policy, an applicant may seek recovery of 50 percent of prudently incurred costs for the period before the incentive's effective date. *See id.* (citing

examples); *see also* Opinion No. 295 at pp. 61,081-83 (adopting an "explicit 50-50 sharing of the loss between investors and ratepayers"); *Potomac Edison Co.*, 165 FERC ¶ 61,168 PP 18, 22 & n.45 (2018) (confirming that applicants are eligible to seek recovery of half of prudently-incurred project costs expended prior to Commission order granting abandoned-plant incentive under Incentives Rule); *PJM Interconnection, LLC*, 142 FERC ¶ 61,156 PP 53-54 (2013) (same). Third, Niagara Mohawk elected to rely on the rebuttable presumption rather than make a direct evidentiary showing that its facilities provide the statutorily required benefits to consumers. *See* Rehearing Order P 16, JA ____; *see also* Order No. 679 P 57 (explaining that Commission is "required to make findings that a particular investment falls within the scope of [§ 824s]"); Argument § II.C (citing examples of agency proceedings where applicant had made an evidentiary showing of consumer benefits). Therefore, Niagara Mohawk's policy concerns are tempered by its ability—and that of other applicants—to develop before the agency a record demonstrating consumer benefits.

The Commission considered and addressed Niagara Mohawk's assertions regarding increased financial exposure. *See* Rehearing Order P 17, JA ____. Those assertions concern costs typically incurred prior to state approval—which, as explained, are usually a minority of project costs—and the Commission found the remaining objections unpersuasive or speculative. *See* Rehearing Order P 17, JA ____ (addressing argument regarding harm to state energy goals). Ultimately, the statute (§ 824s) and the Commission's implementing Incentives Rule are designed to benefit consumers by ensuring reliability and reducing congestion-related costs, not to advance independent state policy goals. *See id.*

III. The Commission forthrightly acknowledged that its past approach has varied on the effective date issue, and reasonably explained its approach here (and going forward).

Niagara Mohawk contends that aligning the effective date with state siting approval for purposes of the rebuttable presumption departs from Commission precedent. *See* Br. 33-45. Several of the cases Niagara Mohawk cites involve distinct factual settings that do not

establish inconsistency (e.g., applications in which prerequisites for approval of the abandonment incentive had already been obtained). Nevertheless, Niagara Mohawk is correct (as the Commission acknowledged) that the agency has, in some instances, issued conditional orders with effective dates preceding state approval. *See* Br. 33-39; Rehearing Order PP 15, 17, JA ____, ____ (recognizing varied approaches in previous cases); *see also* Rehearing Order P 15 n.46 (finding that Niagara Mohawk "errs" by asserting that the Incentive Order "deviated from a singular approach").

But as this Court has explained, "[i]n administrative law, as elsewhere, two wrongs do not make a right." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 928 (D.C. Cir. 2017). "Once an agency has acknowledged that some of its prior cases were wrongly decided, this Court's precedent does not require the agency to endlessly repeat its error for the sake of consistency." *Duke Energy Progress, LLC v. FERC*, 106 F.4th 1145, 1156 (D.C. Cir. 2024).

As the Commission explained, those earlier cases were not the most consistent with 16 U.S.C. § 824s and the Incentives Rule. *See*

Rehearing Order PP 12-17, JA ____-__. The Commission provided sound reasons (based on § 824s and the Incentives Rule) for adopting the policy reflected in the Challenged Orders, which establishes a consistent and legally grounded approach, both here and going forward. *See* Rehearing Order PP 15, 17, JA ____, ____; *see also supra* section II). Arbitrary-and-capricious review demands nothing further.

A. The Commission acknowledged inconsistent precedent and acknowledged that it was departing from some of it, but provided a reasoned explanation for the departure.

Under the Administrative Procedure Act, an agency may depart from its precedent as long as it acknowledges that it is doing so and provides a reasoned explanation for its action. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016); *see also Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Lab. Rels. Auth.*, 25 F.4th 1, 4-5 (D.C. Cir. 2022) (explaining that an agency "certainly" may depart from precedent as long as accompanied by reasoned analysis). If an agency does depart from precedent, it "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old

one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Nat'l Ass'n of Broadcasters v. FCC*, 147 F.4th 978, 996 (D.C. Cir. 2025) (applying *Fox Television Stations*); *Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 41 F.4th 586, 602-05 (D.C. Cir. 2022) (finding that agency acknowledged policy change and adequately explained reasoning, despite the compliance and enforcement challenges associated with the policy change).

Niagara Mohawk contends that the Commission "routinely" sets effective dates that precede state siting approval. Br. 34-36. However, some of the orders Niagara Mohawk cites involve materially different facts that not only fail to support its position, but cut against it.

For example, Niagara Mohawk argues that Commission precedent reflects an "established practice" of anchoring the effective date to the Commission's order "rather than to later, project-specific milestones." Br. 34. But many of the orders it cites involved projects that had

already satisfied the prerequisites for the rebuttable presumption—typically approval through the relevant regional planning process—so those effective-date rulings do not demonstrate any inconsistency with the approach in the Challenged Orders. *See* Br. 34 n.8 (all five orders cited), 35 n.9 (first order cited). Those Commission orders do not support Niagara Mohawk's position. *See Midcontinent Indep. Sys. Operator, Inc.*, 190 FERC ¶ 61,067 PP 19-21 (2025) (granting incentive for project that "was approved" by a regional planning process, but denying incentive for a project that did not and was not otherwise supported by record evidence); *Midcontinent Indep. Sys. Operator, Inc.*, 189 FERC ¶ 61,247 P 12 (2024) (granting incentive for project that had been approved by regional planning process at time of Commission order); *Citizens Energy Corp.*, 162 FERC ¶ 61,161 P 11 (2018) (same); *S. California Edison Co.*, 161 FERC ¶ 61,107 P 10 (2017) (same); *DCR Transmission, LLC*, 153 FERC ¶ 61,295 P 15 (2015) (same); *Jersey Cent. Power & Light Co.*, 184 FERC ¶ 61,108 P 29 (2023) (accepting regional planning process as qualifying for rebuttable presumption

because the process "evaluated" whether the projects "ensure reliability and/or reduce congestion").

Similarly, the Commission distinguished as irrelevant orders Niagara Mohawk cited, explaining that in those cases the "rebuttable presumption had already been satisfied by an appropriate approval." Rehearing Order P 15 n.44, JA ____; *see also id.* (explaining that the "separating point" language quoted by this Court (*see San Diego*, 913 F.3d at 133) and cited by Niagara Mohawk (*see* Br. 13, 35) derived from a non-conditional order, *Pac. Gas & Elec. Co.*, 163 FERC ¶ 61,187 P 14 (2018), which was addressing projects that had already achieved eligibility at the time the Commission issued the incentive order). In short, in these cases, there was no "later, project-specific milestone[] external to the agency" left to occur (Br. 34); delaying the effective date pending an already-completed event would have been nonsensical.

Even so, the Commission does not dispute that some of its prior orders set the effective date to coincide with the date of the Commission's order, notwithstanding the conditional nature of the grant and the pending state authorization. *See* Rehearing Order P 15

n.44, JA ___ (citing orders); *see, e.g., Dayton Power & Light Co.*, 172 FERC ¶ 61,140, *on reh'g*, 173 FERC ¶ 61,154 P 16 (2020) (reversing prior determination and finding that the abandoned-plant incentive should run from the date of the initial order).

Moreover, the Commission specifically identified *Rochester Gas* among the inconsistent orders taking "varied approaches in the past," and Niagara Mohawk is therefore not correct that the "only mention" of the approach in *Rochester Gas* (involving other New York utilities) was merely descriptive of Niagara Mohawk's position. *See* Rehearing Order P 17, JA ____; Br. 37 (citing Rehearing Order P 10 & nn.30-31, JA ____). The Commission reasonably explained that it had taken different approaches in past orders such as *Rochester Gas*, but explained that the Rehearing Order provides the "best approach to adopt going forward" to be most consistent with the agency's Incentives Rule. *See* Rehearing Order P 17, JA ____.

Although this Court's precedent holds that the Commission "cannot treat similarly situated utilities differently without a reasonable justification," a Commission order that "admit[s] error"

satisfies that reasonable justification requirement. *Duke Energy Progress*, 106 F.4th at 1156 (citing *Baltimore Gas & Elec. Co. v. FERC*, 954 F.3d 279 (D.C. Cir. 2020)).

This proceeding required the Commission to grapple with conflicting precedent. The Challenged Orders are transparent about that conflict and "advance a clear approach" going forward. Rehearing Order P 17, JA ____. The Administrative Procedure Act requires nothing more: an agency must either conform to its prior practice and decisions or explain the reason for its departure from such precedent, and it must provide reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. *See Fairless Energy, LLC v. FERC*, 77 F.4th 1140, 1147 (D.C. Cir. 2023); *E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1306 (D.C. Cir. 2007).

B. Consistent with the Challenged Orders, *PPL* and *Dayton Power* set effective dates contingent on subsequent approvals.

Niagara Mohawk contends the Commission mischaracterized two of its orders, *PPL Elec. Utilities Corp.*, 188 FERC ¶ 61,084 (2024), and *Dayton Power & Light Co.*, 182 FERC ¶ 61,147 (2023), that take an

approach similar to that in the Challenged Orders. *See* Br. 39-45. That dispute is largely beside the point: in the Challenged Orders, the Commission explained that the decisions on which Niagara Mohawk primarily relies—*Rochester Gas*, for example—diverged from the best reading of the Incentives Rule. Even if Niagara Mohawk were correct that *PPL* and *Dayton Power* support its position, that would not change the outcome; the Commission acknowledged its prior, mixed approach and provided a reasoned explanation for a consistent approach going forward. *See* Rehearing Order P 15 & n.44, JA ____; *see also supra* Argument § II, pp. 26-39.

Moreover, the Commission did not mischaracterize *PPL* and *Dayton Power*. *See* Rehearing Order P 15 n.45, JA ____ (discussing both orders). As explained by the Commission, the *PPL* order conditionally granted the abandoned-plant incentive, but made it effective on the date when the project is included in the relevant regional transmission plan. *See* 188 FERC ¶ 61,084 P 2, 24-26. The *Dayton Power* order granted the abandoned-plant incentive to be effective when the projects

are either included in the regional plan or approved by the relevant state authority. *See* 182 FERC ¶ 61,147 P 36-39.

Niagara Mohawk's attempted distinction—that those orders addressed projects relying on regional planning approval rather than state approval (as do the Commission orders it cites at Br. 34 n.8)—does not carry the weight Niagara Mohawk assigns to it. *See* Br. 39-40. That distinction is immaterial to the Commission's analysis here.

Whether the rebuttable presumption stems from a regional planning process or from state approval, the Commission views both as mechanisms that avoid duplicating the work required to demonstrate the consumer benefits mandated by 16 U.S.C. § 824s. *See* Order No. 679 P 58. The underlying work—demonstrating entitlement to incentives by showing consumer benefits—must still be established. And to the extent Niagara Mohawk believes any meaningful distinction would entitle state-approved projects to earlier cost recovery than regionally approved projects, it does not develop that argument in its brief, and Commission precedent does not suggest different treatment based on which approval path triggers the rebuttable presumption.

Niagara Mohawk's analysis tellingly rests, in part, on the assertion that *Dayton Power* "may not have been quite correct" on the part of the Commission. Br. 43. Regardless of Niagara Mohawk's aversion to the approach in *Dayton Power*, that decision exemplifies the very outcome Niagara Mohawk now challenges: effective-date treatment turning on whether the requisite approval has already been obtained. *See Dayton Power*, 182 FERC ¶ 61,147 P 37 (granting effective date tied to date of Commission order for projects "that have already been approved" but delaying effective date for projects "that have not yet received" approval); *see also PPL*, 188 FERC ¶ 61,084 PP 2, 24-26 (conditionally granting abandoned-plant incentive for components of project to be effective when each is approved by regional planning process).

Conclusion

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

Respectfully submitted,

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June 1, 2026

Certificate of Compliance

In accordance with Fed. R. App. P 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P 32(a)(7)(B) because it contains 8,462 words, excluding the parts of the brief exempted by Fed. R. App. P 32(f) and Circuit Rule 32(e)(1).

I further certify that, pursuant to Fed. R. App. P 27(d)(1)(E), the foregoing complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because it has been prepared using Century Schoolbook 14-point font, in Microsoft Word.

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June 1, 2026

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vides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

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

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

Statutory Notes and Related Subsidiaries

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.
801. Congressional review.
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803. Special rule on statutory, regulatory, and judicial deadlines.
804. Definitions.
805. Judicial review.
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807. Exemption for monetary policy.
808. Effective date of certain rules.

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

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

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

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

(D) For any rule submitted under subparagraph (A), if the Federal agency promulgating

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(g) Qualifying criteria for closed-loop pumped storage projects

(1) In general

The Commission shall establish criteria that a pumped storage project shall meet in order to qualify as a closed-loop pumped storage project eligible for the expedited process established under this section.

(2) Inclusions

In establishing the criteria under paragraph (1), the Commission shall include criteria requiring that the pumped storage project—

(A) cause little to no change to existing surface and ground water flows and uses; and

(B) is unlikely to adversely affect species listed as a threatened species or endangered species under the Endangered Species Act of 1973 [16 U.S.C. 1531 et seq.].

(h) Savings clause

Nothing in this section affects any authority of the Commission to license a closed-loop pumped storage project under this subchapter.

(June 10, 1920, ch. 285, pt. I, §35, as added Pub. L. 115–270, title III, §3004, Oct. 23, 2018, 132 Stat. 3865.)

Editorial Notes

REFERENCES IN TEXT

The Fish and Wildlife Coordination Act, referred to in subsec. (c)(2), (3)(A), is act Mar. 10, 1934, ch. 55, 48 Stat. 401, which is classified generally to sections 661 to 666c–1 of this title. For complete classification of this Act to the Code, see section 661(a) of this title, Short Title note set out under section 661 of this title, and Tables.

The National Environmental Policy Act of 1969, referred to in subsec. (e), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to chapter 55 (§4321 et seq.) 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 4321 of Title 42 and Tables.

The Endangered Species Act of 1973, referred to in subsec. (g)(2)(B), is Pub. L. 93–205, Dec. 28, 1973, 87 Stat. 884, which is classified principally to chapter 35 (§1531 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of this title and Tables.

§ 823g. Considerations for relicensing terms

(a) In general

In determining the term of a new license issued when an existing license under this subchapter expires, the Commission shall take into consideration, among other things—

(1) project-related investments by the licensee under the new license; and

(2) project-related investments by the licensee over the term of the existing license.

(b) Equal weight

The determination of the Commission under subsection (a) shall give equal weight to—

(1) investments by the licensee to implement the new license under this subchapter, including investments relating to redevelopment, new construction, new capacity, efficiency, modernization, rehabilitation or replacement of major equipment, safety improvements, or environmental, recreation, or other protection, mitigation, or enhancement measures required or authorized by the new license; and

(2) investments by the licensee over the term of the existing license (including any terms under annual licenses) that—

(A) resulted in redevelopment, new construction, new capacity, efficiency, modernization, rehabilitation or replacement of major equipment, safety improvements, or environmental, recreation, or other protection, mitigation, or enhancement measures conducted over the term of the existing license; and

(B) were not expressly considered by the Commission as contributing to the length of the existing license term in any order establishing or extending the existing license term.

(c) Commission determination

At the request of the licensee, the Commission shall make a determination as to whether any planned, ongoing, or completed investment meets the criteria under subsection (b)(2). Any determination under this subsection shall be issued within 60 days following receipt of the licensee's request. When issuing its determination under this subsection, the Commission shall not assess the incremental number of years that the investment may add to the new license term. All such assessment shall occur only as provided in subsection (a).

(June 10, 1920, ch. 285, pt. I, §36, as added Pub. L. 115–270, title III, §3005, Oct. 23, 2018, 132 Stat. 3867.)

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, 824*o*, 824*o*–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, 824*o*, 824*o*–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),[1] 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–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.

(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.

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

AMENDMENTS

2015—Subsec. (b)(2). Pub. L. 114–94, §61003(b)(1), inserted ''824*o*–1,'' after ''824*o*,'' in two places.

Subsec. (e). Pub. L. 114–94, §61003(b)(2), inserted ''824*o*–1,'' after ''824*o*,''.

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, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title'' for ''The provisions of sections 824i, 824j, and 824k of this title'' and ''Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''Compliance with any order of the Commission under the provisions of section 824i or 824j of this title''.

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

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

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

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

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

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

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.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

(1) During the continuance of any war in which the United States is engaged, or whenever

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mental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) Compliance with order of Commission

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

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

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 pro-

vided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

(g) Inaction of Commissioners

(1) In general

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

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

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

(2) Appeal

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

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

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

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

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

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

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

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

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

Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric

utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms ''electric utility companies'' and ''registered holding company'' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.[1]

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

[1] See References in Text note below.

(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 Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision''.

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

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

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

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.

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

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

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

§ 824i. Interconnection authority

(a) Powers of Commission; application by State regulatory authority

(1) Upon application of any electric utility, Federal power marketing agency, geothermal power producer (including a producer which is not an electric utility), qualifying cogenerator, or qualifying small power producer, the Commission may issue an order requiring—

(A) the physical connection of any cogeneration facility, any small power production fa-

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§ 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 824*o* 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

(2) participation by public utilities in cybersecurity threat information sharing programs.

(c) Incentive-based rate treatment

Not later than 1 year after the completion of the study under subsection (b), the Commission shall establish, by rule, incentive-based, including performance-based, rate treatments for the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce by public utilities for the purpose of benefitting consumers by encouraging—

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

(2) participation by public utilities in cybersecurity threat information sharing programs.

(d) Factors for consideration

In issuing a rule pursuant to this section, the Commission may provide additional incentives beyond those identified in subsection (c) in any case in which the Commission determines that an investment in advanced cybersecurity technology or information sharing program costs will reduce cybersecurity risks to—

(1) defense critical electric infrastructure (as defined in section 824*o*–1(a) of this title) and other facilities subject to the jurisdiction of the Commission that are critical to public safety, national defense, or homeland security, as determined by the Commission in consultation with—

(A) the Secretary of Energy;

(B) the Secretary of Homeland Security; and

(C) other appropriate Federal agencies; and

(2) facilities of small or medium-sized public utilities with limited cybersecurity resources, as determined by the Commission.

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ices. 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.

§ 825*l*. Review of orders

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

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), 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 time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

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

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

(A) electric energy; or

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

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

Editorial Notes

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of Title 28 which states that ''the District of Columbia constitutes one judicial district''.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

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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

(v) Does not raise other vertical market power issues.

(3) *Category 2 Sellers* means any Sellers not in Category 1.

(4) *Inputs to electric power production* means intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; physical coal supply sources and ownership of or control over who may access transportation of coal supplies;

(5) *Franchised public utility* means a public utility with a franchised service obligation under State law.

(6) *Captive customers* means any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation.

(7) *Market-regulated power sales affiliate* means any power seller affiliate other than a franchised public utility, including a power marketer, exempt wholesale generator, qualifying facility or other power seller affiliate, whose power sales are regulated in whole or in part on a market-rate basis.

(8) *Market information* means non-public information related to the electric energy and power business including, but not limited to, information regarding sales, cost of production, generator outages, generator heat rates, unconsummated transactions, or historical generator volumes. Market information includes information from either affiliates or non-affiliates.

(9) *Affiliate* of a specified company means:

(i) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company;

(ii) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company;

(iii) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate; and

(iv) Any person that is under common control with the specified company.

Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on June 1, 2026. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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