
ORAL ARGUMENT NOT YET SCHEDULED

**In the United States Court of Appeals
for the District of Columbia Circuit****No. 20-1156**
—————PUBLIC CITIZEN, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.
—————ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION
—————**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**
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Deputy SolicitorFor Respondent
Federal Energy Regulatory
Commission
Washington, D.C. 20426February 4, 2021

CIRCUIT RULE 28(a)(1) CERTIFICATE**A. Parties and Amici**

The parties before this Court are identified in the brief of Petitioner.

B. Ruling Under Review

1. *Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc.*, 168 FERC ¶ 61,042 (2019), JA ____, and
2. *Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc.*, 170 FERC ¶ 61,227 (2020), JA ____.

C. Related Cases

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

February 4, 2021

/s/ Lona T. Perry
Lona T. Perry
Deputy Solicitor

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GLOSSARY

2015 Tariff Order	<i>Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.</i> , 153 FERC ¶ 61,385 (2015), JA ____
2016 Tariff Rehearing Order	<i>Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.</i> , 154 FERC ¶ 61,224 (2016), JA ____
Commission or FERC	Respondent Federal Energy Regulatory Commission
Complaint Order	<i>Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.</i> , 168 FERC ¶ 61,042 (2019), JA ____.
Dynegy	Dynegy, Inc.
Midcontinent or System Operator	Midcontinent Independent System Operator
Policy Statement	<i>Revised Policy Statement On Enforcement</i> , 123 FERC ¶ 61,156 (2008)
Public Citizen	Petitioner Public Citizen, Inc.
Rehearing Order	<i>Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.</i> , 170 FERC ¶ 61,227 (2020), JA ____.

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

This appeal concerns the April 2015 capacity auction (April 2015 Auction) conducted by the Midcontinent Independent System Operator, Inc. (Midcontinent or System Operator). In that auction, Midcontinent's Zone 4 experienced a significant increase in the market clearing price for wholesale electricity as compared to other zones and prior auctions. Respondent Federal Energy Regulatory Commission

(FERC or Commission) conducted a non-public investigation into the auction through its Office of Enforcement, which was closed without further action.

Petitioner Public Citizen, Inc. (Public Citizen) filed a complaint under section 206 of the Federal Power Act, 16 U.S.C. § 824e, alleging that the auction clearing rate was unjust and unreasonable, resulting from unjust and unreasonable tariff rules governing the auction process and/or market manipulation or the exercise of market power by Dynegy, Inc. (Dynegy), a pivotal supplier in Zone 4 during the 2015 auction. In orders not under review, the Commission ordered certain prospective changes to the Midcontinent tariff for application in future auctions.

In the challenged orders, *Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042 (2019), JA ____ (Complaint Order), *on reh'g*, 170 FERC ¶ 61,227 (2020), JA ____ (Rehearing Order), the Commission denied the remainder of Public Citizen's complaint, finding that Public Citizen failed to meet its burden of proof under Federal Power Act section 206 to show that the tariff provisions governing the April 2015 Auction were unjust and

unreasonable and resulted in an unjust and unreasonable clearing price. *The issue presented on appeal is:*

Did the Commission reasonably determine that Public Citizen failed to sustain its burden of proof to justify relief from the April 2015 Auction clearing price in addition to prospective tariff reform?

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Commission Authority Over Organized Electric Markets

Under the Federal Power Act, the Commission has exclusive jurisdiction over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. 16 U.S.C. §§ 824(b)-(d). The Federal Power Act “delegates responsibility to FERC to regulate the interstate wholesale market for electricity – both wholesale rates and the panoply of rules and practices affecting them.” *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 773

(2016). The Act obliges the Commission to ensure that rates are “just and reasonable.” *Id.* at 774.

Regional Transmission Organizations and Independent System Operators administer a number of competitive wholesale auctions. *Hughes v. Talen Energy Mktg, LLC*, 136 S. Ct. 1288, 1293 (2016). The Commission extensively regulates the structure of such auctions to assure just and reasonable rates. *Id.* at 1294. Courts have upheld the Commission’s reliance on markets to set rates, while also recognizing in that context the importance of the Commission’s attendant oversight and enforcement program. *See, e.g., id.* at 1291-92 (recognizing FERC’s use of market-based rate-setting mechanisms under its exclusive jurisdiction); *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1014-16 (9th Cir. 2004) (Federal Power Act allows market forces to set just and reasonable rates if coupled with effective monitoring and enforcement by FERC).

B. Commission Enforcement Authority

In the wake of the California energy crisis of 2000 to 2001, and actions of market participants like Enron, Congress amended the Federal Power Act to forbid the use of manipulative schemes in

connection with the purchase or sale of electric energy “in contravention of such rules and regulations as the Commission may prescribe.”

Federal Power Act section 222, 16 U.S.C. § 824v(a). Section 222(b) provides that “[n]othing in this section shall be construed to create a private right of action.”

Under that statutory authority, the Commission enacted a regulation, 18 C.F.R. § 1c.2, codifying the prohibition on manipulative conduct. *See generally Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 382 (2015) (the Energy Policy Act of 2005 gave FERC authority to issue rules and regulations to prevent manipulative or deceptive conduct in connection with markets subject to FERC jurisdiction). The Commission issued a policy statement to provide guidance on its enforcement policies. *Revised Policy Statement On Enforcement*, 123 FERC ¶ 61,156 (2008) (Policy Statement).

The Commission’s regulations provide Commission enforcement staff with broad authority to “conduct investigations relating to any matter subject to [the Commission’s] jurisdiction.” 18 C.F.R. § 1b.3. Staff investigations can be either preliminary or formal. 18 C.F.R. § 1b.4. Staff may initiate preliminary investigations but staff cannot

compel testimony in such investigations. 18 C.F.R. § 1b.6. Formal investigations are initiated by Commission order, and generally provide staff with subpoena authority. Policy Statement P 23 n.18.

Much of what Commission enforcement staff does is not public. Policy Statement P 7. Where investigations are closed without any action by the Commission, the existence of the investigation remains non-public in all but rare circumstances. *Id.*; *see also*, 18 C.F.R. § 1b.9 (providing that all investigative proceedings, information and documents shall be treated as nonpublic except in specified conditions). In most cases, only when the Commission approves a settlement resolving an action or institutes an Order to Show Cause proceeding, both of which may involve monetary sanctions, do the existence and particulars of the investigation become public. Policy Statement P 7.

II. THE MIDCONTINENT CAPACITY AUCTION

Midcontinent, at the time relevant here, was divided into nine zones. Complaint Order n.8, JA _____. The System Operator's tariff requires load serving entities in each zone to meet annual reserve margin requirements. *Id.* P 3, JA _____. One way to meet that requirement is for the entity to purchase electric capacity at auction.

Id. Capacity is a commitment to produce electricity or forgo consuming electricity when required. *E.g., Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 659 (D.C. Cir. 2017).

The auction selects the least-cost planning resources needed to meet each zone's capacity requirements within the parameters set by the tariff and establishes the auction clearing price for each zone for the upcoming planning year. Complaint Order P 4, JA _____. If there are no local or sub-regional constraints on transmission, the marginal resource that clears the auction sets the auction clearing price for all other capacity in the region. *Id.* If there are constraints, the marginal resource that clears in the constrained zone sets the clearing price for all other capacity in the zone. *Id.*

The System Operator conducts capacity auctions annually in April for the upcoming planning year, which runs from June 1 to May 31 of the following year. *Id.* The capacity auction for planning year 2013/14 resulted in an auction clearing price of \$1.05/MW(megawatt)-day for each zone. *Id.* P 5, JA _____. The capacity auction for planning year 2014/15 set an auction clearing price of \$3.29/MW-day for Zone 1,

\$16.75/MW-day for Zones 2 through 7, and \$16.44/MW-day for zones 8 and 9. *Id.*

The auction for the 2015/16 planning year, the April 2015 Auction, is the subject of the complaint in this proceeding. In that auction, there was substantial price separation between Zone 4 and the rest of the Zones: Zones 1 through 3 and 5 through 7 had an auction clearing price of \$3.48/MW-day, Zones 8 and 9 had an auction clearing price of \$3.29/MW-day, and Zone 4 had an auction clearing price of \$150/MW-day. Complaint Order P 5, JA ____.

Following the April 2015 Auction, petitioner Public Citizen filed a complaint against Midcontinent under section 206 of the Federal Power Act, 16 U.S.C. § 824e. Public Citizen alleged that the Zone 4 clearing price set in the April 2015 Auction was unjust and unreasonable, in violation of the Act. Complaint Order P 8, JA ____.

Public Citizen alleged that the Zone 4 rate increase may have resulted from unjust and unreasonable tariff rules governing the auction process, and/or market manipulation or the exercise of market power by Dynegy. *Id.*

Following a 2013 acquisition of generating capacity in Zone 4, Dynegy was a pivotal supplier of capacity in Zone 4 for the April 2015 Auction,

i.e., the capacity market for Zone 4 in the April 2015 Auction could not clear without some of Dynegy's capacity. See Complaint Order PP 6-7, JA ___-___ (describing acquisition); *Ameren Energy Generating Co.*, 145 FERC ¶ 61,034 PP 1, 54-58 (2013) (approving acquisition). Other complaints with similar allegations were also filed. Complaint Order P 8, JA ___.

III. COMMISSION ACTION FOLLOWING THE AUCTION

A. The Non-Public Investigation

Shortly after the conclusion of the April 2015 Auction, the Commission's Office of Enforcement began a non-public, informal investigation under Part 1b of the Commission's regulations into whether market manipulation or other potential violations of Commission orders, rules and regulations occurred during the auction. Complaint Order P 12, JA ___. On October 1, 2015, the Commission authorized its Office of Enforcement to conduct a non-public, formal investigation, with subpoena authority. Complaint Order P 12, JA ___; *Investigation into MISO Zone 4 Planning Resource Auction Market Participant Offers*, 153 FERC ¶ 61,005 (2015) (authorizing formal investigation).

Following a lengthy investigation in which the Office of Enforcement reviewed over 500,000 pages of documents and heard 17 days of testimony from 11 witnesses, the investigation was closed. Complaint Order PP 30-31, JA ____-____. The Commission concluded that no further action was required to address allegations of market manipulation. *Id.* P 32, JA ____; Rehearing Order P 4, JA ____.

B. The 2015 Tariff Order

In December 2015, the Commission issued an order addressing those portions of Public Citizen's and other complaints that prospectively challenged Midcontinent tariff provisions governing capacity auctions. *Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,385 (2015) (2015 Tariff Order), JA ____, *on reh'g*, 154 FERC ¶ 61,224 (2016) (2016 Tariff Rehearing Order), JA _____. The Commission granted the complaints in part, finding that the current tariff provisions associated with market power mitigation and capacity import limits were no longer just and reasonable for prospective application in future auctions. 2015 Tariff Order PP 3, 92-93, 145, JA ____, ____-____, ____; Complaint Order P 9, JA ____.

The Commission stated that it would continue to consider other issues raised in the complaints. Complaint Order P 10, JA ___; 2015 Tariff Order P 4, JA ___. With respect to allegations of market manipulation, the Commission stated that the Office of Enforcement was conducting a formal, non-public investigation into whether market manipulation occurred during the April 2015 Auction. Complaint Order P 10, JA ___. The Commission stated that it would determine in a subsequent order whether additional action may be appropriate pending the outcome of the formal investigation. *Id.*

C. The Challenged Orders

In later orders, now on review, the Commission denied Public Citizen's complaint to the extent it alleged that the Zone 4 April 2015 Auction clearing price was not just and reasonable. Rehearing Order P 16, JA ___; Complaint Order P 84, JA ___. Commissioner (now Chairman) Glick dissented from each order.

1. Federal Power Act Section 205 Claims

Public Citizen first argued that the Commission must review the April 2015 Auction clearing price under Federal Power Act section 205, 16 U.S.C. § 824d, before that price can go into effect. Rehearing Order

P 16, JA _____. To the contrary, as the Commission explained, under the Commission's market-based rate program, the auction clearing price is not the filed rate. Complaint Order P 89, JA _____. Rather, the filed rate is the tariff setting out the auction procedures, not the resulting market prices that may change over time. *Id.*; Rehearing Order P 16, JA _____ (citing *Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 921 (9th Cir. 2011)).

A market-based rate tariff is lawful under the Federal Power Act as long as it incorporates both an ex ante finding of the absence of seller market power and enforceable post-approval transaction reporting. Rehearing Order P 17, JA ____; Complaint Order P 89, JA _____. From the ex ante standpoint, the Commission allows a seller to make wholesale power sales pursuant to a market-based rate tariff provided that the seller and its affiliates do not have, or have adequately mitigated, market power. Rehearing Order P 17, JA _____. For sellers like Dynegy that operate under an Independent System Operator with Commission-approved market monitoring and mitigation, the Commission has adopted a rebuttable presumption that the market power monitoring and mitigation is sufficient to address market-power concerns. *Id.*

Here, the Midcontinent tariff includes provisions that mitigate auction bids that would substantially distort competitive outcomes by exceeding defined conduct and market impact thresholds. Complaint Order P 33, JA _____. The tariff provides that when an offer into the auction exceeds the conduct threshold and results in an increase in the market clearing price that exceeds the market impact threshold, that bid will be mitigated down to the applicable reference level. *Id.* The reference level “serve[s] as a competitive benchmark that reflects the offer of a supplier that faces robust competition.” Complaint Order P 86 & n.247, JA _____ (quoting Market Monitor Comments at 5, JA _____).

The tariff provides a default, region-wide reference level that at the time of the April 2015 Auction was based on the estimated opportunity cost of exporting capacity to the neighboring PJM Independent System Operator (PJM is named after Pennsylvania-New Jersey-Maryland), and was set at \$155.79/MW-day. *Id.* P 34, JA _____. The tariff also permits market participants to request facility-specific reference levels based on a facility’s going-forward costs. *Id.* n.87, JA _____. In this circumstance, a market-participant’s going-forward

costs are its short-run marginal costs of providing capacity for a planning year. 2016 Tariff Rehearing Order, n.135, JA ____.

The tariff conduct threshold equaled the applicable reference level plus ten percent of the cost of new entry (\$24.74/MW-day). *Id.* P 35, JA _____. Thus, the default conduct threshold for those resources not requesting facility-specific reference levels in the April 2015 Auction equaled \$180.53/MW-day (\$155.79+\$24.74). *Id.* P 35, JA _____. Because Dynegy's offers into the April 2015 Auction all fell below the \$180.53/MW-day conduct threshold for Zone 4, those offers were considered to be competitive under the tariff and not subject to mitigation. *Id.* P 85, JA _____.

The courts also require post-approval transaction reporting as a means of monitoring the justness and reasonableness of market-based rates. Rehearing Order P 17, JA _____. Contrary to Public Citizen's assertions, the required post-approval transaction reporting is not the filing of auction clearing prices for Commission approval under Federal Power Act section 205 prior to the prices going into effect. Complaint Order P 89, JA ____; Rehearing Order PP 16-18, JA ____-____. Rather, the Ninth Circuit in *Lockyer*, 383 F.3d at 1013, and *Montana Consumer*

Counsel, 659 F.3d at 915, 917-18, expressly affirmed the Commission's post-approval reporting requirements that sellers with market-based rate authority: file quarterly reports of all transactions, file an updated market-power analysis every three years, and notify FERC within 30 days of changes in status that might affect their ability to charge market-based rates. Complaint Order P 89, JA ___; Rehearing Order PP 16-18, JA ___-__.

Consistent with this requirement, here, Dynegy submits quarterly reports, triennial market power updates, and change in status updates, which the Commission reviews to ensure Dynegy has not gained or exercised market power since its initial authorization. Rehearing Order P 18, JA ___. The Commission found that Dynegy had followed the Commission's post-approval reporting requirements and that Public Citizen has made no allegations here based on those reports. *Id.* In addition to Commission review and action on this data, the public may file Federal Power Act section 206 complaints based upon this data to challenge alleged market power or excessive rates. *Market-Based Rates for Wholesale Sales*, Order No. 697, 119 FERC ¶ 61,295 P 967 (2007), *on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055 P 417, *on reh'g*, Order No.

697-B, 125 FERC ¶ 61,326 (2008), *on reh'g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *on reh'g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom., Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

2. Federal Power Act Section 206 Claims

Under Federal Power Act section 206, Public Citizen as complainant bears the burden of demonstrating that the April 2015 Auction clearing price was unjust and unreasonable. Rehearing Order P 14, JA _____. The Commission denied Public Citizen's allegations as to the April 2015 Auction clearing price, finding that Public Citizen failed to show that the clearing price was unjust and unreasonable.

Complaint Order P 84, JA _____. While Public Citizen stressed the sharp increase in price in Zone 4, the Commission found that the April 2015 Auction clearing price was not shown to be unjust and unreasonable simply because it was higher than expected. Complaint Order P 84, JA _____. The Commission cited to record evidence submitted by Dynegy showing that Dynegy's bids were cost-based, Complaint Order P 84, JA ____ (citing Dynegy Answer at 33-35, JA ____-____). Public Citizen

offered no record evidence to support its claim that the auction clearing price was not just and reasonable. *Id.*

The Commission also rejected the argument that its prospective changes in the Midcontinent tariff monitoring and mitigation provisions in the December 2015 Tariff Order, which is not under review here, proved that those provisions were unjust and unreasonable at the time of the April 2015 Auction and failed to assure a just and reasonable clearing price. Rehearing Order P 22, JA _____. The market mitigation measures in place during the April 2015 Auction had been approved by the Commission as a just and reasonable approach to mitigating anticompetitive behavior in the System Operator market. *Id.* The prospective changes made in those provisions in the December 2015 Tariff Order were due in large measure to future changes in the PJM capacity market that were approved in a June 2015 order, after the April 2015 Auction. Rehearing Order P 22, JA ____; 2015 Tariff Order PP 85-89, JA ____-___. Accordingly, the Commission reasonably denied Public Citizen's claims that Dynegy exercised market power in the April 2015 Auction, causing unjust and unreasonable rates, as Public Citizen failed to support such claims. Complaint Order P 84, JA _____.

3. Market Manipulation

With regard to allegations of market manipulation, the Commission had authorized a lengthy, formal, non-public investigation by its Office of Enforcement. Complaint Order P 31, JA _____. Based on that investigation, the Commission concluded that no further action was appropriate to address allegations of market manipulation. Complaint Order P 32, JA _____.

The Commission's determination to take no further action was a reasonable exercise of its enforcement discretion. Rehearing Order P 13, JA _____. While parties may bring allegations of market manipulation to the Commission, the Federal Power Act section 222, 16 U.S.C. § 824v, prohibition on market manipulation precludes a private right of action. Rehearing Order P 13 & n.36, JA _____ (citing section 222(b)). Accordingly, Public Citizen's allegations do not limit the Commission's discretion in investigating market manipulation. *Id.*

In any event, the Commission found that Public Citizen failed to meet its burden as a complainant to demonstrate that activity meeting the statutory definition of market manipulation occurred and resulted

in rates that are unjust and unreasonable. Rehearing Order P 14, JA ____.

SUMMARY OF ARGUMENT

In its April 2015 Auction, the Midcontinent System Operator experienced a significant increase in the market clearing price for electric capacity in Zone 4. Public Citizen filed a complaint under section 206 of the Federal Power Act, 16 U.S.C. § 824e, alleging that the price increase may have been the result of unjust and unreasonable tariff monitoring and mitigation provisions and/or an exercise of market manipulation or market power by Dynegy, resulting in an unjust and unreasonable clearing price. In earlier orders not under review, the Commission granted relief to the extent it revised certain tariff rules going forward. But in the challenged, later orders, the Commission denied Public Citizen's claims to the extent the complaint asked for rate relief from the April 2015 Auction clearing price.

Section 205 Claims

On brief, as before the Commission, Public Citizen's first argument is that the Commission must review the auction clearing price under Federal Power Act section 205, 16 U.S.C. § 824d, to find it

just and reasonable before permitting it to go into effect. But as this Court and the Ninth Circuit have found, a seller has no obligation to make section 205 filings every time the market rate changes when a seller has market-based rate authority. Rather, the filed rate for purposes of the statute is the market rate tariff, under which the seller is permitted to charge the rate resulting from the market without making a rate change filing every time the market rate changes.

To be sure, the courts require that the Commission monitor the exercise of market-based rate authority to ensure that market-based rates remain just and reasonable. But, contrary to Public Citizen's claims, this post-approval monitoring is not the filing of auction prices for section 205 review before they become effective. Rather, courts have found this requirement satisfied by the Commission's monitoring of the market-based rate seller, requiring the filing of quarterly transactional reports and other measures to assure that the seller has not obtained market power. Dynegy has complied with all such reporting requirements and Public Citizen has made no allegations based upon this data; the public can review data reports and bring complaints alleging market power based upon them.

Section 206 Claims

Under Federal Power Act section 206, 16 U.S.C. § 824e, in earlier orders not under review here, the Commission granted Public Citizen's and others' complaints in part on a prospective basis, finding it just and reasonable to modify auction procedures in certain respects prospectively for future auctions.

In the challenged orders, the Commission reasonably denied Public Citizen's remaining section 206 claim that the April 2015 Auction clearing price was unjust and unreasonable. As the complainant, Public Citizen has the burden of proof and the Commission reasonably determined that Public Citizen failed to meet that burden.

Public Citizen points to the magnitude of the price increase and the Commission's December 2015 prospective tariff changes as evidence that the April 2015 Auction Zone 4 clearing price was unjust and unreasonable. The Commission, however, reasonably found that the price increase, without more, did not demonstrate that the rates were unjust and unreasonable. The Commission cited to record evidence that Dynegy's Zone 4 bids in the April 2015 Auction (which set the Zone 4

market-clearing price) were cost-based; Public Citizen offered no contrary record evidence to show the bids were exercises of market power. Nor did the Commission's prospective changes to the tariff -- based in significant measure on future changes to PJM capacity markets approved in June of 2015 -- prove that the tariff monitoring and mitigation provisions applicable at the time of the April 2015 Auction were unjust and unreasonable and permitted an unjust and unreasonable market clearing price.

Market Manipulation

Public Citizen urges the Court to compel the Commission to open its non-public investigation to Public Citizen review, contending that the Commission's decision to take no further action on market manipulation allegations was a substantive adjudication of Public Citizen's claims. Under its regulations, however, the Commission had prosecutorial discretion with regard to its non-public investigation. While third parties may bring allegations of market manipulation to the Commission's attention, Federal Power Act section 222, 16 U.S.C. § 824v, which prohibits market manipulation, expressly precludes a private right of action. The Commission's non-public investigation does

not provide a means by which Public Citizen can satisfy its burden of proof under section 206 of the Federal Power Act.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's deferential "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). The "scope of review under [that] standard is narrow." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (citation omitted). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id.* "Rather, the court must uphold a rule if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

"And nowhere is that more true than in a technical area like electricity rate design: '[W]e afford great deference to the Commission in its rate decisions.'" *Id.* (quoting *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)). The Commission's

factual findings are conclusive if supported by substantial evidence.

Federal Power Act section 313(b), 16 U.S.C. § 825l(b).

II. THE COMMISSION REASONABLY CONCLUDED THAT PUBLIC CITIZEN FAILED TO SATISFY ITS BURDEN TO PROVE THAT THE APRIL 2015 AUCTION CLEARING PRICE WAS UNJUST AND UNREASONABLE.

On May 28, 2015, Public Citizen filed a complaint against the Midcontinent System Operator under Federal Power Act section 206, 16 U.S.C. § 824e. Complaint Order P 8, JA ___; Public Citizen Complaint, JA ___-___. Public Citizen alleged that the Zone 4 April 2015 Auction clearing price “may have been the result of illegal manipulation and gaming of the auction bidding process, specifically capacity withholding, contrary to section 222 of the [Federal Power Act], [16 U.S.C. § 824v].” Public Citizen Complaint at 1, JA ___. Public Citizen also alleged that the System Operator failed to make a rate change filing of the auction clearing price for advance Commission review as required by Section 205(d) of the Federal Power Act, 16 U.S.C. § 824d(d). *Id.*

In earlier orders not under review, the Commission granted the complaints of Public Citizen and others insofar as they sought prospective changes to certain tariff market monitoring and mitigation provisions governing future capacity auctions. In the challenged orders,

the Commission denied Public Citizen's claims with regard to the April 2015 Auction market clearing price because Public Citizen failed to satisfy its burden of proof.

A. The Commission Reasonably Did Not Review The April 2015 Auction Clearing Price Under Federal Power Act Section 205.

Public Citizen first argues that the Commission must review the Zone 4 April 2015 Auction market clearing price for justness and reasonableness under Federal Power Act section 205, 16 U.S.C. § 824d, before permitting that market clearing price to go into effect. The Commission reasonably rejected this argument, finding that it rests upon a misunderstanding of the Commission's market-based rate program. Rehearing Order P 16, JA ____.

Federal Power Act section 205 requires that utilities file with the Commission schedules showing their "rates and charges," and provide notice to the Commission prior to any change in that schedule. 16 U.S.C. §§ 824d(c), (d). Market-based tariffs, instead of setting out specific rates or rate-fixing contracts, simply state that the seller will enter into freely negotiated contracts with purchasers. *Morgan Stanley*, 554 U.S. at 537. The market-based rate tariff filed by authorized sellers

is the required rate filing under the statute, and that filed market rate tariff does not change even though the prices charged by the seller rise and fall with the market. *Id.*; Complaint Order P 89, JA ___ (citing *Mont. Consumer Counsel*, 659 F.3d at 921); Rehearing Order P 16, JA ___.

Public Citizen acknowledges that courts have held that the filing of a market-based rate tariff “comports with the statutory requirement that schedules of ‘rates’ be filed and that notice be given of changes in ‘rates.’” Public Citizen Brief at 31 (citing *Mont. Consumer Counsel*, 659 F.3d at 921-22). But Public Citizen on brief for the first time argues that the auction prices are “charges,” distinct from the tariff “rate,” that must themselves be filed for review under section 205. *Id.* As this statutory interpretation argument was not raised to the Commission on rehearing -- notwithstanding the express holding in the Complaint Order that the market-rate tariff is the filed rate for purposes of Federal Power Act section 205, Complaint Order P 89, JA ___ -- the Court lacks jurisdiction to consider it. *See, e.g., New England Power Generators Ass’n, Inc. v. FERC*, 879 F.3d 1192, 1198 (D.C. Cir. 2016) (Under Federal Power Act section 313(b), 16 U.S.C. § 825l(b), the Court

lacks jurisdiction over arguments not raised to the Commission on rehearing).

Nor does this argument have merit. Federal Power Act section 205(c) requires the filing of “schedules showing all rates and charges.” The courts approving the Commission’s market-based rate program have found this requirement satisfied by the filing of the market-based rate tariff and have not required the filing of the resulting market prices under section 205. Complaint Order P 89, JA ___; Rehearing Order P 16, JA ___; *Mont. Consumer Counsel*, 659 F.3d at 921 (rejecting the argument that “rate” means price). There is no basis in the caselaw for Public Citizen’s argument that there are “charges” here that must be separately filed from the “rate.”

To the contrary, as the Supreme Court noted, both this Circuit and the Ninth Circuit have approved market-based rate programs in which, once a seller files a market-based rate tariff, “contracts no longer need to be filed with FERC (and subjected to its investigatory power) before going into effect.” *Morgan Stanley*, 554 U.S. at 537 (citing *La. Energy & Power Authority v. FERC*, 141 F.3d 364, 365-71 (D.C. Cir. 1998) and *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012 (9th Cir.

2004)). Courts do require that the Commission conduct post-approval monitoring to assure that the market-based rates remain just and reasonable. But the Commission satisfies that requirement by monitoring the seller's ability to exercise market power. *Id.*

1. This Court Does Not Require Section 205 Filing Of Market Prices.

As the Commission explained, this Court has approved market-based rate programs that do not require filing of market prices with the Commission for approval under section 205 (or its analog, section 4 of the Natural Gas Act, 15 U.S.C. § 717c). Rehearing Order P 18 & n.46 (citing cases), JA _____. In *Louisiana Energy & Power Authority v. FERC*, 141 F.3d 364, 365-71 (D.C. Cir. 1998), and *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 869-71 (D.C. Cir. 1993), this Court affirmed orders authorizing sellers without market power to charge market-based rates without further filing under section 205 of the Federal Power Act (*Louisiana*) or section 4 of the Natural Gas Act (*Elizabethtown*). The Court found it sufficient that the market-based rates charged remained subject to the Commission's authority under section 206 of the Federal Power Act or section 5 of the Natural Gas Act, 15 U.S.C. § 717d, to review upon complaint or its own motion any claims of market power.

In *Blumenthal v. FERC*, 552 F.3d 875, 882-83 (D.C. Cir. 2009), this Court affirmed the Commissions' denial of a complaint alleging that the market structure of the New England Independent System Operator permitted the charging of unjust and unreasonable rates. The Court found that the Commission fulfilled its statutory rate review obligation by assuring, when it originally granted generators market-based rate authority, that they did not exercise market power at the time and that mitigation provisions were in place to check any future acquisition of market power. *Id.* at 882. The Court further found that the Commission reasonably relied on its continuing oversight of the market to guard against potential abuses of market power. *Id.* The Commission required the New England Independent System Operator to file quarterly and annual reports assessing the competitiveness of the market based on transactional data reflecting the behavior of each market participant. *Id.* These regular reports based on transaction-specific data were sufficient to comply with the Commission's oversight obligations. *Id.* (citing *Lockyer*, 383 F.3d at 1014).

Blumenthal distinguished this reliance on transaction reporting from the regulatory regime at issue in *Farmers Union Central*

Exchange, Inc. v. FERC, 734 F.2d 1486, 1508 (D.C. Cir. 1984), which involved “largely undocumented reliance on market forces as the principal means of rate regulation.” *Blumenthal*, 552 F.3d at 882; *see also, e.g., Interstate Nat. Gas Ass’n v. FERC*, 285 F.3d 18, 34 (D.C. Cir. 2002) (FERC provided adequate oversight of market-based rates by: (1) requiring public reporting of release prices and availability and (2) entertaining complaints alleging market power under Natural Gas Act section 5 (the analog of Federal Power Act section 206)).

2. The Ninth Circuit Does Not Require Section 205 Filing of Market Prices.

The Commission likewise reasonably concluded that Public Citizen misread the Ninth Circuit precedent it cites in claiming the Commission must review auction clearing prices under Federal Power Act section 205 before permitting them to go into effect. Complaint Order P 89, JA ___; Rehearing Order P 18 & n.46, JA ___.

In the context of the California energy crisis of 2000 to 2001, the Ninth Circuit addressed facial challenges to the Commission’s authorization of market-based rates where dramatic price increases occurred in energy auctions run by the California Independent System Operator. *See Lockyer*, 383 F.3d 1006. As Public Citizen does here, the

Lockyer petitioners argued that market-based rate tariffs violate the Federal Power Act because they rely on unfiled, privately-negotiated rates to satisfy section 205 rate filing requirements. *Id.* at 1012.

The court rejected that argument, finding that the Commission's regulatory scheme of an ex ante finding of a lack of market power coupled with sufficient post-approval reporting requirements satisfied the Commission's Federal Power Act obligations. *Id.* at 1013. Because the Federal Power Act specifies that rate filings be "within such time and within such form" and under "such rules and regulations as the Commission may prescribe," the Commission has broad discretion to establish effective reporting requirements for administering market-based rate tariffs. *Id.* (quoting 16 U.S.C. § 824d(c)).

Contrary to Public Citizen's contentions, the post-approval reporting approved in *Lockyer* did not consist of the California Independent System Operator filing auction prices for approval under Federal Power Act section 205 prior to the prices being charged. Complaint Order P 89, JA _____. Rather, *Lockyer* found sufficient post-approval reporting in the Commission's requirement that wholesale

sellers file quarterly reports summarizing their transactions as well as periodic market analyses. *Id.*; *Lockyer*, 383 F.3d at 1013.

Lockyer also found that, during the California energy crisis, there was “rampant non-compliance” with FERC’s quarterly transaction reporting requirements. *Id.* at 1014. The court remanded the case to the Commission to enforce the reporting requirements of its Electric Quarterly Report. Complaint Order P 89, JA ___; Rehearing Order P 18, JA ___; *Lockyer*, 383 F.3d at 1015-17. At no point did the Court require the Commission to make findings under Federal Power Act section 205 that auction market prices were just and reasonable before allowing the prices to go into effect. Complaint P 89, JA ___.

In 2011, in *Montana Consumer Counsel*, 659 F.3d at 917-18, the Ninth Circuit reaffirmed *Lockyer*’s rejection of facial challenges to the market-based rate program. The Court again rejected arguments that the Commission’s market-based rate program contravened the rate filing requirements of Federal Power Act section 205. *Id.* at 921-22. Again, petitioners argued -- as does Public Citizen here -- that “rate” means price, and that section 205(d) expressly requires advance notice and filing of rate changes. *Id.* at 921. The court again affirmed FERC’s

broad discretion to construe the Federal Power Act notice and filing requirements. *Id.* The court found FERC's interpretation -- that a rate change only occurs once, when an authorized seller files for a market-based rate authorization -- to be a reasonable interpretation of the statute. *Id.* at 921-22.

The Ninth Circuit also rejected arguments that the Commission's post-approval review of quarterly transaction reports, triennial market analyses, and change in status reports (notifying FERC of changes that may affect eligibility for market-based rate authority), *see id.* at 915, were insufficient to assure that the rates actually charged in the market remained just and reasonable. *Id.* at 918-20. The court found that the Commission monitors the data to ensure that the reported transactions are consistent with the data expected of a competitive, unmanipulated market. *Id.* at 919. "If the data are consistent with a competitive market, FERC may properly assume that the charged rates fall within a zone of reasonableness." *Id.*

In *California ex rel. Harris v. FERC*, 784 F.3d 1267 (9th Cir. 2015), addressing orders on remand from *Lockyer*, the court again affirmed *Lockyer's* rejection of any facial challenge to the Commission's

market-based rate program. *Id.* at 1270. The court remanded the challenged orders, however, upon finding that the Commission failed on remand from *Lockyer* adequately to consider claims for remedies arising from the “rampant” quarterly transaction reporting violations during the California energy crisis. *Id.* at 1275-77.

3. The Post-Approval Reporting Requirements Affirmed By The Courts Are In Effect Here.

Consistent with this Court’s and the Ninth Circuit’s caselaw, here, Dynegy is required to submit quarterly reports, triennial market power updates, and change in status updates, which the Commission reviews to ensure that Dynegy has not gained or exercised market power since its initial market-based rate authorization. Rehearing Order P 18, JA ____. Dynegy has followed the Commission’s post-approval reporting requirements, and Public Citizen makes no allegations here based on this reported data. *Id.* As the Commission has found, the detailed transactional data required under the Commission’s post-approval monitoring provides both the Commission and the public the means to spot pricing trends or discriminatory patterns that might indicate the presence of market power. *Market-Based Rates*, 123 FERC ¶ 61,055 P 457. The public may file complaints based upon this data to challenge

alleged market power or excessive rates. *Id.* P 417; *Market-Based Rates*, 119 FERC ¶ 61,295 P 967.

Thus, the Commission's actions here were fully consistent with representations to courts that market-based rate tariffs do not simply rest on market forces alone but are subject to transaction reporting in quarterly reports and to complaints that the rates have become unjust and unreasonable. *See* Public Citizen Brief at 41. The sales made pursuant to Dynegy's market-based rate tariff at the time of the April 2015 Auction were therefore appropriately made under Dynegy's market-based rate authority. Rehearing Order PP 17-18, JA ___-__.

4. Public Citizen's Cited Cases On Section 205 Rate Review Are Inapposite.

Public Citizen's caselaw involving section 205 review of bids or auction results is factually distinguishable. Rehearing Order P 19, JA ___. *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1 (D.C. Cir. 2015), required that the Commission review bids into the New England Independent System Operator's Winter Reliability Program under section 205 because the bids were not made in a competitive energy market. Rehearing Order P 19 & n.49, JA ___ (quoting *TransCanada*, 811 F.3d at 5 (the Winter Reliability Program is a "time-limited,

discrete, out-of-market solution, which, in future years would yield a market-based solution”)); *see also TransCanada*, 811 F.3d at 13 (Winter Reliability Program is outside the competitive energy market).

In *Public Citizen v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016), the New England Independent System Operator filed auction clearing prices with the Commission for review under Federal Power Act section 205 because it was required to do so pursuant to the approved settlement agreement and tariff that created the annual forward capacity markets. Rehearing Order P 19, JA ___; *Public Citizen*, 839 F.3d at 1167. Based upon that unique settlement agreement, this annual forward capacity market is an exception to the general rule that individual transactions under a seller’s market-based rate authority are not subject to review under section 205. Rehearing Order P 19, JA ___.

B. The Commission Reasonably Concluded That Public Citizen Failed To Meet Its Burden Of Proof Under Section 206 To Show That The April 2015 Auction Clearing Price Was Unjust And Unreasonable.

As the complainant under Federal Power Act section 206, 16 U.S.C. § 824e, Public Citizen bears the burden of proving that the Zone 4 April 2015 Auction clearing price was unjust and unreasonable. 16 U.S.C. § 824e(b) (“in any proceeding under this section, the burden of

proof to show that any rate, charge, classification, rule, regulation, practice or contract is unjust [and] unreasonable . . . shall be upon . . . the complainant”). Where a complainant asserts “bare allegations of anticompetitive behavior” and offers no “meaningful analysis of whether [the] rates are just and reasonable,” the Commission reasonably denies the complaint. *Blumenthal*, 552 F.3d at 882-884.

Here, the Commission reasonably denied Public Citizen’s section 206 complaint to the extent the complaint alleged that the Zone 4 April 2015 Auction clearing price was unjust and unreasonable and required correction. Complaint Order P 84, JA _____. In the 2015 Tariff Order the Commission had already granted the complaint to the extent that it ordered tariff revisions concerning market power mitigation to be applied in future auctions. 2015 Tariff Order P 3, JA _____.

As demonstrated below, Public Citizen emphasizes the magnitude of the clearing price increase in support of its claims regarding the April 2015 Auction clearing price, but Public Citizen provided no evidence on rehearing or on brief that the increased price was unjust and unreasonable, nor did Public Citizen challenge Dynegy evidence cited by the Commission showing that Dynegy’s auction bids approximate its

marginal costs, which is consistent with competition. Complaint Order P 84, JA _____. While Public Citizen emphasizes the Commission's prospective tariff changes to the default, region-wide reference level for bid mitigation, those changes were in substantial measure based on PJM capacity market changes approved in a June 2015 order that post-dated the April 2015 Auction. Rehearing Order P 22, JA _____. Those changes do not rebut the presumption that the Midcontinent tariff in the April 2015 Auction sufficiently addressed market power concerns. *Id.* P 17, JA _____. Further, even as revised the Midcontinent tariff would still have permitted Dynegy to request facility-specific reference levels based on its marginal costs in lieu of reliance on the new default, region-wide reference level. 2015 Tariff Order P 93, JA _____.

1. The Auction Clearing Price Increase Does Not Prove That The Clearing Price Is Unjust And Unreasonable.

In alleging that the Zone 4 April 2015 Auction clearing price was unjust and unreasonable, Public Citizen stresses that the clearing price increased substantially in comparison with other zones and prior auctions. The Commission found no record evidence to support Public Citizen's claim that the clearing price was unjust and unreasonable.

Complaint Order P 84, JA _____. Midcontinent conducted the April 2015 Auction in compliance with its tariff, including provisions pertaining to Dynegy's auction offers that were designed to mitigate the exercise of market power and result in a just and reasonable rate. *Id.* Under the Commission's market-based rate rulemaking, there is a rebuttable presumption that the Midcontinent mitigation rules are sufficient to address market power concerns. Rehearing Order P 17, JA ____ (citing *Market-Based Rates*, 123 FERC ¶ 61,055 P 111). Public Citizen bears the burden of rebutting that presumption. *Market-Based Rates*, 123 FERC ¶ 61,055 P 111.

An auction clearing price is not proven unjust and unreasonable simply because it is higher than expected. Complaint Order P 84, JA ____ (citing System Operator Answer at 2-4, JA ____-__; Dynegy Answer at 33-35, JA ____-__); *see, e.g., Blumenthal*, 552 F.3d at 883 (Commission reasonably declined to find estimated generator returns of 44% to 257% prima facie evidence of unjust and unreasonable rates).

The Commission cited to evidence introduced by Dynegy answering claims that its auction bids were unjust and unreasonable. Complaint P 84, JA ____ (citing Dynegy Answer at 33-35, JA ____-__). In

the cited pages, Dynegy offered evidence that its bids in the April 2015 Auction were cost-based. Complaint Order P 56, JA ___ (citing Dynegy Answer at 33-35, JA ___-___, Jones Affidavit, ___-___). Further, in an affidavit prepared by Dynegy's expert Mr. Gerhardt, Dynegy provided evidence that if it had bid in the auction based on its going-forward costs, those bids would have produced a Zone 4 auction clearing price equal to or higher than the \$150/MW-day clearing price. Complaint Order P 83, JA ___ (citing Dynegy Answer at 33-35, JA ___-___; Gerhardt Affidavit, JA ___-___). In this circumstance, a market-participant's going-forward costs are its short-run marginal costs of providing capacity for a planning year. *See* 2016 Tariff Rehearing Order, n.135, JA ___.

As this Court and the Ninth Circuit have recognized, in a competitive market, it is reasonable "to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment." *Elizabethtown Gas*, 10 F.3d at 870 (quoting *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C.Cir.1990)); *Lockyer*, 383 F.3d at 1013 (quoting *Tejas*); *Mont. Consumer Couns.*, 659 F.3d at 916 (quoting *Tejas*); *see also Interstate Nat. Gas Ass'n*, 285 F.3d at 31 (competition

provides a reasonable assurance that rates will approximate costs).

Accordingly, evidence that Dynegy's bids that set the auction clearing price approximated its marginal costs supports a finding that the bids and the resulting auction clearing price were consistent with competition and the Midcontinent tariff and were not unjust and unreasonable. Complaint Order P 84, JA ____.

Indeed, the Midcontinent tariff mitigation provisions permit market participants to request facility-specific reference levels based on their going-forward costs as an alternative to the default, region-wide reference level setting the conduct threshold for bid mitigation. Complaint Order P 34 & n.87, JA ____; 2015 Tariff Order P 93, JA ____.

Specifically, the Midcontinent tariff includes provisions that mitigate auction bids exceeding competitive levels. Complaint Order PP 33, 84-85, JA ____, ____-___. The tariff conduct threshold, at which a bid is potentially subject to mitigation, is largely set based upon what is called a reference level, which is a competitive benchmark reflecting the offer of a supplier facing robust competition. *Id.* PP 35, 85, 86 & n.247, JA ____, ____, ____.

The tariff provides one default reference level that applies to all capacity suppliers region-wide in the Midcontinent

auctions. *Id.* P 34, JA ____; 2015 Tariff Order P 27, JA ____.

Alternatively, the tariff permits market participants to request a facility-specific reference level, which is based on the facility's going forward costs. Complaint Order P 34 n.87, JA _____. Thus, the tariff permits facilities to bid in excess of the default, region-wide conduct threshold without mitigation if the bid is supported by evidence of going-forward costs. 2015 Tariff Order P 93, JA _____.

The Commission, moreover, rejected arguments that a pivotal seller such as Dynegy should not be permitted to set the auction clearing price based on its going-forward costs. As the Commission explained, uniform price auctions are used throughout Independent System Operator markets to establish market clearing prices irrespective of whether there is a pivotal capacity supplier in a constrained zone. 2016 Tariff Rehearing Order P 88, JA _____. By paying all resources that clear in a given market the price offered by the marginal resource, resources have incentive to bid at their marginal cost so they will be selected when the clearing price equals or exceeds their cost. *Id.* It is consistent with a competitive market to permit a

market participant to offer capacity into the auction according to its going-forward costs. *Id.*

Mitigation holding a pivotal supplier to offers based on its respective facility-specific reference levels, based on the resource's going-forward costs, will prevent the pivotal supplier from submitting anticompetitive offers and setting an uncompetitive auction clearing price. *Id.* P 91, JA _____. If an offer of a pivotal supplier sets the auction clearing price at an appropriately developed facility-specific reference level of the marginal resource, that price will be efficient. *Id.*

In its rehearing request, Public Citizen neither challenged the evidence in Dynegy's Answer cited by the Commission in the Complaint Order P 84, JA _____, nor pointed to any evidence in the record contradicting this evidence. *See* Public Citizen Rehearing Request at 15-22, JA ____-____ (argument contesting the Commission's finding that the auction clearing price had not been shown to be unjust and unreasonable). Public Citizen has therefore waived any challenge to the evidence cited by the Commission in the Complaint Order. *See New England Power Generators*, 879 F.3d at 1198 (Under Federal Power Act

section 313(b), 16 U.S.C. § 825l(b), the Court lacks jurisdiction over arguments not raised to the agency on rehearing).

Instead, Public Citizen argued that the Commission relied solely on compliance with the Midcontinent tariff at the time of the April 2015 Auction to reject Public Citizen's section 206 complaint, when in December 2015 the Commission found the Midcontinent tariff mitigation provisions unjust and unreasonable for future use. Public Citizen Rehearing Request at 15-16, 21-22, JA ___-___, ___-___. The Commission reasonably rejected this argument as demonstrated below.

2. The Prospective Tariff Revisions Do Not Prove That The April 2015 Auction Clearing Price Was Unjust And Unreasonable.

The Commission reasonably rejected the argument that it denied Public Citizen's Federal Power Act section 206 complaint based solely on the fact that Dynegy's bids in the April 2015 Auction were made in compliance with the Midcontinent tariff. Rehearing Order P 20, JA ___. The Commission can exercise its section 206 authority to determine whether a seller's market-based rate authority remains just and reasonable. Rehearing Order P 20 & n.53, JA ___ (citing *Market-Based Rates*, 119 FERC ¶ 61,295 P 964) (upon review of quarterly reports,

market power updates or change in status reports, the Commission may institute section 206 proceedings to revoke a seller's market-based rate authorization and may impose remedies for tariff violations or market manipulation).

Further, under section 206, the Commission can review the System Operator's market monitoring and mitigation rules governing auctions. Rehearing Order P 20, JA _____. In the December 2015 Tariff Order the Commission acted under section 206 to direct prospective changes to the Midcontinent market monitoring and mitigation rules. Rehearing Order P 21, JA _____. Those prospective changes mitigated the ability that all capacity sellers, including Dynegy, might have to exercise market power in future Midcontinent capacity auctions. *Id.* This is precisely the type of "active ongoing review" of a seller's market-based rate authority contemplated in *Lockyer* and *Harris*. *Id.* (citing *Lockyer*, 383 F.3d at 1017; *Harris*, 784 F.3d at 1273-74)

That the Commission in December 2015 ordered prospective changes in the Midcontinent tariff, however, does not satisfy Public Citizen's burden to show that the tariff provisions applied in the April 2015 Auction were unjust and unreasonable and permitted an unjust

and unreasonable clearing price. Rehearing Order P 22, JA _____. The December 2015 Tariff Order found certain market mitigation provisions no longer just and reasonable due to changes in the PJM capacity market, including future changes to the capacity market construct. Rehearing Order P 22, JA _____ (citing 2015 Tariff Order PP 85-89, JA ____-____). Those changes in the PJM market would affect the opportunity costs for Midcontinent capacity resources participating in capacity auctions “going forward.” *Id.* Accordingly, the Commission directed changes to the tariff to be effective prospectively. *Id.*

Specifically, at the time of the April 2015 Auction, the default, region-wide reference level was set at the estimated opportunity cost to Midcontinent capacity resources of exporting capacity into PJM. Complaint Order P 34, JA _____. The December 2015 Tariff Order found that the opportunity cost of exporting capacity into PJM no longer was an appropriate default opportunity cost for all Midcontinent capacity resources going forward. 2015 Tariff Order P 86, JA _____. That is because -- in a June 2015 order -- the Commission had approved PJM’s Capacity Performance construct, which would, on a going forward basis, require Midcontinent capacity resources to satisfy additional

requirements to sell capacity into PJM. 2015 Tariff Order P 87, JA ___; *PJM Interconnection, LLC*, 151 FERC ¶ 61,208 (2015), *on reh'g*, 155 FERC ¶ 61,157 (2016), *aff'd*, *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017).

While recent auctions evidenced some existing limitations on Midcontinent resources' ability to sell into PJM, *see* 2015 Tariff Order P 91, JA ___, the Commission concluded that the future changes in PJM's capacity market would "further limit the opportunity for capacity sales into PJM and make PJM capacity prices non-comparable to [Midcontinent] capacity prices, and thus make that opportunity a less appropriate basis for [Midcontinent's] market power mitigation provisions." *Id.* P 87, JA ___; *see also id.* P 88, JA ___ (describing future implementation of PJM's capacity performance construct); *Advanced Energy*, 860 F.3d at 661-62 (describing issues addressed by PJM's Capacity Performance construct).

This prospective finding does not demonstrate that use of that region-wide reference level in the April 2015 Auction (which predated the June 2015 order approving the new PJM capacity construct) was unjust and unreasonable or resulted in an unjust and unreasonable

clearing price. Rehearing Order P 22, JA _____. Public Citizen argues that the December 2015 tariff changes necessarily were based on current conditions as PJM's Capacity Performance construct would not be in place until the 2020/21 planning year. Public Citizen Brief at 46 (citing 2015 Tariff Order P 88, JA ____). The transition to the Capacity Performance construct, however, would be *completed* as of the 2020/21 planning year. 2015 Tariff Order P 88, JA _____. The Commission approved a transition mechanism that began in the 2016/17 planning year. *PJM Interconnection*, 151 FERC ¶ 61,208 PP 253-261. See 2016 Tariff Rehearing Order P 7, JA _____ (recent changes to PJM's capacity market made the existing tariff reference level "problematic going forward because, as PJM's capacity performance requirements *continue to be phased in*, [Midcontinent] capacity resources must now satisfy additional requirement to sell capacity into PJM.") (emphasis added).

Further, the changes to the default, region-wide reference level made in the December 2015 Tariff Order did not change the fact that the tariff also permits market participants to request facility-specific reference levels based on their going forward costs. Complaint Order P 34 & n.87, JA ____; 2015 Tariff Order P 93, JA _____. Accordingly, the

tariff in any event would have permitted Dynegy to seek facility-specific reference levels based on its going-forward costs. *See* 2016 Tariff Rehearing Order PP 88-89, JA ___-___. As discussed above, the Commission cited evidence by Dynegy's expert witness that using Dynegy's going-forward costs to calculate bids would have produced clearing prices equal to or higher than the \$150/MW-day clearing price in the auction. *See* Complaint Order PP 83-84, JA ___-___ (citing Dynegy Answer at 34-35, JA ___-___; Gerhardt Affidavit, JA ___-___).

Thus, as the Commission found, Public Citizen failed to satisfy its burden to show that the Commission's forward-looking tariff changes -- based in substantial measure on future changes to the PJM capacity market approved in a June 2015 order -- rendered the market mitigation provisions applicable in the April 2015 Auction unjust and unreasonable and resulted in any unjust and unreasonable clearing price. Rehearing Order P 22, JA ___. As in *New England Power Generators*, the Commission reasonably denied the section 206 complaint when it "confronted [the complainant's] evidence and found it insufficient to demonstrate that rates were unjust and unreasonable." 879 F.3d at 1200.

Public Citizen also points to the December 2015 Tariff Order finding that the calculation of the local clearing requirement was no longer just and reasonable. Public Citizen Brief at 46. The local clearing requirement governs how much capacity purchased in the auction must be physically located within a zone for reliability reasons. Public Citizen suggests in its Statement of the Case that the local clearing requirement permitted Dynegy to exercise market power in the April 2015 Auction in Zone 4. Public Citizen Brief at 6-7.

But Public Citizen's argument fails to account for the tariff mitigation provisions. As the Commission found, the tariff mitigation provisions are designed to mitigate any bid exceeding competitive levels down to a just and reasonable rate, including pivotal sellers. Complaint Order PP 84-85, JA ___-___; 2016 Tariff Rehearing Order PP 88, 91, JA ___, ___. Thus, even though Dynegy was a pivotal supplier in Zone 4 for the April 2015 Auction, the auction clearing price would nonetheless remain just and reasonable under the tariff mitigation provisions unless Public Citizen showed those provisions to be unjust and unreasonable. *Id.* As discussed, Public Citizen failed to show that the mitigation

provisions were unjust and unreasonable at the time of the April 2015 Auction.

C. The Commission's Non-Public Investigation Is Not An Adjudication Of Public Citizen's Section 206 Complaint And Is Not Open To Disclosure.

Shortly after the conclusion of the April 2015 Auction, in the exercise of the Commission's market monitoring authority, the Commission's Office of Enforcement began a non-public, informal investigation into whether market manipulation or other potential violations of Commission rules and regulations occurred during the April 2015 Auction. Complaint Order P 12, JA ____. In October of 2015, the Commission authorized a non-public formal investigation. Complaint Order P 12, JA ____; *Investigation into MISO Zone 4 Planning Resource Auction Market Participant Offers*, 153 FERC ¶ 61,005 (2015). A formal investigation authorizes the Office of Enforcement to subpoena witnesses and compel evidence. *Id.*

The Commission has established detailed procedures for conducting market manipulation investigations, as set forth in Part 1b of its regulations, 18 C.F.R. pt. 1b. Rehearing Order P 13, JA ____. No person may intervene or participate as a matter of right in any

investigation under this part. 18 C.F.R. § 1b.11. All information and documents obtained during an investigation and all investigative proceedings are non-public except in specified conditions. 18 C.F.R. § 1b.9. Accordingly, where investigations are closed without any action by the Commission, the existence of the investigation remains non-public in all but rare circumstances. Policy Statement P 7. In most cases, only when the Commission either approves a settlement resolving an action or institutes an Order to Show Cause proceeding, both of which may involve the imposition of monetary sanctions, do the existence and particulars of the investigation become public. *Id.*

The Commission's investigation was open for more than three years, during which time the Office of Enforcement reviewed over 500,000 pages of documents and heard 17 days of testimony from 11 witnesses. Complaint Order P 31, JA _____. Prior to issuance of the Complaint Order, the investigation was closed. *Id.* PP 12, 30, JA _____, _____. The Complaint Order concluded that no further action was appropriate to address allegations of market manipulation because the conduct investigated did not violate the Commission's market

manipulation regulations. Complaint Order P 32, JA ___ (citing 18 C.F.R. § 1c.2); Rehearing Order P 14, JA ___.

The Commission's decision to take no further action on the allegations of market manipulation is unreviewable as an exercise of the Commission's prosecutorial discretion. Rehearing Order P 13, JA ___ (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (agency's decision not to prosecute or enforce is committed to agency's absolute discretion)). The Supreme Court, moreover, has affirmed that statutory authority to "make such rules and regulations as may be necessary or appropriate to implement [statutory] provisions" empowers an agency to establish standards for whether to conduct investigations publicly or privately. *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 744-45 (1984) (citing *FCC v. Schreiber*, 381 U.S. 279, 292 (1965)). See Federal Power Act section 222, 16 U.S.C. § 824v (prohibiting market manipulation "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers"); see also Federal Power Act section 309, 16 U.S.C. § 825h ("The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such

orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.”).

Thus, as the Ninth Circuit recognized with regard to the Commission’s investigations of market manipulation in the California energy crisis, “FERC enjoys broad discretion in the management of its own § 1b prosecutorial investigations.” *Pub. Utils. Comm’n of State of Cal. v. FERC*, 462 F.3d 1027, 1050 (9th Cir. 2006). Because FERC investigations are prosecutorial in nature, third parties do not participate. *Id.* FERC investigations may be formal or preliminary, public or private. *Id.* (citing 18 C.F.R. § 1b.4). “FERC may settle claims without review, and need not justify its decision to order refunds, or to decline to order refunds.” *Id.*

In *Baltimore Gas & Electric Co. v. FERC*, 252 F.3d 456, 461 (D.C. Cir. 2001), this Court found FERC’s decision to terminate an investigation through settlement rather than pursuing enforcement action unreviewable based, *inter alia*, on the breadth of FERC’s discretion under its regulations, citing 18 C.F.R. § 1b.7. Similarly, in *Friends of the Cowlitz v. FERC*, 253 F.3d 1161, 1171 (9th Cir. 2001), *amended*, 282 F.3d 609 (9th Cir. 2002), the Ninth Circuit found FERC’s

erroneous summary dismissal of a complaint alleging license violations unreviewable where, under its applicable regulations, “FERC decisions to investigate (or not investigate) are even more clearly committed to the agency’s discretion,” citing 18 C.F.R. §§ 1b.4, 1b.6, 1b.7.

Public Citizen does not question its lack of authority to “dictate the agency’s investigative procedures” nor does it “seek[] review of an exercise of enforcement discretion.” Brief at 52. Public Citizen claims the right to disclosure of the Commission’s non-public enforcement investigation because it contends that the Commission’s decision to take no further action on the market manipulation allegations was a substantive ruling on the merits of Public Citizen’s complaint. *Id.*

The Commission reasonably rejected this argument. Complaint Order PP 30-32, JA ___-___; Rehearing Order PP 12-15, JA ___-___. In its “Emergency Section 206 Complaint,” Public Citizen asked the Commission to act under Federal Power Act section 206 to institute an emergency investigation into whether the April 2015 Auction results were unjust and unreasonable due to “illegal practices under [Federal Power Act] section 222.” Rehearing Order P 12, JA ___ (quoting Public Citizen Complaint at 14, JA ___). But section 222, “Prohibition of

Energy Market Manipulation,” 16 U.S.C. § 824v, expressly precludes any private right of action. Rehearing Order n.36, JA ___ (citing section 222(b)). *See also* Complaint Order P 22, JA ___ (the Commission’s anti-manipulation regulation also precludes a private right of action) (citing 18 C.F.R. § 1c.2(b)). Rather, Congress “vested FERC with authority to enforce [its anti-manipulation] rules by imposing civil penalties to the tune of up to \$1 million per day per violation.” *FERC v. Powhatan Energy Fund, LLC*, 949 F.3d 891, 894 (4th Cir. 2020); *see* Rehearing Order P 13, JA ___ (describing FERC’s civil penalty authority).

Parties can bring allegations of market manipulation to the Commission’s attention by filing a complaint under Federal Power Act section 306, 16 U.S.C. § 825e, which authorizes petitions alleging violations of the Federal Power Act. Rehearing Order n.36, JA ___. But section 306 expressly provides that “it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.” *Id.* (quoting section 306). This language plainly confers prosecutorial discretion on the Commission. *Id.* P 13 & n.36, JA ___. Accordingly, a complaint of market manipulation, properly pled under section 306, does not limit

nor supersede the Commission's discretion on whether or how to investigate market manipulation claims. *Id.*

To be sure, the Commission's authority to commence investigations and enforcement proceedings does not preclude Public Citizen's claims of unjust and unreasonable rates under Federal Power Act section 206. Rehearing Order PP 14 & n.39, 15, JA ___, ___; *Pub. Utils. Comm'n*, 462 F.3d at 1049. But the Commission's prosecutorial investigation into market manipulation is separate from its adjudication of Public Citizen's complaint. Rehearing Order PP 14 & n.39, 15, JA ___, ___ (citing *Blumenthal v. ISO-New England, Inc.*, 135 FERC ¶ 61,117 PP 37-38 (2011)). As the Ninth Circuit has recognized, "[t]he two types of proceedings are quite distinct." *Pub. Utils. Comm'n*, 462 F.3d at 1050. "One is investigative and prosecutorial; the other is a contested proceeding." *Id.* "In contrast to an adjudicated, contested proceeding, in a § 1b proceeding, FERC may settle claims without review, and need not justify its decision to order refunds, or to decline to order refunds." *Id.*

Here the Commission adjudicated, based upon Public Citizen's section 206 complaint, "the distinct question of whether an exercise of

market power in the auction resulted in rates that are unjust and unreasonable.” Rehearing Order P 15, JA _____. As the complainant, Public Citizen had the burden to demonstrate that unjust and unreasonable rates resulted from any alleged market manipulation. *Id.* P 14, JA _____. The Commission reasonably determined that Public Citizen had neither demonstrated any conduct meeting the definition of market manipulation nor demonstrated that the 2015 Auction market clearing price was unjust and unreasonable. *Id.* See, e.g., *Pub. Utils. Comm’n*, 462 F.3d at 1051 (only if a complainant tenders sufficient evidence to support its complaint is it entitled to have FERC adjudicate the complaint and determine what relief is appropriate). Accordingly, the Commission reasonably declined to disclose its non-public investigation as permitted under its regulations, and reasonably denied Public Citizen’s complaint of unjust and unreasonable rates. *Id.*

CONCLUSION

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

Respectfully submitted,

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February 4, 2021

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word, in 14-point Century Schoolbook) and contains 10,941 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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§ 824c. Issuance of securities; assumption of liabilities

(a) Authorization by Commission

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

(b) Application approval or modification; supplemental orders

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

(c) Compliance with order of Commission

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

(d) Authorization of capitalization not to exceed amount paid

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

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

Subsection (a) shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not

more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

(g) Inaction of Commissioners

(1) In general

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

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

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

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

(2) Appeal

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

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

AMENDMENTS

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

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by con-

tract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

¹ See References in Text note below.

Subsec. (e). Pub. L. 109-58, §1286, added subsec. (e).
1988—Subsec. (a). Pub. L. 100-473, §2(1), inserted provisions for a statement of reasons for listed changes, hearings, and specification of issues.

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

LIMITATION ON AUTHORITY PROVIDED

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

STUDY

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

§ 824f. Ordering furnishing of adequate service

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

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

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

The Commission may investigate and ascertain the actual legitimate cost of the property

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

(b) Request for inventory and cost statements

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

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

§ 824h. References to State boards by Commission

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

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

(b) Cooperation with State commissions

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

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

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

parency provided by existing price publishers and providers of trade processing services, and shall rely on such publishers and services to the maximum extent possible. The Commission may establish an electronic information system if it determines that existing price publications are not adequately providing price discovery or market transparency. Nothing in this section, however, shall affect any electronic information filing requirements in effect under this chapter as of August 8, 2005.

(b) Exemption of information from disclosure

(1) Rules described in subsection (a)(2), if adopted, shall exempt from disclosure information the Commission determines would, if disclosed, be detrimental to the operation of an effective market or jeopardize system security.

(2) In determining the information to be made available under this section and time to make the information available, the Commission shall seek to ensure that consumers and competitive markets are protected from the adverse effects of potential collusion or other anticompetitive behaviors that can be facilitated by untimely public disclosure of transaction-specific information.

(c) Information sharing

(1) Within 180 days of August 8, 2005, the Commission shall conclude a memorandum of understanding with the Commodity Futures Trading Commission relating to information sharing, which shall include, among other things, provisions ensuring that information requests to markets within the respective jurisdiction of each agency are properly coordinated to minimize duplicative information requests, and provisions regarding the treatment of proprietary trading information.

(2) Nothing in this section may be construed to limit or affect the exclusive jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.).

(d) Exemption from reporting requirements

The Commission shall not require entities who have a de minimis market presence to comply with the reporting requirements of this section.

(e) Penalties for violations occurring before notice

(1) Except as provided in paragraph (2), no person shall be subject to any civil penalty under this section with respect to any violation occurring more than 3 years before the date on which the person is provided notice of the proposed penalty under section 825o-1 of this title.

(2) Paragraph (1) shall not apply in any case in which the Commission finds that a seller that has entered into a contract for the sale of electric energy at wholesale or transmission service subject to the jurisdiction of the Commission has engaged in fraudulent market manipulation activities materially affecting the contract in violation of section 824v of this title.

(f) ERCOT utilities

This section shall not apply to a transaction for the purchase or sale of wholesale electric energy or transmission services within the area described in section 824k(k)(2)(A) of this title.

(June 10, 1920, ch. 285, pt. II, §220, as added Pub. L. 109-58, title XII, §1281, Aug. 8, 2005, 119 Stat. 978.)

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in subsec. (c)(2), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to chapter 1 (§1 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1 of Title 7 and Tables.

§ 824u. Prohibition on filing false information

No entity (including an entity described in section 824(f) of this title) shall willfully and knowingly report any information relating to the price of electricity sold at wholesale or the availability of transmission capacity, which information the person or any other entity knew to be false at the time of the reporting, to a Federal agency with intent to fraudulently affect the data being compiled by the Federal agency.

(June 10, 1920, ch. 285, pt. II, §221, as added Pub. L. 109-58, title XII, §1282, Aug. 8, 2005, 119 Stat. 979.)

§ 824v. Prohibition of energy market manipulation

(a) In general

It shall be unlawful for any entity (including an entity described in section 824(f) of this title), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of title 15), in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.

(b) No private right of action

Nothing in this section shall be construed to create a private right of action.

(June 10, 1920, ch. 285, pt. II, §222, as added Pub. L. 109-58, title XII, §1283, Aug. 8, 2005, 119 Stat. 979.)

§ 824w. Joint boards on economic dispatch

(a) In general

The Commission shall convene joint boards on a regional basis pursuant to section 824h of this title to study the issue of security constrained economic dispatch for the various market regions. The Commission shall designate the appropriate regions to be covered by each such joint board for purposes of this section.

(b) Membership

The Commission shall request each State to nominate a representative for the appropriate regional joint board, and shall designate a member of the Commission to chair and participate as a member of each such board.

(c) Powers

The sole authority of each joint board convened under this section shall be to consider is-

(c) Statement of prior positions; definitions

(1) On or before April 30 of each year, any person, who, during the calendar year preceding the filing date under this subsection, was an officer or director of a public utility and who held, during such calendar year, the position of officer, director, partner, appointee, or representative of any other entity listed in paragraph (2) shall file with the Commission, in such form and manner as the Commission shall by rule prescribe, a written statement concerning such positions held by such person. Such statement shall be available to the public.

(2) The entities listed for purposes of paragraph (1) are as follows—

(A) any investment bank, bank holding company, foreign bank or subsidiary thereof doing business in the United States, insurance company, or any other organization primarily engaged in the business of providing financial services or credit, a mutual savings bank, or a savings and loan association;

(B) any company, firm, or organization which is authorized by law to underwrite or participate in the marketing of securities of a public utility;

(C) any company, firm, or organization which produces or supplies electrical equipment or coal, natural gas, oil, nuclear fuel, or other fuel, for the use of any public utility;

(D) any company, firm, or organization which during any one of the 3 calendar years immediately preceding the filing date was one of the 20 purchasers of electric energy which purchased (for purposes other than for resale) one of the 20 largest annual amounts of electric energy sold by such public utility (or by any public utility which is part of the same holding company system) during any one of such three calendar years;

(E) any entity referred to in subsection (b); and

(F) any company, firm, or organization which is controlled by any company, firm, or organization referred to in this paragraph.

On or before January 31 of each calendar year, each public utility shall publish a list, pursuant to rules prescribed by the Commission, of the purchasers to which subparagraph (D) applies, for purposes of any filing under paragraph (1) of such calendar year.

(3) For purposes of this subsection—

(A) The term “public utility” includes any company which is a part of a holding company system which includes a registered holding company, unless no company in such system is an electric utility.

(B) The terms “holding company”, “registered holding company”, and “holding company system” have the same meaning as when used in the Public Utility Holding Company Act of 1935.¹

(June 10, 1920, ch. 285, pt. III, §305, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 856; amended Pub. L. 95-617, title II, §211(a), Nov. 9, 1978, 92 Stat. 3147; Pub. L. 106-102, title VII, §737, Nov. 12, 1999, 113 Stat. 1479.)

¹ See References in Text note below.

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c)(3)(B), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classified generally to chapter 2C (§79 et seq.) of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109-58, title XII, §1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

1999—Subsec. (b). Pub. L. 106-102 inserted subsec. heading, designated existing provisions as par. (1), inserted heading, and substituted “After 6” for “After six”, and added par. (2).

1978—Subsec. (c). Pub. L. 95-617 added subsec. (c).

EFFECTIVE DATE OF 1978 AMENDMENT

Pub. L. 95-617, title II, §211(b), Nov. 9, 1978, 92 Stat. 3147, provided that: “No person shall be required to file a statement under section 305(c)(1) of the Federal Power Act [subsec. (c)(1) of this section] before April 30 of the second calendar year which begins after the date of the enactment of this Act [Nov. 9, 1978] and no public utility shall be required to publish a list under section 305(c)(2) of such Act [subsec. (c)(2) of this section] before January 31 of such second calendar year.”

§ 825e. Complaints

Any person, electric utility, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee, transmitting utility, or public utility in contravention of the provisions of this chapter may apply to the Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee, transmitting utility, or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee, transmitting utility, or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper.

(June 10, 1920, ch. 285, pt. III, §306, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 856; amended Pub. L. 109-58, title XII, §1284(a), Aug. 8, 2005, 119 Stat. 980.)

AMENDMENTS

2005—Pub. L. 109-58 inserted “electric utility,” after “Any person,” and “, transmitting utility,” after “licensee” wherever appearing.

§ 825f. Investigations by Commission

(a) Scope

The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person, electric utility, transmitting utility, or other entity has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter re-

thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 10, 1920, ch. 285, pt. III, §308, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 858.)

§ 825h. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 10, 1920, ch. 285, pt. III, §309, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 858.)

COMMISSION REVIEW

Pub. L. 99-495, §4(c), Oct. 16, 1986, 100 Stat. 1248, provided that: "In order to ensure that the provisions of Part I of the Federal Power Act [16 U.S.C. 791a et seq.], as amended by this Act, are fully, fairly, and efficiently implemented, that other governmental agencies identified in such Part I are able to carry out their responsibilities, and that the increased workload of the Federal Energy Regulatory Commission and other agencies is facilitated, the Commission shall, consistent with the provisions of section 309 of the Federal Power Act [16 U.S.C. 825h], review all provisions of that Act [16 U.S.C. 791a et seq.] requiring an action within a 30-day period and, as the Commission deems appropriate, amend its regulations to interpret such period as mean-

ing 'working days', rather than 'calendar days' unless calendar days is specified in such Act for such action."

§ 825i. Appointment of officers and employees; compensation

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 10, 1920, ch. 285, pt. III, §310, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859; amended Oct. 28, 1949, ch. 782, title XI, §1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter "without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States" have been omitted as obsolete and superseded.

Such appointments are subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order No. 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, §1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed Pub. L. 89-554, Sept. 6, 1966, §8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

"Chapter 51 and subchapter III of chapter 53 of title 5" substituted in text for "the Classification Act of 1949, as amended" on authority of Pub. L. 89-554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted "Classification Act of 1949" for "Classification Act of 1923".

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89-554, Sept. 6, 1966, §8, 80 Stat. 632, 655.

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

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

Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

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

§ 825k. Publication and sale of reports

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

(June 10, 1920, ch. 285, pt. III, §312, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859; amend-

ed Pub. L. 113-235, div. H, title I, §1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

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.

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.

§ 825l. 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.)

CODIFICATION

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

AMENDMENTS

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

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

Subsec. (b). Pub. L. 85-791, §16(b), in second sentence, substituted "transmitted by the clerk of the court to" for "served upon", substituted "file with the court" for

"certify and file with the court a transcript of", and inserted "as provided in section 2112 of title 28", and in third sentence, substituted "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

1969 (42 U.S.C. 4321 et seq.) pre-filing process within 60 days after August 8, 2005. An applicant shall comply with pre-filing process required under the National Environmental Policy Act of 1969 prior to filing an application with the Commission. The regulations shall require that the pre-filing process commence at least 6 months prior to the filing of an application for authorization to construct an LNG terminal and encourage applicants to cooperate with State and local officials.

(b) State consultation

The Governor of a State in which an LNG terminal is proposed to be located shall designate the appropriate State agency for the purposes of consulting with the Commission regarding an application under section 717b of this title. The Commission shall consult with such State agency regarding State and local safety considerations prior to issuing an order pursuant to section 717b of this title. For the purposes of this section, State and local safety considerations include—

- (1) the kind and use of the facility;
- (2) the existing and projected population and demographic characteristics of the location;
- (3) the existing and proposed land use near the location;
- (4) the natural and physical aspects of the location;
- (5) the emergency response capabilities near the facility location; and
- (6) the need to encourage remote siting.

(c) Advisory report

The State agency may furnish an advisory report on State and local safety considerations to the Commission with respect to an application no later than 30 days after the application was filed with the Commission. Before issuing an order authorizing an applicant to site, construct, expand, or operate an LNG terminal, the Commission shall review and respond specifically to the issues raised by the State agency described in subsection (b) in the advisory report. This subsection shall apply to any application filed after August 8, 2005. A State agency has 30 days after August 8, 2005 to file an advisory report related to any applications pending at the Commission as of August 8, 2005.

(d) Inspections

The State commission of the State in which an LNG terminal is located may, after the terminal is operational, conduct safety inspections in conformance with Federal regulations and guidelines with respect to the LNG terminal upon written notice to the Commission. The State commission may notify the Commission of any alleged safety violations. The Commission shall transmit information regarding such allegations to the appropriate Federal agency, which shall take appropriate action and notify the State commission.

(e) Emergency Response Plan

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States

Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

(2) A cost-sharing plan developed under paragraph (1) shall include a description of any direct cost reimbursements that the applicant agrees to provide to any State and local agencies with responsibility for security and safety—

- (A) at the LNG terminal; and
- (B) in proximity to vessels that serve the facility.

(June 21, 1938, ch. 556, §3A, as added Pub. L. 109-58, title III, §311(d), Aug. 8, 2005, 119 Stat. 687.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (a), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, 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.

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas 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 declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas 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) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) 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 transportation 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) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or

service, or in any rule, regulation, or contract relating thereto, except after thirty 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 thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, 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 natural-gas company 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 the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision 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 natural-gas company, 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) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15

U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

(June 21, 1938, ch. 556, § 4, 52 Stat. 822; Pub. L. 87-454, May 21, 1962, 76 Stat. 72; Pub. L. 109-58, title III, § 312, Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsec. (f)(1), is Pub. L. 95-621, Nov. 9, 1978, 92 Stat. 3350, as amended, which is classified generally to chapter 60 (§ 3301 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of this title and Tables.

AMENDMENTS

2005—Subsec. (f). Pub. L. 109-58 added subsec. (f).

1962—Subsec. (e). Pub. L. 87-454 inserted “or gas distributing company” after “State commission”, and struck out proviso which denied authority to the Commission to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only.

ADVANCE RECOVERY OF EXPENSES INCURRED BY NATURAL GAS COMPANIES FOR NATURAL GAS RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROJECTS

Pub. L. 102-104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, development and demonstration activities by Gas Research Institute for projects on use of natural gas in motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102-486, title IV, § 408(c), Oct. 24, 1992, 106 Stat. 2882.

§ 717c-1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regula-

tions as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, §4A, as added Pub. L. 109-58, title III, §315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, 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: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

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 transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, §5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, 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) Inventory of property; statements of costs

Every natural-gas company 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 21, 1938, ch. 556, §6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

§ 1b.1

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§ 1b.1 Definitions.

For purposes of this part—

(a) *Formal investigation* means an investigation instituted by a Commission Order of Investigation.

(b) *Preliminary Investigation* means an inquiry conducted by the Commission or its staff, other than a formal investigation.

(c) Investigating officer means the individual(s) designated by the Commission in an Order of Investigation as Officer(s) of the Commission.

(d) *Enforcement Hotline* is a forum in which to address quickly and informally any matter within the Commission's jurisdiction concerning natural gas pipelines, oil pipelines, electric utilities and hydroelectric projects.

[43 FR 27174, June 23, 1978, as amended by Order 602, 64 FR 17097, Apr. 8, 1999]

§ 1b.2 Scope.

This part applies to investigations conducted by the Commission but does not apply to adjudicative proceedings.

§ 1b.3 Scope of investigations.

The Commission may conduct investigations relating to any matter subject to its jurisdiction.

§ 1b.4 Types of investigations.

Investigations may be formal or preliminary, and public or private.

§ 1b.5 Formal investigations.

The Commission may, in its discretion, initiate a formal investigation by issuing an Order of Investigation. Orders of Investigation will outline the basis for the investigation, the matters to be investigated, the officer(s) designated to conduct the investigation and their authority. The director of the office responsible for the investigation may add or delete Investigating Officers in the Order of Investigation.

§ 1b.6 Preliminary investigations.

The Commission or its staff may, in its discretion, initiate a preliminary investigation. In such investigations, no process is issued or testimony compelled. Where it appears from the preliminary investigation that a formal investigation is appropriate, the staff will so recommend to the Commission.

§ 1b.7 Procedure after investigation.

Where it appears that there has been or may be a violation of any of the provisions of the acts administered by the Commission or the rules, opinions or orders thereunder, the Commission may institute administrative proceedings, initiate injunctive proceedings in the courts, refer matters, where appropriate, to the other governmental authorities, or take other appropriate action.

§ 1b.8 Requests for Commission investigations.

(a) Any individual, partnership, corporation, association, organization, or other Federal or State governmental entity, may request the Commission to institute an investigation.

(b) Requests for investigations should set forth the alleged violation of law with supporting documentation and information as completely as possible. No particular forms or formal procedures are requested.

(c) It is the Commission's policy not to disclose the name of the person or entity requesting an investigation except as required by law, or where such disclosure will aid the investigation.

§ 1b.9 Confidentiality of investigations.

All information and documents obtained during the course of an investigation, whether or not obtained pursuant to subpoena, and all investigative proceedings shall be treated as nonpublic by the Commission and its staff except to the extent that (a) the Commission directs or authorizes the public disclosure of the investigation; (b) the information or documents are made a matter of public record during the course of an adjudicatory proceeding; or (c) disclosure is required by the Freedom of Information Act, 5 U.S.C. 552. Procedures by which persons submitting information to the Commission during the course of an investigation may specifically seek confidential treatment of information for purposes of Freedom of Information Act disclosure are set forth in 18 CFR part 3b and § 1b.20. A request for confidential treatment of information for purposes of Freedom of Information Act disclosure shall not, however, prevent disclosure for law enforcement

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purposes or when disclosure is otherwise found appropriate in the public interest and permitted by law.

§ 1b.10 By whom conducted.

Formal Commission investigations are conducted by the Commission or by an individual(s) designated and authorized in the Order of Investigation. Investigating Officers are *officers* within the meaning of the statutes administered by the Commission and are authorized to perform the duties of their office in accordance with the laws of the United States and the regulations of the Commission. Investigating Officers shall have such duties as the Commission may specify in an Order of Investigation.

§ 1b.11 Limitation on participation.

There are no parties, as that term is used in adjudicative proceedings, in an investigation under this part and no person may intervene or participate as a matter of right in any investigation under this part.

[43 FR 27174, June 23, 1978, as amended by Order 756, 77 FR 4893, Feb. 1, 2012]

§ 1b.12 Transcripts.

Transcripts, if any, of investigative testimony shall be recorded solely by the official reporter, or by any other person or means designated by the investigating officer. A witness who has given testimony in an investigation shall be entitled, upon written request, to procure a transcript of the witness' own testimony on payment of the appropriate fees, except that in a non-public formal investigation, the office responsible for the investigation may for good cause deny such request. In any event, any witness or his counsel, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.

[43 FR 27174, June 23, 1978, as amended by Order 225, 47 FR 19054, May 3, 1982; Order 756, 77 FR 4893, Feb. 1, 2012]

§ 1b.13 Powers of persons conducting formal investigations.

Any member of the Commission or the Investigating Officer, in connection with any formal investigation ordered by the Commission, may administer

oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements or other records relevant or material to the investigation.

§ 1b.14 Subpoenas.

(a) Service of a subpoena upon a person named therein shall be made by the investigating officer (1) by personal delivery, (2) by certified mail, (3) by leaving a copy thereof at the principal office or place of business of the person to be served, (4) or by delivery to any person designated as agent for service or the person's attorney.

(b) At the time for producing documents subpoenaed in an investigation, the subpoenaed party shall submit a statement stating that, if true, such person has made a diligent search for the subpoenaed documents and is producing all the documents called for by the subpoena. If any subpoenaed document(s) are not produced for any reason, the subpoenaed party shall state the reason therefor.

(c) If any subpoenaed documents in an investigation are withheld because of a claim of the attorney-client privilege, the subpoenaed party shall submit a list of such documents which shall, for each document, identify the attorney involved, the client involved, the date of the document, the person(s) shown on the document to have prepared and/or sent the document, and the person(s) shown on the document to have received copies of the document.

[43 FR 27174, June 23, 1978, as amended by Order 756, 77 FR 4893, Feb. 1, 2012]

§ 1b.15 Non-compliance with compulsory processes.

In cases of failure to comply with Commission compulsory processes, appropriate action may be initiated by the Commission or the Attorney General, including but not limited to actions for enforcement or the imposition of penalties.

§ 1b.21

§ 1b.21 Enforcement hotline.

(a) The Hotline Staff may provide information to the public and give informal staff opinions. The opinions given are not binding on the General Counsel or the Commission.

(b) Except as provided for in paragraph (g) of this section, any person may seek information or the informal resolution of a dispute by calling or writing to the Hotline at the telephone number and address in paragraph (f) of this section. The Hotline Staff will informally seek information from the caller and any respondent, as appropriate. The Hotline Staff will attempt to resolve disputes without litigation or other formal proceedings. The Hotline Staff may not resolve matters that are before the Commission in docketed proceedings.

(c) All information and documents obtained through the Hotline Staff shall be treated as non-public by the Commission and its staff, consistent with the provisions of section 1b.9 of this part.

(d) Calls to the Hotline may be made anonymously.

(e) Any person who contacts the Hotline is not precluded from filing a formal action with the Commission if discussions assisted by Hotline Staff are unsuccessful at resolving the matter. A caller may terminate use of the Hotline procedure at any time.

(f) The Hotline may be reached by calling (202) 502-8390 or 1-888-889-8030 (toll free), by e-mail at *hotline@ferc.gov*, or writing to: Enforcement Hotline, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

[Order 602, 64 FR 17097, Apr. 8, 1999, as amended by Order 647, 69 FR 32438, June 10, 2004; Order 734, 75 FR 21505, Apr. 26, 2010; Order 821, 81 FR 5379, Feb. 2, 2016]

§ 1b.22 Landowner Helpline.

(a) Any person affected by either the construction or operation of a certificated or authorized natural gas project under the Natural Gas Act or by the construction or operation of a project under the Federal Power Act may seek the informal resolution of a dispute by contacting the Commission's Landowner Helpline. The Commission's Landowner Helpline may be reached by

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calling toll-free at 1-877-337-2237, or by email at *LandownerHelp@ferc.gov*, or writing to: Commission's Landowner Helpline, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

(b) Any person who contacts the Landowner Helpline is not precluded from filing a formal action with the Commission if discussions assisted by the Landowner Helpline staff are unsuccessful at resolving the matter. A caller may terminate the use of alternative dispute resolution procedures at any time.

[Order 821, 81 FR 5379, Feb. 2, 2016]

PART 1c—PROHIBITION OF ENERGY MARKET MANIPULATION

Sec.

1c.1 Prohibition of natural gas market manipulation.

1c.2 Prohibition of electric energy market manipulation.

AUTHORITY: 15 U.S.C. 717-717z; 16 U.S.C. 791-825r, 2601-2645; 42 U.S.C. 7101-7352.

SOURCE: 71 FR 4258, Jan. 26, 2006, unless otherwise noted.

§ 1c.1 Prohibition of natural gas market manipulation.

(a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission,

(1) To use or employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

(b) Nothing in this section shall be construed to create a private right of action.

§ 1c.2 Prohibition of electric energy market manipulation.

(a) It shall be unlawful for any entity, directly or indirectly, in connection

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with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission,

(1) To use or employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

(b) Nothing in this section shall be construed to create a private right of action.

PART 2—GENERAL POLICY AND INTERPRETATIONS

STATEMENTS OF GENERAL POLICY AND INTERPRETATIONS OF THE COMMISSION

Sec.

2.1 Initial notice; service; and information copies of formal documents.

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STATEMENTS OF GENERAL POLICY AND INTERPRETATIONS UNDER THE FEDERAL POWER ACT

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2.13 Design and construction.

2.15 Specified reasonable rate of return.

2.17 Price discrimination and anticompetitive effect (price squeeze issue).

2.18 Phased electric rate increase filings.

2.19 State and Federal comprehensive plans.

2.20 Good faith requests for transmission services and good faith responses by transmitting utilities.

2.21 Regional Transmission Groups.

2.22 Pricing policy for transmission services provided under the Federal Power Act.

2.23 Use of reserved authority in hydro-power licenses to ameliorate cumulative impacts.

2.24 Project decommissioning at relicensing.

2.25 Ratemaking treatment of the cost of emissions allowances in coordination transactions.

2.26 Policies concerning review of applications under section 203.

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2.27 Availability of North American Energy Standards Board (NAESB) Smart Grid Standards as non-mandatory guidance.

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2.51 [Reserved]

2.52 Suspension of rate schedules.

2.55 Auxiliary installations and replacement facilities.

2.57 Temporary certificates—pipeline companies.

2.60 Facilities and activities during an emergency—accounting treatment of defense-related expenditures.

2.67 Calculation of taxes for property of pipeline companies constructed or acquired after January 1, 1970.

2.69 [Reserved]

2.76 Regulatory treatment of payments made in lieu of take-or-pay obligations.

2.78 Utilization and conservation of natural resources—natural gas.

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2.80 Detailed environmental statement.

STATEMENT OF GENERAL POLICY TO IMPLEMENT THE ECONOMIC STABILIZATION ACT OF 1970, AS AMENDED, AND EXECUTIVE ORDERS 11615 AND 11627

2.100–2.102 [Reserved]

2.103 Statement of policy respecting take or pay provisions in gas purchase contracts.

2.104 Mechanisms for passthrough of pipeline take-or-pay buyout and buydown costs.

2.105 Gas supply charges.

RULES OF GENERAL APPLICABILITY

2.201 [Reserved]

STATEMENTS OF GENERAL POLICY AND INTERPRETATIONS UNDER THE NATURAL GAS POLICY ACT OF 1978

2.300 Statement of policy concerning allegations of fraud, abuse, or similar grounds under section 601(c) of the NGPA.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 4th day of February 2021, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

/s/ Lona Perry
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