

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 19-1224, *et al.* (consolidated)

BELMONT MUNICIPAL LIGHT DEPARTMENT, *ET AL.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

The parties to the underlying agency proceedings and who have appeared before the Court are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review

1. *ISO New England, Inc.*, Notice of Filing Taking Effect by Operation of Law (August 6, 2019), R. 85, JA ___;
2. *ISO New England, Inc.*, Notice of Denial of Rehearing by Operation of Law, 169 FERC ¶ 61,013 (October 7, 2019), R. 98, JA ___;
3. *ISO New England, Inc.*, Order Accepting Tariff Revisions, 171 FERC ¶ 61,235 (June 18, 2020), R. 110, JA ___; and
4. *ISO New England, Inc.*, Notice of Denial of Rehearings by Operation of Law, 172 FERC ¶ 62,095 (August 20, 2020), R 117, JA ___.

C. Related Cases

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

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TABLE OF CONTENTS

| | |
|--|----|
| Statement Of The Issues..... | 1 |
| Statutory And Regulatory Provisions..... | 4 |
| Statement Of Facts..... | 4 |
| I. Statutory And Regulatory Background..... | 4 |
| A. Federal Power Act..... | 4 |
| B. Developing Regional Markets..... | 6 |
| C. Overview Of The New England Market..... | 7 |
| 1. The players..... | 8 |
| 2. The energy markets..... | 9 |
| 3. The forward capacity market | 10 |
| II. The Inventoried Energy Program..... | 12 |
| A. New England’s Winter Energy Security Risk..... | 12 |
| B. Prior Efforts To Address The Winter Energy Security Risk | 15 |
| C. The Mystic Retirements And The Commission’s directive | 17 |
| D. ISO New England’s Proposal..... | 20 |
| 1. The misaligned incentive problem | 21 |
| 2. The inventoried energy product | 22 |

| | | |
|------|--|----|
| 3. | How the Program works | 24 |
| 4. | Program cost estimates | 26 |
| III. | The Commission Proceedings | 27 |
| A. | The Program Goes Into Effect By Operation Of Law..... | 27 |
| B. | The Commission’s Order..... | 28 |
| | Summary of Argument..... | 30 |
| | Argument..... | 33 |
| I. | Standard Of Review | 33 |
| II. | The Commission Appropriately Found That New England Faces A Winter Energy Security Risk..... | 35 |
| A. | In Determining That New England Faces A Winter Energy Security Risk, The Commission Appropriately Relied On ISO New England’s Fuel Security Analysis And Its Own Prior Findings..... | 37 |
| 1. | The Fuel Security Analysis found that New England faces a significant, near-term, winter energy security risk | 37 |
| 2. | The Mystic Order found that New England faces a significant, near-term winter energy security risk..... | 38 |
| B. | The Sierra Club Petitioners’ Objections To The Evidence Relied Upon By The Commission Are Baseless | 39 |
| 1. | The Commission appropriately relied on its findings in the Mystic Order | 39 |

| | | |
|------|--|----|
| 2. | The Commission appropriately relied on the Fuel Security Analysis..... | 41 |
| 3. | The Commission appropriately relied on ISO New England’s retirement projections..... | 43 |
| 4. | The State Petitioners’ reliance on the Commission’s December 2020 order is misplaced..... | 45 |
| III. | The Commission Reasonably Balanced The Inventoried Energy Program’s Costs And Benefits | 47 |
| A. | The Commission Reasonably Found That The Program Would Benefit Ratepayers | 49 |
| 1. | The Commission found that the Program would likely provide reliability benefits | 49 |
| 2. | Addressing the misaligned incentives problem would help mitigate energy price spikes | 51 |
| B. | Petitioners’ Critique Of The Commission’s Benefits Analysis Lacks Merit | 53 |
| IV. | The Commission Reasonably Analyzed The Components Of The Inventoried Energy Program..... | 57 |
| A. | The Commission Reasonably Concluded That The Program Should Be Open To All Generators That Can Provide Inventoried Energy..... | 58 |
| 1. | The Commission appropriately determined that it was just and reasonable to provide similar compensation for similar service..... | 59 |
| 2. | The Commission reasonably found that the Program may deter retirements..... | 60 |

| | | |
|----|---|----|
| 3. | The Commission appropriately distinguished the Inventoried Energy Program from the earlier Winter Reliability Programs | 63 |
| B. | The Commission Reasonably Found That The Program’s Design Elements Will Lead To Just And Reasonable Rates | 65 |
| 1. | The Commission reasonably analyzed the Program’s forward rate..... | 66 |
| 2. | The Commission reasonably analyzed the Program’s maximum duration parameter | 67 |
| C. | The Commission Reasonably Considered How The Inventoried Energy Program Would Interact With Other Tariff Provisions | 71 |
| 1. | The Commission determined that the Inventoried Energy Program would complement the Pay-for-Performance Program | 71 |
| 2. | The possibility of cost-of-service agreements with retiring generators does not remove the need for the Inventoried Energy Program..... | 73 |
| 3. | The Inventoried Energy Program is a reasonable interim risk mitigation measure | 74 |
| V. | The Inventoried Energy Program Does Not Unduly Discriminate Against Renewable Generators..... | 75 |
| A. | The Program’s Eligibility Criteria Are Rational And Not Unduly Discriminatory | 76 |
| B. | Wind And Solar Resources Are Not Similarly Situated To Generators That Can Provide Inventoried Energy | 77 |
| | Conclusion..... | 79 |

TABLE OF AUTHORITIES

COURT CASES:

| | |
|---|---------------|
| <i>*Advanced Energy Mgmt. All. v. FERC</i> , 860 F.3d 656 (D.C. Cir. 2017) | 6, 51, 77 |
| <i>Ameren Servs. Co. v. FERC</i> , 893 F.3d 786 (D.C. Cir. 2018) | 43 |
| <i>Associated Gas Distribs. v. FERC</i> , 824 F.2d 981 (D.C. Cir. 1987) | 56 |
| <i>*Blumenthal v. FERC</i> , 552 F.3d 875 (D.C. Cir. 2009) | 49, 75 |
| <i>Brooklyn Union Gas Co. v. FERC</i> , 409 F.3d 404 (D.C. Cir. 2005) | 46 |
| <i>Cent. Hudson Gas & Elec. Corp. v. FERC</i> , 783 F.3d 92 (2d Cir. 2015)..... | 5, 49, 56, 57 |
| <i>Conn. Dep't of Pub. Util. Control v. FERC</i> , 569 F.3d 477 (D.C. Cir. 2009) | 10, 11 |
| <i>Consol. Edison Co. v. FERC</i> , 510 F.3d 333 (D.C. Cir. 2007) | 5, 47 |
| <i>Elec. Consumers Res. Council v. FERC</i> , 407 F.3d 1232 (D.C. Cir. 2005) | 49, 56, 70 |
| <i>Envtl. Action v. FERC</i> , 996 F.2d 401 (D.C. Cir. 1993) | 65 |

* Cases chiefly relied upon are marked with an asterisk.

| | |
|--|------------|
| <i>FERC v. Elec. Power Supply Ass’n</i> , 136 S.Ct. 760 (2016) | 9, 33, 57 |
| <i>Fla. Gas Transmission Co. v. FERC</i> , 604 F.3d 636 (D.C. Cir. 2010) | 35 |
| <i>Ill. Commerce Comm’n v. FERC</i> , 721 F.3d 764 (7th Cir. 2013) | 49 |
| <i>Ill. Commerce Comm’n v. FERC</i> , 756 F.3d 556 (7th Cir. 2014) | 50 |
| <i>La. Pub. Serv. Comm’n v. FERC</i> , 522 F.3d 378 (D.C. Cir. 2008) | 35 |
| <i>Md. Pub. Serv. Comm’n v. FERC</i> , 632 F.3d 1283 (D.C. Cir. 2011) | 33 |
| <i>Me. Pub. Utils. Comm’n v. FERC</i> , 454 F.3d 278 (D.C. Cir. 2006) | 47 |
| <i>Mo. Pub. Serv. Comm’n v. FERC</i> , 783 F.3d 310 (D.C. Cir. 2015) | 41 |
| <i>Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1</i> , 554 U.S. 527 (2008) | 6, 7, 34 |
| <i>NAACP v. FPC</i> , 425 U.S. 662 (1976) | 5 |
| <i>NextEra Energy Res., LLC v. FERC</i> , 898 F.3d 14 (D.C. Cir. 2018) | 44, 45, 54 |
| <i>*New England Power Generators Ass’n v. FERC</i> , 757 F.3d 283 (D.C. Cir. 2014) | 34, 62, 70 |
| <i>New England Power Generators Assoc., Inc. v. FERC</i> , 879 F.3d 1192 (D.C. Cir. 2018) | 11, 16 |

| | |
|---|------------|
| <i>New York v. FERC</i> , 535 U.S. 1 (2002) | 4, 6 |
| <i>NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n</i> , 558 U.S. 165 (2010) | 8 |
| <i>NSTAR Elec. & Gas Corp. v. FERC</i> , 481 F.3d 794 (D.C. Cir. 2007) | 7 |
| <i>Permian Basin Area Rate Cases</i> , 390 U.S. 747 (1968) | 33, 47 |
| <i>PPL Wallingford Energy LLC v. FERC</i> , 419 F.3d 1194 (D.C. Cir. 2005) | 73 |
| <i>Process Gas Consumers Grp. v. FERC</i> , 866 F.2d 470 (D.C. Cir. 1989) | 47 |
| <i>Pub. Citizen, Inc. v. FERC</i> , 839 F.3d 1165 (D.C. Cir. 2016) | 11 |
| <i>Sacramento Mun. Util. Dist. v. FERC</i> , 616 F.3d 520 (D.C. Cir. 2010) | 56 |
| <i>S.C. Pub. Serv. Auth. v. FERC</i> , 762 F.3d 4, 55 (D.C. Cir. 2014) | 34, 35, 55 |
| <i>TC Ravenswood, LLC v. FERC</i> , 331 Fed. Appx. 8 (D.C. Cir. 2009)..... | 73 |
| <i>TransCanada Power Mktg., Ltd. v. FERC</i> , 811 F.3d 1 (D.C. Cir. 2015) | 34 |
| <i>Transmission Access Policy Study Grp. v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000) | 34 |
| <i>Transmission Agency of N. Cal. v. FERC</i> , 628 F.3d 538 (D.C. Cir. 2010) | 78 |

Williston Basin Interstate Pipeline Co. v. FERC,
165 F.3d 54 (D.C. Cir. 1999) 65

Wis. Pub. Power, Inc. v. FERC,
493 F.3d 239 (D.C. Cir. 2007) 54

ADMINISTRATIVE CASES:

Constellation Mystic Power, LLC,
165 FERC ¶ 61,267 (2018) 19

Constellation Mystic Power, LLC,
172 FERC ¶ 61,044 (2020) 19

ISO New England Inc., 144 FERC ¶ 61,204 (2013)..... 16, 36

ISO New England Inc., 147 FERC ¶ 61,026 (2014)..... 16

ISO New England Inc., 147 FERC ¶ 61,172 (2014)..... 16

ISO New England Inc., 148 FERC ¶ 61,179 (2014)..... 36

ISO New England, Inc., 152 FERC ¶ 61,190 (2015)..... 16, 36, 63

ISO New England, Inc., 153 FERC ¶ 61,223 (2015)..... 16

ISO New England, Inc., 154 FERC ¶ 61,133 (2016)..... 16, 63, 64

**ISO New England, Inc.*, 164 FERC ¶ 61,003 (2018) 18, 36, 38, 39,
40, 42, 43, 71, 72

ISO New England, Inc., 165 FERC ¶ 61,202 (2018)..... 19, 41, 73

ISO New England, Inc., 171 FERC ¶61,003 (2020)..... 50

| | |
|--------------------------------|--|
| <i>*ISO New England, Inc.,</i> | |
| 171 FERC ¶61,235 (2020) | 28, 29, 37, 38 |
| | 41, 44, 48, 49, 50, 51, 52, 53, 54, 55 |
| | 56, 57, 58, 59, 60, 62, 63, 64 65, 66 |
| | 67, 68, 69, 70, 71, 73, 74. 75, 77, 79 |
| <i>ISO New England, Inc.,</i> | |
| 173 FERC ¶ 61,106 (2020) | 19, 20, 41, 45, 46 |

STATUTES:

Administrative Procedure Act

| | |
|----------------------------|----|
| 5 U.S.C. § 706(2)(A) | 33 |
|----------------------------|----|

Federal Power Act

| | |
|---------------------------|--------|
| 16 U.S.C. § 824 | 4 |
| 16 U.S.C. § 824d(a) | 5, 66 |
| 16 U.S.C. § 824d(b) | 5, 76 |
| 16 U.S.C. § 824d(d) | 5, 27 |
| 16 U.S.C. § 824d(e) | 6 |
| 16 U.S.C. § 824d(g) | 27 |
| 16 U.S.C. § 824e | 18 |
| 16 U.S.C. § 825l(b) | 33, 43 |

GLOSSARY

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| Commission or FERC | Federal Energy Regulatory Commission |
| Fuel Security Analysis | ISO New England Operational Fuel-Security Analysis, dated January 17, 2018 |
| ISO New England or System Operator | ISO New England, Inc., the independent operator of the high-voltage electric transmission network in the Northeast and administrator of the region's wholesale electricity markets. |
| ISO New England Answer | ISO New England Motion For Leave To Answer And Answer, filed April 30, 2019 (R. 64) |
| ISO New England Response | ISO New England Response to Request for Additional Information, filed June 6, 2019) (R. 71) |
| Municipal Utility Petitioners | the entities making up the New England Consumer-Owned Systems |
| Mun. Util. Br. | Brief of the New England Consumer-Owned Systems Petitioners |
| Mystic Order | <i>ISO New England, Inc.</i> , 164 FERC ¶ 61,003 (2018) |
| Sierra Club Petitioners | Sierra Club and Union of Concerned Scientists |
| Sierra Club Br. | Brief of Petitioners Sierra Club and Union of Concerned Scientists |

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| State Petitioners | Massachusetts Attorney General, New Hampshire Public Utilities Commission, and New Hampshire Office of the Consumer Advocate |
| State Br. | Brief of Petitioners Massachusetts Attorney General, New Hampshire Public Utilities Commission, and New Hampshire Office of the Consumer Advocate |
| Tariff Filing | ISO New England Proposed Tariff Revisions, filed Mar. 25, 2019 (R. 2) |
| Tariff Order | <i>ISO New England, Inc.</i> , 171 FERC ¶ 61,235 (2020) (R. 110) |

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ON PETITIONS FOR REVIEW OF AN ORDER OF THE
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**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUES

This is the latest in a series of cases concerning the ongoing efforts of the Federal Energy Regulatory Commission, the New England regional transmission operator, and wholesale electricity market participants to create and implement mechanisms to ensure that the New England power system can meet consumer demand during winter cold spells that stress the regional power system. The orders on review concern the Commission's approval of a proposal by ISO New England

Inc. (ISO New England or System Operator), the independent system operator of the high-voltage electric transmission network in the Northeast and administrator of the region's wholesale electric markets.

The proposal consists of an interim program, while market participants develop a long-term solution, that would compensate electric generators that maintain stockpiles of fuel, or other potential “inventoried energy,” during the winters of 2023/2024 and 2024/2025. This Inventoried Energy Program is designed to mitigate New England's winter energy security risk – i.e., the potential inability of generators to get the fuel they need, when they need it, to meet consumer demand during times of system stress – and better ensure the system's ability to keep the lights on during the coldest weeks of the year. The Commission approved the Program as a step in the right direction, explaining that its benefits in resolving an identified reliability problem justify, on balance, the increased costs.

Three groups of petitioners challenge the Commission's approval: (1) the State Petitioners (the Massachusetts Attorney General, the New Hampshire Public Utilities Commission, and the New Hampshire Office of the Consumer Advocate); (2) the Municipal Utility Petitioners (the

various entities making up the New England Consumer-Owned Systems); and (3) the Sierra Club Petitioners (Sierra Club and Union of Concerned Scientists). Although presented in three separate briefs, their challenges largely overlap and raise the following issues for review:

(1) Whether the Commission reasonably approved the proposed Inventoried Energy Program as “just and reasonable,” within the meaning of the Federal Power Act:

(a) where the Commission found that ISO New England had demonstrated, with supporting record evidence, that the New England region faced a near-term, winter energy security risk, and that the Program’s anticipated costs are reasonable in light of the expected benefits, and

(b) where the Commission determined that it is appropriate for the Inventoried Energy Program to be open to all generating resources capable of providing the reliability product sought by ISO New England, even though some resources (like coal, nuclear, or hydroelectric generators) may already maintain inventoried energy as part of their standard operating practices, and

(c) where the Commission determined that the design elements of the Program are reasonably calibrated to produce just and reasonable rates.

(2) Whether the Commission reasonably found that the Inventoried Energy Program does not unduly discriminate against renewable power generators that are unable to maintain inventoried energy.

STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Power Act

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction).

The Act provides that “[a]ll rates and charges ... by any public

utility for or in connection with the transmission or sale of electric energy,” and “all rules and regulations affecting or pertaining to such rates and charges,” must be “just and reasonable,” and not “undu[ly] preferen[tial]” nor “undu[ly] prejudicial.” 16 U.S.C. § 824d(a), (b).

The reasonableness of any particular rate is assessed in light of the Act’s goal of promoting reliable service and the development of energy supplies. *See, e.g., Consol. Edison Co. v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) (“the FPA has multiple purposes in addition to preventing ‘excessive rates’ including protecting against ‘inadequate service’ and promoting the ‘orderly development of plentiful supplies of electricity’”) (internal citations omitted); *accord, Cent. Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 111 (2d Cir. 2015); *see also NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) (finding it “clear” that the “principal purpose” of the Natural Gas Act and Federal Power Act “was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices”).

Under section 205 of the Federal Power Act, a public utility seeking to change any rate or rule must file the proposed change with the Commission. 16 U.S.C. § 824d(d). The utility bears the burden of

showing that the change is just and reasonable. *Id.* § 824d(e). When reviewing a proposed change under section 205, “the Commission undertakes ‘an essentially passive and reactive role’ and restricts itself to evaluating the confined proposal.” *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) (quoting *City of Winnfield v. FERC*, 744 F.2d 871, 875-76 (D.C. Cir. 1984)).

B. Developing Regional Markets

Historically, electric utilities had been vertically integrated monopolies, with a single utility controlling the generation, transmission, and distribution of electricity in a geographic region. Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition among power suppliers. *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 535-36 (2008).

One such policy reform was the Commission’s decision to order the functional unbundling of wholesale generation and transmission services, requiring utilities to provide open, non-discriminatory access to their transmission facilities to competing electricity suppliers. *See New York*, 535 U.S. at 11-13. To reduce the technical inefficiencies

associated with different utilities operating different parts of the grid, the Commission encouraged transmission providers to establish “Regional Transmission Organizations,” which would have operational control over the facilities owned by transmission providers. *See Morgan Stanley*, 554 U.S. at 536-37 (citing Order No. 2000, 65 Fed. Reg. 810, 811-12 (2000)). The Commission also encouraged the management of these Regional Transmission Organizations by “Independent System Operators,” not-for-profit entities that operate transmission facilities in a non-discriminatory manner. *Id.*

C. Overview Of The New England Market

In the Northeast, ISO New England is the entity that operates the regional transmission system and administers bid-based energy markets across six States (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont). *See generally NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 796 (D.C. Cir. 2007). These FERC-jurisdictional wholesale markets facilitate the sale of electricity by generators to electric utilities and electricity traders before it is eventually sold to consumers. The rates charged by ISO New England for access to the transmission system and the rules for the wholesale

markets are set forth in a “single, unbundled, grid-wide tariff.” *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 558 U.S. 165, 169 n.1 (2010) (quoting *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004)).

The Inventoried Energy Program at issue here is a temporary construct that operates in tandem with the established ISO New England energy and capacity markets. A general overview of those markets is set forth below.

1. The players

The fundamental product underlying ISO New England’s markets is the electric energy produced by generators, whose facilities convert fuels such as oil, natural gas, uranium, or the energy inherent in wind, sunshine, or water, into a flow of electrons. That flow of electrons is then transmitted over high-voltage power lines operated by ISO New England on behalf of its member transmission owners.

The electric energy is received by local public utilities, like the Municipal Utility Petitioners here, who in turn distribute that electricity to consumers. The amount of energy required by end users is called “load,” and thus local utilities are sometimes referred to as “load-

serving entities.” *See TransCanada Power Mktg., Ltd. v. FERC*, 811 F.3d 1, 4-5 (D.C. Cir. 2015); *see also* FERC, ENERGY PRIMER: A HANDBOOK OF ENERGY MARKET BASICS 35-36 (Apr. 2020) (Energy Primer).¹ The retail transactions between local utilities and their customers are state-jurisdictional.

2. The energy markets

In the day-ahead New England energy market, load-serving entities submit orders for electricity and generators submit supply offers one day before the electricity is needed. ISO New England uses these orders and offers to construct supply and demand curves for this market. The intersection of these curves identifies the market-clearing price. Supply offers below and demand orders above the identified price are cleared and scheduled. *See* Energy Primer at 77. “The price of the last unit of electricity purchased” – the market-clearing price – “is then paid to every supplier whose bid was accepted, regardless of its actual offer; and the total cost is split among the [load-serving entities] in proportion to how much energy they have ordered.” *FERC v. Elec.*

¹ The Energy Primer is available at <https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020.pdf>.

Power Supply Ass'n, 136 S.Ct. 760, 768 (2016).

A real-time energy market allows market participants to respond to changes in anticipated supply or demand. Throughout the operating day, ISO New England accepts supply bids and demand orders and sets real-time clearing prices for incremental demand. See Energy Primer at 77.

3. The forward capacity market

In addition to ensuring that there is enough supply to meet present-day demand, ISO New England must also ensure that there will be sufficient generating resources in place to meet future electricity needs. This is accomplished through the forward capacity market, where public utilities purchase “capacity,” which “is not electricity itself but the ability to produce it when necessary.” *Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009). Generators provide capacity by promising to remain operational and capable of providing electricity when called upon.

The forward capacity market uses annual auctions to set the price of capacity. In the auctions, ISO New England first estimates the amount of capacity that will be required for reliable operation three

years in the future. Suppliers willing to provide capacity submit bids reflecting the lowest price they will accept before exiting the market that year. Under the ensuing “descending clock” auction, the price falls and suppliers exit the market until the amount of capacity offered matches ISO New England’s projected capacity requirement. *See Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1168 (D.C. Cir. 2016) (discussing auction mechanics); *see also Conn. Dept’ of Pub. Util.*, 569 F.3d at 480 (same). All generators remaining in the market are paid this clearing price, regardless of their bids, during the capacity commitment period (three years in the future). In return, they must offer capacity into the electricity markets during the course of that year. The cost of the capacity is divided among the public utilities in proportion to their share of the system’s projected capacity requirement for that year. *See New England Power Generators Assoc., Inc. v. FERC*, 879 F.3d 1192, 1195 (D.C. Cir. 2018).

At times, a generator’s decision whether to cease operations may depend on whether it can earn sufficient revenues from capacity auctions. If the generator’s capacity-market revenues, coupled with revenues from other sources, is sufficient to cover its costs, the

generator would continue to operate. But if the generator's expected revenues are too low, the generator may choose to retire, rather than operate at a loss.

The Inventoried Energy Program is intended to operate in the winters of 2023/2024 and 2024/2025, which are within the capacity commitment periods associated with the 14th forward capacity auction (held February 2020) and 15th forward capacity auction (to be held in February 2021). The Program is intended to influence generator retirement decisions, which are signaled four years in advance of the cessation of operations through "de-list" bids submitted during forward capacity auctions. *See* ISO New England Tariff Filing at 7 (Mar. 25, 2019) (R. 2) (Tariff Filing); JA ____.

II. THE INVENTORIED ENERGY PROGRAM

A. New England's Winter Energy Security Risk

New England faces an energy security risk – i.e., the possibility that power plants will not have or be able to get the fuel they need to produce energy when the system is under stress in the winter. This long-recognized problem is the foremost challenge to the reliable delivery of electricity to consumers in New England. *See* ISO New England Operational Fuel-Security Analysis at 6 (Jan. 17, 2018) (Fuel

Security Analysis), JA ____.

Historically, most of New England's electricity was supplied by generators that had ready stockpiles of fuel on site, such as oil, coal, and nuclear facilities. As a result, they could be relied upon to run in response to unexpected contingencies, such as a large loss of generation or surge in demand. *See id.* at 11, JA ____.

Today, in light of consistently low natural gas prices and state policies encouraging the development of renewable resources, the generation fleet is increasingly comprised of resources with "just-in-time" energy sources. For natural-gas generators – which now produce about 40% of the region's electricity – this means fuel purchased on the spot market and delivered through interstate pipelines. *Id.* at 16, JA __ (natural gas generators "typically buy pipeline capacity released by local gas utilities on the secondary market"). For renewables, this means bright skies and windy days. *Id.* at 11, JA ____.

While the region's reliance upon natural gas as an energy source has grown, its pipeline infrastructure has not. Expansion efforts have been stymied, leaving the region with a relatively small natural gas pipeline gas system. The impact of this mismatch becomes particularly

evident during cold periods, where most natural gas is committed to local public utilities for residential, commercial, and industrial heating. As a result, natural gas generators cannot procure all the fuel they need to run. *See id.* at 16, JA _____. Winter also poses challenges for renewable resources. Solar output is affected by snow, clouds, and shortened daylight hours. *Id.* at 15, JA _____.

As a result, during cold snaps, a large portion of the region's power comes from coal, oil, and nuclear power plants. The "low average annual output from generators using oil or coal masks the major contributions of these aging generators during peak winter and summer days when they may be contributing as much as a third, sometimes more, of the region's power." *Id.* at 12, JA _____. But operating, fuel, and environmental-compliance costs have led many of these plants to close.

Since 2013, roughly 7,000 megawatts of mostly coal, oil, and nuclear generation have retired or have announced plans for retirement in the coming years. Another 5,000 megawatts of oil and coal generating facilities, which now run only during peak demand or periods of gas pipeline constraints, are projected to be at risk for retirement. *See ISO New England Response to Request for Additional*

Information at 15 n.32 (June 6, 2019) (R. 71) (ISO New England Response), JA _____. For context, there is about 31,000 megawatts of generation capacity in New England. See <https://www.iso-ne.com/about/key-stats/resource-mix/>.

These two factors – just-in-time fuel delivery for many generators, and the closure of generating plants with ready stockpiles of fuel on-site – combine to create a winter energy security risk (i.e., the potential inability of the system to meet demand during winter cold snaps). Because ISO New England has thus far been able to maintain the power system through winter periods, “the region’s consumers have been shielded from this growing risk, apart from severe winter price spikes that eventually show up in retail rates.” Fuel Security Analysis at 10, JA _____.

B. Prior Efforts To Address The Winter Energy Security Risk

Through the years, ISO New England has tried a number of different approaches to address the reliability risks associated with operation during cold winter months. For example, during the winters of 2013/2014 through 2017/2018, ISO New England implemented “Winter Reliability” programs, which, as relevant here, compensated

generators for establishing specified amounts of oil inventory and for any liquefied natural gas contract volumes that remained unused at winter's end. *See, e.g., ISO New England Inc.*, 144 FERC ¶ 61,204 (2013) (conditionally accepting 2013/2014 Winter Reliability program), *reh'g denied*, 147 FERC ¶ 61,026 (2014), *rev'd in part sub nom. TransCanada Power Marketing Ltd. v. FERC*, 811 F.3d 1 (D.C. Cir. 2015); *see also ISO New England, Inc.*, 152 FERC ¶ 61,190 (2015) (accepting Winter Reliability Programs for 2015/2016, 2016/2017, 2017/2018), *reh'g denied*, 154 FERC ¶ 61,133 (2016).

In 2018, ISO New England implemented "Pay for Performance" enhancements to its forward capacity market design. Under the new rules, generators that fail to meet their capacity performance obligations during energy scarcity conditions would be subject to significant monetary penalties, and those that over-performed relative to their obligations would receive additional revenues. *See ISO New England Inc.*, 147 FERC ¶ 61,172 (2014) (accepting Pay-for-Performance proposal), *reh'g denied*, 153 FERC ¶ 61,223 (2015), *aff'd sub nom. New England Power Generators Ass'n v. FERC*, 879 F.3d 1192 (D.C. Cir. 2018).

C. The Mystic Retirements And The Commission's Directive

In order to further study these reliability risks, ISO New England prepared an Operational Fuel Security Analysis. The study, published in January 2018, determined, under a variety of generation resource combinations, whether and how often the region would run short of fuel during an entire winter and how often the resulting energy shortfalls would require the System Operator to take emergency actions. The study concluded that the possibility of energy shortfalls becomes acute by the winter of 2024/2025, and could occur earlier. *See* Fuel Security Analysis at 5, 21, 32, JA ___, ___, ___. As a result, emergency actions – ranging from requests for energy conservation to rolling blackouts – would be necessary to keep the power flowing. *Id.* at 5, JA ___. (To avoid overloads and blackouts, “operators must plan and operate power plants and the transmission grid so that demand and supply exactly match, every moment of the day, every day of the year, in every location.” *See* Energy Primer at 36.)

These risks became all the more real two months later when, in March 2018, Exelon Generation Company LLC announced its intention to retire the units at its Mystic Station Generation Station, which

serves the Greater Boston area. *See ISO New England, Inc.*, 164 FERC ¶ 61,003, PP 3-5 (2018) (Mystic Order). Citing the energy security and operational risks posed by the retirement, ISO New England petitioned the Commission for a waiver of certain tariff provisions to allow it to enter into cost-of-service agreements to keep the Mystic units on-line for the 2022/2023 and 2023/2024 winter periods.

The Commission denied ISO New England's petition, finding that it did not actually seek a waiver of tariff provisions, but rather the creation of new provisions to allow for cost-of-service agreements to meet regional fuel security concerns. *See id.* P 47. That said, the Commission agreed that the record evidence demonstrated that the region faced a serious fuel security risk. *See id.* PP 49, 55. The Commission therefore utilized its authority under section 206 of the Federal Power Act, 16 U.S.C. § 824e – which authorizes the Commission to investigate whether existing tariff provisions are just and reasonable – to direct ISO New England to file tariff revisions that (1) provide for a short-term process for implementing cost-of-service agreements to address demonstrated fuel security concerns, and (2) improve the market design in New England to better address fuel

security concerns, or to show cause why such filings were unnecessary.

See id. P 55.

The Commission subsequently approved ISO New England's proposed tariff provisions for fuel-security-cost-of-service agreements (see *ISO New England, Inc.*, 165 FERC ¶ 61,202, PP 82-88 (2018)), and accepted such an agreement regarding the Mystic facilities. See *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (2018), *on reh'g*, 172 FERC ¶ 61,044 (2020). The Mystic units have the right to retire in May 2023 and, in any event, will not be retained beyond May 31, 2024. See ISO New England Response at 3, JA ____.

In April 2020, ISO New England filed tariff revisions proposing long-term, market design changes to address the region's energy security risk. The proposed changes – which were recently rejected, without prejudice to refile, by the Commission (see *ISO New England, Inc.*, 173 FERC ¶ 61,106 (2020))² – were to take effect on June 1, 2024,

² The Commission found that the Energy Security Improvements proposal was unjust and unreasonable “because (1) [it] fail[ed] to sufficiently align the timing of reserve procurement with the timing of fuel procurement; (2) the voluntary nature of the [Energy Security Improvement] market design undermine[d] its ability to address fuel security during stressed conditions; and (3) the [record] demonstrate[d] that [the Energy Security Improvements] would not materially reduce

the start of the 2024/2025 capacity commitment period. The Inventoried Energy Program at issue here is intended to serve as temporary stopgap measure for the winters of 2023/2024 and 2024/2025 until a full market redesign is in place. *See* Tariff Filing at 1, JA ____.

(ISO New England would have discontinued the Program had its proposed long-term market redesign been accepted and put in place before the winter of 2024/2025. *See ISO New England*, 173 FERC ¶ 61,106 at P 16.)

D. ISO New England's Proposal

On March 25, 2019, pursuant to section 205 of the Federal Power Act, 16 U.S.C. § 824d, ISO New England filed proposed tariff revisions to implement the Inventoried Energy Program. The filing was supported by testimony from Dr. Christopher Geissler, an economist in ISO New England's Market Development Department, and Dr. Todd Schatzki, an economic consultant engaged by the System Operator to assist with rates and cost estimates associated with the Inventoried Energy Program. *See* Tariff Filing at Ex. A (Geissler Testimony), Ex. B.

reserve shortages or the potential for loss of load, but nevertheless would impose substantial costs on consumers.” *Id.* P 49.

(Schatzki Testimony), JA ___-___, ___-___.

ISO New England did not conduct any new energy security analysis in conjunction with the development of the Inventoried Energy Program. The System Operator explained that it had provided quantitative analyses in other regulatory proceedings and public fora regarding its energy security concerns for the winters of 2023/2024 and 2024/2025. *See* ISO New England Response at 3 (citing the Fuel Security Analysis and Mystic-specific studies), JA ____. To ensure that the interim program was filed and understood by stakeholders before the March 2019 deadline for retirement de-list bids in connection with the next forward capacity auction in February 2020, ISO New England determined that it was appropriate to forgo the complex and time-consuming development of an analysis of the Program's reliability benefits and impact on market participants. *See id.* at 2-3, JA ___-___; *see also* ISO New England Motion For Leave To Answer And Answer at 5 (Apr. 30, 2019) (R. 64) (ISO New England Answer), JA ___.

1. The misaligned incentive problem

The Inventoried Energy Program addresses a misaligned incentive problem in the regional market design. The problem stems

from the divergent values placed upon secure fuel arrangements by society on the one hand, and generators on the other. From society's perspective, investing in more robust fuel supply arrangements is cost-effective mitigation against high energy prices and potentially catastrophic reliability risks. But for individual generators, such fuel arrangements impose up-front costs. And, in reducing the risk of supply shortfalls, these fuel arrangements reduce the market price for energy and, in turn, undermine the generator's return on its investment in such arrangements. *See* ISO New England Answer at 7, JA ____.

2. The inventoried energy product

The Inventoried Energy Program helps address this problem by compensating generators that can provide the product called “inventoried energy” – i.e., fuel that a resource can convert to electric energy at the System Operator's direction – thereby enhancing fuel availability during cold periods. *Id.* at 15, JA _____. This can take the form of fuel on site or contracts for delivery of fuel that can be called on to produce energy at the System Operator's direction when needed. *Id.* at 16, JA _____.

The Program is intended to mitigate the region's winter energy

risk in three ways. First, the Program's compensation scheme may motivate generators to arrange for more fuel at the start of winter or as their inventory is depleted. *See* Tariff Filing at 8 (citing Geissler Testimony at 12), JA ____.

Second, the Inventoried Energy Program may change the types of resources that are typically called upon by ISO New England to supply the region's electricity. This is because the Program creates an opportunity cost; when a generator converts fuel into electric energy, the fuel is no longer available for compensation as inventoried energy. As a result, generators are likely to increase the price of their supply offers to capture this opportunity cost. This will tend to reduce the likelihood that their higher bids clear in the market. Instead, generators that do not use inventoried fuel or have a significant stock – and thus do not incur an opportunity cost in using it – will likely be called upon by ISO New England to meet that day's electricity demand. This will “help maintain the region's inventoried energy so that it is available later in the winter if system conditions are stressed.” *Id.* at 9 (citing Geissler Testimony at 12-13), JA ____.

Finally, the compensation received through the Program reduces

the amount of revenue that generators need to recover through the capacity markets in order to meet their going-forward costs. As a result, the Program may decrease the likelihood that such resources will retire, which in turn will help reduce the region's winter energy security risk. *Id.* at 9, JA ____.

3. How the Program works

Participation in the Inventoried Energy Program is open to any generator whose fuel inventory (1) can be converted to electricity at the System Operator's direction, (2) is reduced after conversion to electricity, and (3) can be measured by the participant and reported daily. As a result, oil, coal, and nuclear generators are generally able to participate, as are hydroelectric facilities that utilize a pond or reservoir. Wind or solar resource that are coupled with a battery storage system may also participate. *Id.* at 14-15, JA ____ Natural gas-fired generators can be compensated under the Program if they sign a contract for the firm delivery of gas, with no limitations on when the natural gas can be called for delivery during a day. *Id.* at 16, JA ____.

The Program would be triggered on any day in December, January, or February for which the average of the high and low

temperature is 17 degrees Fahrenheit or less. These “Inventoried Energy Days” are intended to identify periods when the region’s energy supply system is more likely to be stressed. The Program thus motivates generators to take action to maintain fuel supplies when they are needed most. *Id.* at 13, JA ____.

Each morning following an Inventoried Energy Day, participating generators are required to report their inventoried fuel to the System Operator. The reported inventory forms the basis of the Program’s “forward” and “spot” settlement system.

The “forward” settlement occurs before winter commences when generators designate an amount of inventoried energy (expressed in its megawatt hour equivalent) that they will maintain through each Inventoried Energy Day. These generators are then paid the forward rate of \$82.49 per megawatt hour. Any deviations are resolved through the “spot” settlement after the Inventoried Energy Day. At that time, generators that maintained more than the designated amount of fuel will be paid the spot rate of \$8.25 per megawatt hour for that additional inventoried energy. Those that failed to maintain the designated amount of fuel will be charged the spot rate for their shortfalls. *Id.* at 9-

12, JA ___-___. Generators can also choose to participate in only the “spot” component of the Program, in which case they will be paid the spot rate for the amount of fuel maintained during each Inventoried Energy Day. *Id.*

Under the Program, each generator is limited to compensation for 72-hours’-worth of fuel. The cap reflects the fact that the incremental winter reliability benefits of inventoried energy decreases as a resource maintains a greater quantity of inventoried energy (i.e., the extra fuel added to a six-month supply is less valuable than extra fuel for a just-in-time resource). *Id.* at 14, JA ___.

4. Program cost estimates

ISO New England estimated that the Program could have annual costs between \$148 million per year for 1.8 million megawatt hours of inventoried energy (if natural gas generators fully participate) and \$102 million per year for 1.2 million megawatts of inventoried energy (if natural gas generators do not participate). *Id.* at 18-19, JA ___-___. The cost of the Program would be allocated to load-serving entities.

III. THE COMMISSION PROCEEDINGS

A. The Program Goes Into Effect By Operation Of Law

Under section 205(d) of the Federal Power Act, 16 U.S.C. § 824d(d), proposed tariff changes become effective after sixty days absent Commission action. In an August 6, 2019 notice – issued sixty day after ISO New England’s response to Commission staff’s request for additional information regarding the tariff filing – the Commission advised that it lacked a quorum and could not act on ISO New England’s proposal.³ As a result, the proposed tariff change went into effect by operation of law. *See ISO New England*, Notice of Filing Taking Effect by Operation of Law, FERC Dkt. ER19-1428-001 (Aug. 6, 2019) (R. 85), JA _____. Requests for rehearing were similarly denied by operation of law. *See ISO New England, Inc.*, Notice of Denial of Rehearing by Operation of Law, 169 FERC ¶ 61,013 (Oct. 7, 2019) (R. 98), JA _____. Petitioners sought judicial review of those notices. *See* 16 U.S.C. § 824d(g)(2) (if “the Commission fails to act on the merits” of

³ At the time, the Commission was made up of four Commissioners, two of whom recused themselves from participating in this proceeding.

any party's rehearing request because "the Commission lacks a quorum, such person may appeal").

B. The Commission's Order

After regaining a quorum, the Commission sought, and the Court granted, a voluntary remand of the agency record so that it could address ISO New England's filing. *See* Apr. 21, 2020 Order. And on June 18, 2020, the Commission issued an order – the only merits order on review – accepting the proposed tariff revisions. *See ISO New England, Inc.*, 171 FERC ¶ 61,235 (2020) (R. 110) (Tariff Order), JA ____.

The Commission found that the Inventoried Energy Program is a just and reasonable, short-term mechanism to address the region's fuel security risk, while the parties develop a long-term solution. *Id.* PP 57-58, JA ____-____. Commissioner (now Chairman) Glick dissented. *Id.*, JA ____.

The Commission explained that ISO New England's current market design "contains a misaligned incentives problem, such that fuel secure resources may not be sufficiently incented to make additional investments in energy supply arrangements, which may have adverse efficiency and reliability consequences." *Id.* P 62, JA __. The

Inventoried Energy Program addresses that problem, “by providing additional compensation to fuel secure resources.” *Id.* The Program reasonably makes such compensation available to all types of generators that can provide the sought-after product – fuel that can be immediately converted to electricity at the System Operator’s direction (i.e., inventoried energy). *Id.*, JA _____. The Commission found that the Program was reasonably designed to both motivate generators contemplating retirement to stay in the market, and increase the likelihood that financially-secure generators would maintain adequate fuel supplies during periods of system stress. *Id.* P 61, JA _____.

The Tariff Order discussed the arguments raised by the parties in their requests for rehearing of the August 2019 notice that ISO New England’s tariff filing had gone into effect by operation of law. *See id.* P 2, JA _____. But because the Tariff Order was the initial order on the merits, the Commission did not make any formal findings on those rehearing requests. Requests for rehearing of the Tariff Order were denied by operation of law. *See ISO New England, Inc.*, 172 FERC ¶ 62,095 (Aug. 20, 2020) (R. 117), JA _____.

SUMMARY OF ARGUMENT

This case concerns the Commission's responsibility under the Federal Power Act to balance the interests of all parties in the New England electricity market and ensure, to the extent possible, that electricity is available when needed most during cold winter months. While Petitioners focus exclusively on the need to avoid excessive rates, the Commission is also obligated to protect consumers against inadequate service and promote the development of plentiful, reliable supplies of electricity.

Here, the Commission considered and approved ISO New England's proposal to create the Inventoried Energy Program, which compensates generators that maintain fuel (either on-site or through firm contractual arrangements) that can be converted to energy at the System Operator's direction when it is needed. The Commission viewed the Program as imperfect, but (on balance) a short-term, temporary step in the right direction while market participants develop a better long-term solution.

On appeal, Petitioners first contend there is no need for the Program. But New England has been grappling with a winter energy

security risk for more than a decade. The record in this case established that the primary drivers of the region's winter energy security risk are: (1) generators' reliance on just-in-time fuel delivery, and (2) the retirement of generators with on-site fuel supplies that have historically been called upon to meet demand when the region's natural gas infrastructure is unable to supply fuel when needed during cold winter months. The Inventoried Energy Program directly addresses both of these issues.

Petitioners also contend that the Program's benefits do not outweigh its costs. The Commission found, however, that the Program would likely improve reliability, which is essential to protecting consumers from the costs of power outages. In addition, by motivating generators to make up-front fuel arrangements, the Program could also minimize winter price spikes, which impose severe costs upon consumers.

Petitioners also take issue with the fact that nuclear, coal, and hydroelectric generators can participate in the Program, even though they generally maintain fuel on site as part of their normal operating procedures. The Commission explained, however, that the Program

compensates generators if they can provide inventoried energy, whether they have historically done so or are now incented to do so. The Program's revenues may also deter the retirement of these resources, which have been critical to keeping the lights on during the New England winters.

Petitioners' challenge to the various design elements of the Program are also without merit. Although the Program utilizes an administratively-determined price for inventoried energy, the Commission explained that the price was derived from historical data. And it approximates the price that would occur if inventoried energy were procured through a market mechanism, and if a natural gas generator were the marginal resource setting the clearing price for all participants. The Commission also found that the Program's cap on the amount of inventoried energy that each generator can provide – a cap based on ISO New England's historic operating experience – reasonably protected consumers from excess charges.

Finally, Petitioners' claim that the Inventoried Energy Program discriminates against wind and solar resources is meritless. Such resources are incapable of providing inventoried energy – fuel that can

be converted to electricity at all times at the direction of the System Operator – and thus are not similarly situated to those generators that can meet the Program’s eligibility criteria.

ARGUMENT

I. STANDARD OF REVIEW

The Commission’s action in accepting ISO New England’s proposed Inventoried Energy Program is reviewed under the Administrative Procedure Act’s narrow “arbitrary and capricious” standard. 5 U.S.C. § 706(2)(A). Under that standard, the question is not “whether a regulatory decision is the best one possible or even whether it is better than the alternatives.” *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. at 782. Rather, the court must uphold the Commission’s determination “if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” *Id.* (internal quotations omitted).

The Commission’s decisions regarding rate issues are entitled to broad deference because of “the breadth and complexity of the Commission’s responsibilities.” *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Md. Pub. Serv. Comm’n v. FERC*, 632 F.3d

1283, 1286 (D.C. Cir. 2011) (“[B]ecause issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is highly deferential.”) (internal quotation marks and citation omitted). As the Supreme Court has explained, “[t]he statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions.” *Morgan Stanley*, 554 U.S. at 532.

The Commission’s policy assessments also are afforded “great deference.” *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000). *See also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014) (“the Commission must have considerable latitude in developing a methodology responsive to its regulatory challenge”) (internal quotation marks and citations omitted); *New England Power Generators Ass’n v. FERC*, 757 F.3d 283, 293 (D.C. Cir. 2014) (court “properly defers to policy determinations invoking the Commission’s expertise in evaluating complex market conditions”) (internal quotation marks and citation omitted).

The Commission's factual findings are conclusive if supported by substantial evidence. *See* 16 U.S.C. § 825l(b). The substantial evidence standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *La. Pub. Serv. Comm’n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (citation omitted); *accord S.C. Pub. Serv. Auth.*, 762 F.3d at 54. If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) (“[W]e do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision.”).

II. THE COMMISSION APPROPRIATELY FOUND THAT NEW ENGLAND FACES A WINTER ENERGY SECURITY RISK.

For nearly a decade, the Commission, the New England System Operator, and its stakeholders have recognized that New England's limited natural gas pipeline infrastructure and the makeup of its generating fleet combine to create a significant winter energy security risk for the region. *See supra* pp. 12-15 (discussing historical reliability problem).

When approving the 2013-14 Winter Reliability Program, the Commission recognized the “particular challenges” to reliability given “increased reliance on natural gas-fired resources” and potential “resource unavailability due to natural gas pipeline constraints.” *ISO New England*, 144 FERC ¶ 61,204 at PP 42, 50. A year later, in approving another Winter Reliability Program, the Commission found that “non-gas generator retirements in the past year” had exacerbated these circumstances. *ISO New England*, 148 FERC ¶ 61,179, P 40 (2014). The Commission subsequently found that these issues would continue to pose significant winter energy security risks throughout the decade. *See ISO New England*, 152 FERC ¶ 61,190 at P 45 (approving Winter Reliability Programs for 2015/2016, 2016/2017, and 2017/2018). And in 2018, the Commission found that ISO New England’s tariff “does not sufficiently address the fuel security issues currently facing the region.” *Mystic Order*, 164 FERC 61,003 at P 55.

Against this backdrop, the Sierra Club Petitioners contend that there is “no evidence of a fuel or energy security problem in 2023-2025 not adequately addressed by existing measures.” *Sierra Club Br.* at 17. They are wrong.

A. In Determining That New England Faces A Winter Energy Security Risk, The Commission Appropriately Relied On ISO New England’s Fuel Security Analysis And Its Own Prior Findings.

In the Tariff Order, the Commission determined that there was a need for the Inventoried Energy Program “in light of the fuel security concerns presented in the [Fuel Security Analysis] and in the [Mystic Order.” 171 FERC ¶ 61,235 at P 58, JA __. The Commission also found that the potential retirement of up to 5,000 megawatts of generating capacity contributes to the region’s “existing winter energy security concerns,” and thus the need for the Program. *Id.* P 61, JA __.

1. The Fuel Security Analysis found that New England faces a significant, near-term, winter energy security risk.

ISO New England prepared the Fuel Security Analysis to quantify the region’s future fuel security risk and inform stakeholder discussions about how to manage that risk. The study modeled 23 possible generation resource-mix combinations during the hypothetical winter of 2024/25 in order to illustrate the range of potential risks that could confront the power system. *See* Fuel Security Analysis at 7-8, JA __-__. The conclusions were stark: energy shortfalls due to inadequate fuel would occur with almost every generator-mix scenario in winter

2024/25, requiring frequent use of emergency actions – including rolling blackouts – to protect the grid. *See id.* at 5, 8-9, 32, 50-54, JA ____, ____-____, ____, ____-____.

Although the Fuel Security Analysis focused on the hypothetical winter of 2024/25, “actual power grid conditions could change earlier ... than the target winter.” *Id.* at 7, JA _____. And the study found that “[t]he major trends affecting the New England power system are moving in a negative direction.” *Id.* at 33, JA _____. These trends include the “increasing retirements of generators with stored fuels (nuclear, coal, and oil).” *Id.* at 52, JA _____.

2. The Mystic Order found that New England faces a significant, near-term winter energy security risk.

In finding a need for the Inventoried Energy Program, the Commission also relied upon its findings in the Mystic Order. *See* Tariff Order at P 58, JA _____. In that 2018 order, the Commission found that the Mystic retirements would pose reliability threats (*see* Mystic Order, 164 FERC ¶ 61,003, P 52), but also that there are broader “fuel security issues currently facing the region.” *Id.* P 55. The record upon which those findings were based included the Fuel Security Analysis,

analyses specifically focused on the impact of the Mystic retirements, testimony from ISO New England regarding the impact of the Mystic retirements and the region's broader energy security risks, and testimony from ISO New England's external, independent market monitor regarding the need for a broad solution to the region's ongoing energy security risks. *See, e.g., id.* PP 14, 20, 37. Accordingly, the Commission directed ISO New England to not only implement tariff provisions that would allow it to enter into short-term, cost-of-service agreements with the Mystic generators, but also to propose broader market design changes "to better address regional fuel security concerns," or show cause why such changes were unnecessary. *Id.* P 55.

B. The Sierra Club Petitioners' Objections To The Evidence Relied Upon By The Commission Are Baseless.

1. The Commission appropriately relied on its findings in the Mystic Order.

The Sierra Club Petitioners contend that the Commission "cannot point to the Mystic proceeding as a justification" for the Inventoried Energy Program because the Mystic proceeding only involved "a specific problem" – the retirement of the Mystic generators – "and provided an answer to that problem" in the form of ISO New England's revised tariff

provisions for short-term, cost-of-service agreements. Sierra Club Br.

25. But that is simply not the case.

As just discussed, the Mystic Order also focused on the region's broader energy security risks. *See* 164 FERC ¶ 61,003, PP 14, 20, 37, 53-55. Thus, while the Commission ordered tariff revisions that would allow ISO New England to contract with the retiring Mystic generators, it did not stop there. In light of the broader winter energy security risk, the Commission also ordered ISO New England to propose tariff "revisions reflecting improvements to its market design to better address regional fuel security concerns." *Id.* Ordering P (F).

The Sierra Club Petitioners further argue that any findings in the Mystic Order were only "tentatively worded." Sierra Club Br. 24. To be sure, in the Mystic Order, the Commission "preliminarily [found] that [ISO New England's] Tariff may be unjust and unreasonable." *See* 164 FERC ¶ 61,003 at P 2. That is because the Commission offered ISO New England the opportunity to show cause why it should not be required to propose tariff revisions to address the region's energy security risks. *Id.* P 55. Rather than contest the Commission's findings, ISO New England filed cost-of-service tariff provisions (*see*

ISO New England, Inc., 165 FERC ¶ 61,202 (2018)) and later proposed a “long-term, market-based solution to the New England region’s fuel security region that complies with the Commission’s directives in the [Mystic] Order.” *See ISO New England, Inc.*, 173 FERC ¶ 61,106 at P 5. The Inventoried Energy Program is intended to fill the gap until that long-term solution can be implemented. *See* Tariff Order P 34, JA ____.

The Sierra Club Petitioners criticize the Commission for failing to make any “new findings” regarding New England’s energy security risk. Sierra Club Br. 24. But deference is owed to the Commission’s determination that its prior findings as to the region’s broader risk remained unaddressed and are equally applicable here. *See, e.g., Mo. Pub. Serv. Comm’n v. FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015) (“deference is due to the Commission’s interpretation of its own precedent”).

2. The Commission appropriately relied on the Fuel Security Analysis.

The Sierra Club Petitioners contend that the Commission failed to explain how the Fuel Security Analysis supports a finding that New England faces a winter energy security risk. Sierra Club Br. 26. But identifying New England’s winter energy security risk is the whole

point of the Fuel Security Analysis. And that Analysis was extensively discussed in the Mystic Order. *See* 164 FERC ¶ 61,003 at PP 4-5, 26-30, 50-55.

The Sierra Club Petitioners further argue that, because one of the scenarios examined in the Fuel Security Analysis occurred – the retirement of the Mystic generators – and was addressed through cost-of-service agreements, the Analysis cannot be used to justify any further risk mitigation measures. *See* Sierra Club Br. 26. Of course, the mere fact that one of the many scenarios examined in the Fuel Security Analysis occurred does not mean that others could not, or that New England no longer faces a winter energy security risk.

Reprising an argument they made in the Mystic proceeding, the Sierra Club Petitioners criticize the Fuel Security Analysis for using a “deterministic methodology ... that did not quantify the likelihood” that the various threats to the New England region would actually occur. *See* Sierra Club Br. 26; *see also* Mystic Order, 164 FERC ¶ 61,003 at P 26. As the Commission has explained, there is no “established methodological framework, ... industry standards or best practices for conducting” fuel security analyses. Mystic Order, 164 FERC ¶ 61,003

at P 52. A deterministic analysis – which “is far from novel” – allows for an assessment of the impact of the loss of resources due to inability to secure fuel, retirement, or outages. *Id.* P 50. And it is consistent with the methodology used to assess the need for the Winter Reliability Programs employed in New England in prior winters. *Id.*

3. The Commission appropriately relied on ISO New England’s retirement projections.

The Sierra Club Petitioners argue (at 27) that the Commission cannot rely on ISO New England’s determination “that there are up to 5,000 [megawatts] of coal and oil capacity at risk of retirement, which contributes to the region’s winter energy security concerns.” Tariff Order P 45, JA __. This argument was not raised on rehearing to the agency and cannot be considered by the Court. *See Clean Energy Advocates Request for Rehearing at 10-15 (R. 113), JA ___-___; see also 16 U.S.C. § 825l(b)* (“No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.”); *Ameren Servs. Co. v. FERC*, 893 F.3d 786, 793 (D.C. Cir. 2018) (“To bring a particular claim in a petition for review, a petitioner needs to have alerted the Commission

to the specific legal argument presented on rehearing (absent a reasonable ground for not doing so).”) (internal quotations omitted).

In any event, the Sierra Club Petitioners do not contest that up to 5,000 megawatts of generating capacity are at risk for retirement. They simply note that the 2019 State of the Grid presentation that ISO New England cited for that figure does not show how it was derived. *See* Sierra Club Br. 27. True enough, but the fact that a significant number of New England generators are at risk for retirement has long been known to stakeholders. *See, e.g., NextEra Energy Res., LLC v. FERC*, 898 F.3d 14, 25 (D.C. Cir. 2018) (noting “that ISO New England had previously predicted 6,500 megawatts of retirements by 2020, which is a substantial portion of the 35,000-megawatt market.”)

As the Fuel Security Analysis explains, the original at-risk-for-retirement estimate arose from ISO New England’s 2012 Strategic Planning Initiative. *See* Fuel Security Analysis at 12, JA _____. It was based on the collective capacity of 28 generators that are more than 40 years old. *See* ISO New England Strategic Transmission Analysis:

Generation at Risk of Retirement (Dec. 18, 2012)⁴ (cited in Fuel Security Analysis at 12, JA ____). Of the original 8,300 megawatts identified as being at risk for retirement, roughly 3,100 megawatts of coal-and-oil-fired generation have already retired. Fuel Security Analysis at 12, JA _____. The Commission is entitled to rely on ISO New England's unrebutted expert analysis. *See NextEra Energy Res.*, 898 F.3d at 25 (Commission reasonably relied on expert predictions regarding generator retirements).

4. The State Petitioners' reliance upon the Commission's December 2020 order is misplaced.

The State Petitioners claim that, in a December 2020 order regarding ISO New England's proposed long-term market redesign, the Commission found that the Fuel Security Analysis was outdated and suggested that "energy security problems are not actually an issue under existing market rules." State Br. 25 (citing *ISO New England, Inc.*, 173 FERC ¶ 61,106 at P54); *see also id.* 36 n.9. This argument is

⁴ The Strategic Transmission Analysis is available at https://www.iso-ne.com/static-assets/documents/committees/comm_wkgrps/prtcpnts_comm/pac/mtrls/2012/dec132012/retirements_redacted.pdf.

misguided as a matter of law and fact.

First, the State Petitioners cannot invoke the Commission's December 2020 order – which post-dates the close of the record on review here – because the Court “will not reach out to examine a decision made after the one actually under review.” *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005).

Second, in the December 2020 order, the Commission expressly found the Fuel Security Analysis “suggested that there may be hours of reserve deficiencies and load shedding under a current market rules scenario.” *ISO New England*, 173 FERC ¶ 61,106 at P 54. The Commission also recognized the concerns about ISO New England's “current and future ability to reliably serve load given its growing reliance on ‘just-in-time’ resources such as pipeline-fed natural gas and renewable generation, which could have efficiency and reliability consequences.” *Id.* P 57. But because it rejected ISO New England's proposed long-term solution, the Commission did not need to make any formal findings in that regard. *Id.*

Third, the December 2020 order demonstrates the Commission's commitment to balancing a proposal's benefits against its costs. That

the Commission in one case, on balance, and in another, on balance, made different decisions does not demonstrate arbitrary and capricious decision-making. Instead, as explained further below, it shows that the Commission will carefully scrutinize the evidence and arguments before it, and will make a decision that best reflects its overall assessment of whether the market design proposal before it appropriately promotes reliable service while accounting for costs to consumers. *See, e.g., Consol. Edison Co.*, 510 F.3d at 342 (Commission must balance statutory aims of preventing excessive rates, ensuring reliable service, and development of plentiful supplies).

III. THE COMMISSION REASONABLY BALANCED THE INVENTORIED ENERGY PROGRAM'S COSTS AND BENEFITS.

In determining whether a market rule change is just and reasonable, the Commission must consider all pertinent factors and make a “common-sense assessment” that the costs that will be incurred are consistent with the ratepayers’ overall needs and interests. *See Process Gas Consumers Grp. v. FERC*, 866 F.2d 470, 476-77 (D.C. Cir. 1989). This assessment may encompass non-cost factors as well as cost factors. *See, e.g., Permian Basin*, 390 U.S. at 814-15 (finding that the

Commission's consideration of non-cost factors is consistent with its statutory authority); *Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 288 (D.C. Cir. 2006) (noting "FERC's authority to consider non-cost factors in setting rates"). Here, the Commission found that the proposed Inventoried Energy Program was "a reasonable short-term solution to compensating in a technology-neutral manner resources that provide fuel security." Tariff Order P 57, JA ____.

Petitioners acknowledge that the Commission need not establish with mathematical precision that the Program's benefits outweigh its costs. *See* State Br. 19; Mun. Util. Br. at 15. They contend, however, that the "record is simply devoid of evidence that the [Inventoried Energy Program] will accomplish anything beyond enriching particular generators at the expense of customers." Mun. Util. Br. 18; *see also* State Br. 13 (claiming Program costs are "not even remotely commensurate with the benefits ratepayers may receive"); Sierra Club Br. 23 (arguing that "the record evidences no benefits that might justify this expenditure"). This claim simply ignores the record.

A. The Commission Reasonably Found That The Program Would Benefit Ratepayers.

1. The Commission found that the Program would likely provide reliability benefits.

The Commission found that the Inventoried Energy Program would “likely provide reliability benefits such as incenting up to 1.8 million [megawatt hours] of inventoried energy to be available during stressed winter conditions.” Tariff Order P 58, JA ____.

Improved reliability is crucial. This and other courts have repeatedly affirmed that system reliability is a significant benefit to customers. *See Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1240 (D.C. Cir. 2005) (affirming Commission’s “predictive judgments and policy choices” in balancing short-term cost increases with the long-term reliability benefits of reducing price volatility and encouraging entry of new capacity resources); *see also Cent. Hudson*, 783 F.3d at 110-11 (affirming both the Commission’s focus on reliability and its predictive judgments about long-term benefits in adopting new capacity zone); *Ill. Commerce Comm’n v. FERC*, 721 F.3d 764, 775 (7th Cir. 2013) (recognizing that system reliability is a benefit to market participants and consumers); *Blumenthal v. FERC*, 552 F.3d 875, 879 (D.C. Cir. 2009) (describing system reliability as “a primary goal”).

“Reliability is not a middling concern – power outages and the more serious ‘cascading’ outages are not uncommon.” *Ill. Commerce Comm’n v. FERC*, 756 F.3d 556, 568 (7th Cir. 2014) (Cudahy, J., dissenting). The Department of Energy estimates that power outages cost American businesses \$150 billion per year. *See* Dep’t of Energy, *The Smart Grid: An Introduction* 5 (available at: https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/DOE_SG_Book_Single_Pages%281%29.pdf). In New England, in particular, it was estimated that the “economic impacts associated with loss of load (and thus the benefits of avoiding such interruptions) could reach into billions of dollars.” *See ISO New England*, 171 FERC ¶ 61,003, P 62 (2020) (discussing benefits of 2013/2014 Winter Reliability Program).

In New England, the “foremost risk to current and future power system reliability” is “the ability of power plants to get the fuel they need to run, when they need it.” Fuel Security Analysis at 50, JA ____; *see also* Tariff Order P 50 (relying upon “the fuel security concerns presented in the [Fuel Security Analysis]”), JA _____. Under most scenarios studied in the Fuel Security Analysis, the failure to address

the region’s winter energy security risk “would require multiple hours of load shedding” – *i.e.*, rolling blackouts or controlled outages. *Id.* at 32, JA ___; *see also Advanced Energy*, 860 F.3d at 656 (observing that natural-gas-fired resources are “particularly vulnerable to fuel interruptions, especially during winter storms” which can eventually “lead to power outages”).

The Commission found that the Inventoried Energy Program is reasonably designed to (1) motivate resources to firm up winter fuel arrangements and thus be in a position to maintain inventoried energy during cold snaps, and (2) deter retirements from coal, nuclear, and oil resources that have been critical to regional reliability during periods of system stress. *See* Tariff Order PP 58, 61-62, 86, 95-96, JA __, __-__, __, __-__. Accordingly, the Commission determined that the Program would “likely provide reliability benefits,” which in turn confer significant benefits to consumers. *Id.* P 58, JA ___.

2. Addressing the misaligned incentives problem would help mitigate energy price spikes.

The Commission also found the Inventoried Energy Program to be a reasonable “short-term solution that helps address the misaligned

incentives problem that currently exists in the Tariff.” Tariff Order P 62, JA _____. Again, this problem stems from the fact that, while consumers see up-front fuel supply arrangements as a cost-effective way to avoid high energy prices, generators have little incentive to incur the costs of such arrangements since they will ultimately lower the prices recovered in the energy markets. *Id.* P 33, JA _____. *See also supra* pp. 21-22.

The absence of fuel supply arrangements that can be used “when the region’s gas pipelines are tightly constrained and renewables’ output is low,” means that “high real-time wholesale energy market prices will prevail – prices that cost consumers dearly.” *See* ISO New England Discussion Paper, Energy Security Improvements at 3 (Apr. 2019) (cited in Tariff Order P 33 n.48, JA ____); *see also* Fuel Security Analysis at 10 (when generators cannot get the fuel they need to run, “the region’s electricity consumers” are exposed to “severe winter price spikes that eventually show up in retail rates”), JA _____. These severe price spikes can be seen in a comparison of the colder-than-normal winter of 2013/2014, where the total value of the wholesale energy market for the three-month winter period was roughly \$5.05 billion, to

2016, where the value of the wholesale market for the entire 12 months was \$4.1 billion. *See Fuel Security Analysis* at 10 n.5, JA ____.

By providing generators with additional compensation to cover the costs of upfront fuel arrangements, the Inventoried Energy Program is “a step in the right direction” toward “address[ing] winter energy security in light of the misaligned incentives in the market,” while stakeholders work on a long-term solution. *Tariff Order P 34*, JA ____.

In turn, any improvement in the misaligned incentive problem will redound to the benefit of consumers in form of lower energy prices.

Finally, the Commission observed that “[l]ower relative capacity prices could occur as a result of the program because fuel secure resources can reduce their de-list bid price to reflect expected program revenues.” *Id.* P 109, JA ____.

Thus, while the Program will impose new costs on consumers, those costs could ultimately be offset through lower capacity prices.

B. Petitioners’ Critique Of The Commission’s Benefits Analysis Lacks Merit.

Petitioners’ various critiques of the Commission’s benefits analysis lack merit. First, they note that there is no “empirical analysis” establishing the Program’s reliability benefits. *Mun. Util. Br. 10*. But

the Commission found that the New England region faces a winter energy security risk and that the Inventoried Energy Program is likely to address that risk. *See* Tariff Order PP 32-34, 60-66, JA ___-___, ___-___. Based upon the record – including the Fuel Security Analysis and its findings in the Mystic proceeding – the Commission reasonably made a predictive judgment about the Program’s reliability benefits. That judgment is due deference. *See, e.g., NextEra Energy Res.*, 898 F.3d at 23 (“We defer to the Commission’s reasoning when it relies on substantial evidence to make a predictive judgment in an area in which it has expertise, such as in the power markets.”); *see also Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 260 (D.C. Cir. 2007) (“This forecast – that approval of the fixed cost adder would help ensure that electricity suppliers continue to invest in [transmission constrained regions] – was a reasonable predictive judgment that warrants judicial deference.”).

Petitioners also deride the misaligned incentive problem and its impact upon consumers. They claim that the problem is “not predictive of any [near-term] energy security problem” (State Br. 24), and characterize the Commission’s belief that the Inventoried Energy Program may help address it as “simply vacuous” (Mun. Util. Br. 24)

because the Program is only “valuable in the argot of economics” (Sierra Club Br. 31). But none disputes that the misaligned incentive problem exists or that consumers ultimately bear its consequences.

As for the State Petitioners’ claim that the misaligned incentives do not give rise to a near-term energy security risk, the record establishes that the “foremost risk to current and future power system reliability” in New England revolves around fuel procurement and transportation. Fuel Security Analysis at 50, JA _____. That risk arises from limitations on the region’s natural gas infrastructure and the financial disincentive for generators to enter into “costly ... long-term commitment[s]” for guaranteed pipeline delivery capacity. *Id.* at 17, JA ____; *see also id.* at 10 (fuel security depends upon “contractual arrangements secured in advance to ensure timely deliveries”). The Inventoried Energy Program attempts to address those risks by (1) motivating generators to enter into firm fuel supply arrangements, and (2) compensating generators for their ability to supply inventoried energy, which could deter retirements of generators critical to reliability during winter cold snaps. *See, e.g.,* Tariff Order P 61, JA ____; *see also South Carolina*, 762 F.3d at 68 (deferring to Commission’s predictive

judgment “grounded in basic economic principles”); *Cent. Hudson*, 783 F.3d at 114 (deferring to Commission’s economic predictions and judgments in a “highly technical area”).

Quoting *Electricity Consumers Resource Council v. FERC*, 747 F.2d 1511, 1517 (D.C. Cir. 1984), the Municipal Utility Petitioners argue that “[m]ere economic theory may not take the place of record evidence.” Mun. Util. Br. 17. But the Court has explained that it vacated the Commission’s order in *Electricity Consumers* not because reliance on economic theory alone is never permissible, but because the Court “was persuaded that the Commission had ‘inexplicably distorted’ the theory that it claimed to apply.” *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1008 (D.C. Cir. 1987) (quoting *Elec. Consumers*, 747 F.2d at 1514); see also *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 531 (D.C. Cir. 2010) (*per curiam*) (same). Here, the Commission has not distorted economic theory in reasoning the Inventoried Energy Program will help address New England’s winter energy security risk.

In short, the Commission acknowledged the Program’s projected annual costs. See Tariff Order P 17, JA _____. The Commission found, however, that, on balance, those costs were justified by the Program’s

potential reliability and energy price benefits. *See, e.g., id.* PP 32, 33, 58, JA ___, ___, ___. While Petitioners may disagree with that balance, that is not enough to show that the Commission failed to engage in reasoned decision-making. *See, e.g., Elec. Power Supply Ass’n*, 136 S. Ct. at 784 (“It is not our job to render that [policy] judgment, on which reasonable minds can differ.”). In the end, the “Commission’s weighing of the various considerations and ultimate policy judgment” is entitled to deference. *Advanced Energy*, 860 F.3d at 662; *see also Cent. Hudson*, 783 F.3d at 111 (“In determining whether rates are just and reasonable, FERC is charged with balancing ... competing interests, and we are not persuaded that there is anything unreasonable in FERC’s conclusion that higher prices were necessary to ensure reliability by generating accurate price signals in the long run.”).

IV. THE COMMISSION REASONABLY ANALYZED THE COMPONENTS OF THE INVENTORIED ENERGY PROGRAM.

In addition to their overarching challenge to the Commission’s assessment of the benefits of the Inventoried Energy Program, Petitioners also challenge particular aspects of the Program: (1) the ability of coal, nuclear, biomass, and hydroelectric resources to

participate, (2) the use of incentive payments, rather than market-based or cost-based rates, (3) the failure to limit the quantity of inventoried energy to be procured, and (4) the Program's interaction with other market rules. As to each, the Commission adequately considered the objections and determined, based on its policy judgment and substantial record evidence, that the proposed elements were just and reasonable.

A. The Commission Reasonably Concluded That The Program Should Be Open To All Generators That Can Provide Inventoried Energy.

The Commission found that it was just and reasonable to open the Inventoried Energy Program to all generating resources that could provide inventoried energy. *See* Tariff Order P 62 (“we find that it is just and reasonable to provide similar compensation for similar service”), JA ____. Petitioners claim that compensating coal, nuclear, biomass, and hydroelectric resources for their inventoried energy amounts to “windfall payments” because those resources already maintain stockpiles of fuel as part of their normal operating proceedings. State Br. 20. *See also* Mun. Util. Br. at 23-27; Sierra Club Br. 29-31. In so arguing, however, Petitioners ignore that the

Inventoried Energy Program is not just an incentive program.

1. The Commission appropriately determined that it was just and reasonable to provide similar compensation for similar service.

An explicit design goal of the Program is to compensate all generators for a reliability attribute not currently recognized under the ISO New England market rules – namely, the maintenance of inventoried energy during stressed winter conditions. *See* Tariff Filing at 6 (“The interim program strives to ensure that all providers of inventoried energy are similarly compensated.”), JA ____; *see also* ISO New England Answer at 16 (same), JA ____; Tariff Order P 62 (Program “is aimed at compensating resources for a specific reliability attribute for which they are not currently compensated”), JA ____ . This reliability attribute – having fuel available so that it can be immediately converted to electricity at ISO New England’s direction – directly addresses the region’s winter energy security risk. And that benefit exists whether the fuel availability arises from a change in generator behavior or from normal operating procedures. The Commission thus reasonably concluded that “it is just and reasonable to provide similar compensation for similar service.” Tariff Order P 62, JA ____.

2. The Commission reasonably found that the Program may deter retirements.

Moreover, generators with readily available fuel stored on site have been critical to reliability when natural-gas fired generators have been unable to secure the fuel they need to run during winter months. See Fuel Security Analysis at 11-12, JA _____. But a significant number of those generators are at risk for retirement, “which contributes to the existing winter energy security concerns in the New England region.” Tariff Order P 61, JA _____.

By compensating these resources for their ability to maintain inventoried energy, the Inventoried Energy Program may deter such retirements. *Id.* As the Commission explained, the Program’s “forward component ... allow[s] resources to account for the program’s revenue in making retirement and other de-list decisions.” *Id.*, JA _____. The impact was expected to be most significant for those resources that maintain stockpiles of fuel as part of their normal operating practices – like coal, oil, hydroelectric, and nuclear plants – and thus would incur little or no incremental cost to participate in the Program. See Tariff Order P 92 (citing ISO New England Response at 16), JA _____

Petitioners contend that it was unreasonable for the Commission

to conclude that the Inventoried Energy Program may deter retirements. *See* State Br. 28-29; Mun. Util. Br. 18-19, 27. They point to an analysis concluding that the Program would only provide coal and oil resources a modest increase in revenues, and contend that the Commission never grappled with this claim. *See* Mun. Util. Br. 18-19; State Br. 28. Not so.

ISO New England explained that Petitioners' argument "demonstrates a fundamental misunderstanding of how a profit-maximizing [generator] would bid in the forward capacity auction." ISO New England Answer at 8, JA _____. A generator considering retirement will submit a de-list bid into the forward capacity market – *i.e.*, a minimum capacity price that it must receive to stay in operation. That bid will reflect the "missing money" the generator needs to cover its costs, after accounting for revenues from other ISO New England markets and programs. *See id.* An additional fifty cents per kilowatt hour per month in net revenues – whether that is a small or large portion of the generator's gross revenues – is fifty cents less in missing money that needs to be recovered in the capacity market. *Id.* 8-9, JA ____-____. A generator that participates in the Inventoried Energy

Program can “thus lower its capacity offer to reflect program revenues and potentially clear the” forward capacity auction. Tariff Order P 95, JA ___; *see also id.* P 110, JA ___. This “potentially help[s] to retain an additional fuel secure resource that would have otherwise retired.” *Id.* P 95, JA ___.

Petitioners are correct in noting that ISO New England did not prepare an analysis of the Program’s likely impact on retirement decisions. *See, e.g.*, State Br. 28. Nonetheless, the Commission credited ISO New England’s reasonable explanation of the Program’s potential impact on retirement decisions. *See* Tariff Order P 95, JA ___. The consideration of whether market rules will “encourage older resources to stay in the market ... is precisely the sort of policy matter FERC is charged with considering.” *New England Power Generators Ass’n*, 757 F.3d at 297.

Moreover, the Commission agreed with the System Operator’s view that, in order for the Program to have a real-world impact, it was critical that it be developed and understood by market participants in time to influence retirement decisions during the upcoming forward capacity auctions. *See* Tariff Order P 96, JA __; *see also* ISO New

England Answer at 5, JA __; Geissler Testimony at 9-10, JA __-__. The time-consuming development of a complex estimate of the Program's expected reliability benefits would threaten that goal. *See* Tariff Order P 96, JA ____.

3. The Commission appropriately distinguished the Inventoried Energy Program from the earlier Winter Reliability Programs.

Petitioners contend that the Commission failed to explain why it was appropriate to exclude coal, hydroelectric, and nuclear generators from ISO New England's earlier Winter Reliability Programs, but not the Inventoried Energy Program. *See* State Br. 20-22, 38-39; Muni Br. 25-26; Sierra Club Br. 29-31. Petitioners correctly note that the Commission found that there was no evidence that such resources would change their fuel purchasing practices in response to the incentive payments under the Winter Reliability Programs. *See, e.g.*, State Br. 21 (citing *ISO New England*, 152 FERC ¶ 61,190 at P 47; *ISO New England*, 154 FERC ¶ 61,133, P 13 (2016)); Mun. Br. 25 (same). They fail to acknowledge, however, that the Inventoried Energy Program is designed differently and has different aims.

The relevant components of the Winter Reliability Programs were “specifically aimed at incremental fuel procurement.” Tariff Order P 62 (citing *ISO New England Inc.*, 154 FERC ¶ 61,133 at P 12 (“the oil and [liquefied natural gas] components ensure reliability during the winter through incremental fuel procurement”)), JA _____. By contrast, the Inventoried Energy Program is “aimed at compensating resources for a specific reliability attribute for which they are not currently compensated” – *i.e.*, the ability to maintain fuel so that it can be converted to electricity at the System Operator’s direction. *Id.*; *see also* ISO New England Answer at 16, JA _____.

In addition, unlike the Winter Reliability Program, the Inventoried Energy Program is designed in part to forestall the retirement of those resources, like coal and nuclear plants, that provide crucial megawatts when winter pipeline constraints occur. *See* Tariff Order P 62 , JA ____; *see also* Tariff Filing at 6, JA ____; Geissler Testimony at 6-7, JA ____-____; Fuel Security Analysis at 11, JA ____.

Again, the Inventoried Energy Program’s “forward component ... will allow resources to account for the program’s revenue in making retirement and other de-list bid decisions.” Tariff Order P 62, JA _____.

The Commission therefore concluded that “it is just and reasonable for the program to allow broader eligibility” as compared to the earlier Winter Reliability Programs. *Id.*

Rather than ignoring its prior rulings concerning the Winter Reliability Programs, the Commission reasonably explained why the material differences between those earlier programs and the Inventoried Energy Program lead to generator eligibility differences. *See, e.g., Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 65 (D.C. Cir. 1999) (“where the reviewing court can ascertain that the agency has not in fact diverged from past decisions, the need for a comprehensive and explicit statement of its current rationale is less pressing”) (internal quotations omitted); *Envtl. Action v. FERC*, 996 F.2d 401, 412 (D.C. Cir. 1993) (“the circumstances here differ too significantly from the precedent on which petitioners rely for us to invalidate FERC’s orders”).

B. The Commission Reasonably Found That The Program’s Design Elements Will Lead To Just And Reasonable Rates.

Petitioners contend that the Inventoried Energy Program cannot be just and reasonable because it “is neither cost-based nor market-

based.” Mun. Util. Br. 20; *see also* Sierra Club Br. 32-33; State Br. 30-37. The Commission’s statutory obligation, however, is to ensure that rates are just and reasonable and not unduly preferential, not that they are a product of any particular rate design methodology. *See* 16 U.S.C. § 824d(a). And here, the Commission found that the Program’s design elements would lead to just and reasonable rates. *See, e.g.*, Tariff Order P 63, JA ___; *see also supra* pp. 47-48 (court cases establishing that it is the end result, not the method employed, that matters).

1. The Commission reasonably analyzed the Program’s forward rate.

Petitioners take issue with the fact that the Program utilizes a single, administratively-determined price for the procurement of inventoried energy (*i.e.*, the forward rate), rather than a price established through competition. *See* Mun. Util. Br. 21. The forward rate was established through an economic model that used historical data to assess what it would cost a typical New England natural gas generator to sign a contract for winter delivery of vaporized liquefied natural gas. *See* Tariff Order P 86, JA ___; *see also* Tariff Filing at 11, JA ___; Geissler Testimony at 25, JA __; Schatzki Testimony at 2-6, JA __. The forward rate is thus an estimate of the minimum value

that would motivate natural gas generators to participate in the Program. *See* Geissler Testimony at 22, JA ____.

As the Commission explained, the forward rate “approximat[es] the price that would occur if inventoried energy was competitively procured through a market-based mechanism.” Tariff Order P 63, JA ____.

In such a mechanism, the forward rate is akin to a break-even bid from a natural gas generator that is the marginal resource, and thus sets the price for all participating resources. *See id*; *see also* Geissler Testimony at 23, JA ____.

2. The Commission reasonably analyzed the Program’s maximum duration parameter.

Petitioners contend that the Inventoried Energy Program is unjust and unreasonable because ISO New England did not prepare an assessment of how much inventoried energy needs to be secured in the upcoming winters. They assert that, in the absence of such an assessment, there is no mechanism that prevents the Program from saddling ratepayers with inventoried energy that is not needed. *See* State Br. 30-37; Mun. Util. Br. 22.

The Commission found that “it was reasonable for ISO New England to forgo an assessment of the quantity of inventoried energy

that would be optimal to estimate demand.” Tariff Order P 63, JA ____.

As the System Operator explained, developing a robust specification of demand along with an auction mechanism to put that demand out for bid would have required significant design work and prevented the interim Program from being finalized before retirement decisions were due. *See* ISO New England Answer at 6, JA ____; *see also* Geissler Testimony at 8, JA ____.

In addition, the Program does have design elements that restrict the amount of inventoried energy that may be procured. First, there is a limit on the amount of inventoried energy from gas contracts with liquefied natural gas facilities that can be compensated under the Program. The cap (560,000 megawatt hours) is based on historic data and reflects the quantities of gas that could be expected to be delivered through regional liquefied natural gas facilities. *See* Tariff Order P 15, JA ____.

The cap reduces the possibility that more inventoried energy associated with these contracts is sold than can reasonably be expected to be delivered. *See* Geissler Testimony 60, JA ____.

More broadly, the Program limits each resource’s compensation to 72-hours’-worth of inventoried energy. This maximum duration

parameter reflects the fact that the incremental benefit of another megawatt of inventoried energy decreases as a generator maintains a greater quantity of such inventoried energy. (The addition of one megawatt hour of inventoried energy by a generator that can operate for six months has less value for winter energy security purposes than the addition of one megawatt hour by a generator with only 6 hours of inventoried energy.) *See* Tariff Filing at 14, JA _____. The 72-hour cap thus limits compensation to stores of inventoried energy that are likely to be used in a timeframe that would improve winter energy security. *See* Geissler Testimony 16-17, JA ____-____. The Commission therefore found that the Program “protect customers from excessive rates and charges.” Tariff Order P 64, JA _____.

The 72-hour maximum duration limit was based on ISO New England’s operational experience during winter operations in 2017/2018. During a cold snap, ISO New England was forced to take action to conserve energy inventories by reducing the output of certain units for up to three consecutive days in order to help maintain system reliability. *See* Geissler Testimony 47, JA _____. The Commission found that it was reasonable to base the Program’s compensation cap on the

System Operator's recent experience in managing New England's winter energy security risk. *See* Tariff Order P 63, JA _____. The State Petitioners complain that ISO New England did not discuss the number of units affected during the 2017/2018 winter and their output. State Br. 37. But a call for more granular detail does not establish that the Commission unreasonably relied on the operational experience of ISO New England – the entity with principal responsibility for ensuring reliable operation of the region's grid – in assessing the Program's maximum duration cap. *See New England Power Generators Ass'n*, 757 F.3d at 299 (deferring to Commission's market design choice noting, “[t]hat ISO-NE and the Internal Market Monitor agree with this decision underscores its reasonableness”); *Elec. Consumers Res. Council*, 407 F.3d at 1241-41 (deferring to Commission's “policy choice” because the Commission provided “a reasonable explanation” for its choice of a revised demand curve design).

C. The Commission Reasonably Considered How The Inventoried Energy Program Would Interact With Other Tariff Provisions.

1. The Commission determined that the Inventoried Energy Program would complement the Pay-for-Performance Program.

The Municipal Utility Petitioners assert that the Inventoried Energy Program is unjust and unreasonable because it “duplicates” ISO New England’s Pay-for-Performance Program and thus imposes “substantial duplicative and unproductive costs.” Mun. Util. Br. at 27, 29. It is correct that both programs attempt to improve reliability performance during times of system stress. But as the Commission found in the Mystic proceedings – which occurred after approval of Pay-for-Performance – ISO New England’s tariff “does not sufficiently address the fuel security issues currently facing the region.” 164 FERC ¶ 61,003 at P 55. The Inventoried Energy Program addresses these issues by ameliorating “a misaligned incentive issue that ... still exists under Pay-for-Performance.” Tariff Order P 117, JA ___; *see also* ISO New England Answer at 7-8, JA ___-___.

The Commission found that the Inventoried Energy Program “should complement the incentives produced by Pay-for-Performance.” Tariff Order P 118, JA ___. The Pay-for-Performance program

compensates generators for energy provided when energy and generating reserves are scarce. The Inventoried Energy Program, on the other hand, covers the fuel generators can hold in reserve to be converted into electricity at the System Operator's direction during cold weather conditions that may not necessarily correspond with scarcity conditions. See ISO New England Response at 12, JA _____. And, as ISO New England explained, "if the inventoried energy program succeeds in deterring the retirement of resources that maintain inventoried energy during stressed winter conditions," winter energy security would likely be enhanced "relative to the status quo (including Pay-for-Performance)." *Id.*

Moreover, while the Pay-for-Performance rules may signal that additional investments are needed, ultimately states have the authority to control whether, and which, new resources get built in response. To date, unsuccessful efforts to expand natural gas infrastructure, environmental regulations (such as caps on oil-related emissions), and the lack of transmission development to accommodate large-scale renewable projects, have collectively impacted the region's ongoing winter energy security concerns. See *Mystic Order*, 164 FERC ¶ 61,003

at P 54. While the Inventoried Energy Program “will not fully resolve” the region’s energy security risk (Tariff Order P 119, JA __), it is “a step in the right direction.” *Id.* P 34, JA __. “An incremental approach to a problem is certainly within the scope of the Commission's discretion.” *TC Ravenswood, LLC v. FERC*, 331 Fed. Appx. 8, 9 (D.C. Cir. 2009) (citing *Mobil Oil Expl. & Prod. S.E., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991)).

2. The possibility of cost-of-service agreements with retiring generators does not remove the need for the Inventoried Energy Program.

The Sierra Club Petitioners argue that the Inventoried Energy Program is unnecessary because ISO New England now has tariff provisions allowing it to enter into cost-of-service agreements to delay the retirement of critical generators. *See* Sierra Club Br. 32-33. But those cost-service-agreements are expensive, last-resort options for generators that have already decided to retire. *See ISO New England*, 165 FERC ¶ 61,202 at P 38 (discussing triggering criteria for cost-of-service agreements); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1197 (D.C. Cir. 2005) (noting Commission’s view “that such agreements should be a last resort”). Moreover, those agreements do

not address the fact that generators currently have limited incentive to take on the additional costs associated with firm fuel arrangements and thus utilize “‘just-in-time’ fuel delivery [that] has exposed the limitations of New England’s existing fuel infrastructure and has heightened the region’s fuel security risks.” Fuel Security Analysis at 18. The Commission therefore reasonably rejected the contention that the existing cost-of-service tariff provisions negate the need for the Inventoried Energy Program. *See* Tariff Order P 117, JA ____.

3. The Inventoried Energy Program is a reasonable interim risk mitigation measure.

New England’s winter energy security problem has proven to be intractable for more than decade. The Inventoried Energy Program is intended to serve as a two-year, stop-gap measure while stakeholders attempt, once again, to develop tariff changes that will result in a long-term solution. *See* Tariff Order P 32-34, JA _____. The Commission candidly acknowledged that the Program is not perfect and that “other approaches may have been more consistent with all market design principles.” *Id.* P 63, JA _____. But the Inventoried Energy Program is a “step in the right direction” that helps mitigate the region’s winter energy security risk. *Id.* P 34, JA ____.

The New England markets “present[] ‘intensely practical difficulties.’” *Blumenthal*, 552 F.3d at 885 (quoting *Permian Basin*, 390 U.S. at 790). “Congress has entrusted” the Commission, “not the courts,” to resolve these difficulties. *Id.* at 884. “A presumption of validity therefore attaches to each exercise of the Commission’s expertise.” *Id.* 884-85 (quoting *Permian Basin*, 390 U.S. at 767). Where, as here, the Commission has explained and supported its acceptance of an interim solution to these “intensely practical difficulties,” deference is due. *Id.* at 885 (“We defer to FERC’s reasonable approach here,” even though “FERC acknowledges the imperfections of these interim solutions.”).

V. THE INVENTORIED ENERGY PROGRAM DOES NOT UNDULY DISCRIMINATE AGAINST RENEWABLE GENERATORS.

The Inventoried Energy Program is designed to permit ISO New England to purchase inventoried energy that can be converted to electricity so that it can meet demand during winter cold snaps. Resources that cannot provide the inventoried energy product – such as solar or wind generators that are not connected to storage devices – are not eligible to participate. The Sierra Club Petitioners claim that the

Program's eligibility requirements violate the Federal Power Act's prohibition on "subject[ing] any person to any undue prejudice or disadvantage." 16 U.S.C. § 824d(b). They are incorrect.

A. The Program's Eligibility Criteria Are Rational And Not Unduly Discriminatory.

Generators seeking to participate in the Inventoried Energy Program must be able to meet three criteria: (1) the resource must be able to convert the inventoried energy into electric energy at the System Operator's direction; (2) that conversion must reduce the amount of electric energy the resource can produce in the future (until replenished); and (3) the participant must measure inventoried energy in megawatt hours and report it to the System Operator. *See* Tariff Filing at 14-16, JA ___-___; *see also id.* Geissler Testimony at 48-49, JA ___-___.

The Sierra Club Petitioners assert these criteria are "arbitrar[y] ... concepts that only certain generation types can satisfy." Sierra Club Br. 35. It is true that only certain generators can satisfy them, but the criteria are not arbitrary. They define a product that responds directly and immediately to the region's winter energy security risk.

Inventoried energy that can be stored in the present (or arranged in

advance) and then called upon at the System Operator's direction, rather than sold into the market at the generator's discretion, seeks to remedy a component of the region's winter energy security concerns: the potential lack of fuel available to be converted to energy to meet demand during extended cold spells. See Tariff Filing at 14-15, JA ___-___; Geissler Testimony at 48-49, JA ___-___; see also Tariff Order P 58 (having inventoried energy available to be called upon by the System Operator will likely provide reliability benefits), JA ___.

To be sure, the criteria will be difficult for most wind and solar resources to meet. But "[t]he law provides no basis to claim the Commission cannot approve uniform performance requirements simply because those requirements will be easier to satisfy for some generators than others." *Advanced Energy*, 860 F.3d at 670.

B. Wind And Solar Resources Are Not Similarly Situated To Generators That Can Provide Inventoried Energy.

The Sierra Club Petitioners do not contest that wind and solar resources lack stores of energy that can be called upon by the System Operator when needed. This is fatal to any undue discrimination claim, since "[t]he court will not find a Commission determination to be unduly

discriminatory if the entity claiming discrimination is not similarly situated to others.” *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010).

Nonetheless, they argue that the Program is discriminatory because electricity generated by wind and solar resources reduces the amount that needs to be generated by burning gas. *See* Sierra Club Br. 36. True, but “the output of wind and solar facilities depends on the weather and time of day.” Fuel Security Analysis at 15. There is thus no guarantee they will be able to produce sufficient electricity when called upon by the System Operator during times of system stress. *See id.* at 54 (“[e]nergy from wind farms isn’t always available when needed”); *see also* ISO New England Answer at 19 (wind and solar resources do not provide inventoried energy “that can be converted to electric energy at the ISO’s direction”). As a result, wind and solar resources do not provide the same potential reliability benefit as those generators eligible to participate in the Inventoried Energy Program.

The Commission thus reasonably concluded that “it is not unduly discriminatory that suppliers incapable of providing inventoried energy

are not directly compensated under the program.” Tariff Order P 78,
JA ____.

CONCLUSION

The petitions for review should be denied and the Commission’s
orders should be affirmed in all respects.

Respectfully submitted,

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February 9, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation established in the Court's November 10, 2020 order because this brief contains 14,603 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Century Schoolbook 14-point font using Microsoft Word 2010.

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February 9, 2021

ADDENDUM

STATUTES AND REGULATIONS

TABLE OF CONTENTS

Administrative Procedure Act

5 U.S.C. § 706(2)(A)A-1

Federal Power Act

16 U.S.C. § 824A-2

16 U.S.C. § 824dA-4

16 U.S.C. § 824eA-6

16 U.S.C. § 825lA-8

§ 703. Form and venue of proceeding

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

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

HISTORICAL AND REVISION NOTES

| <i>Derivation</i> | <i>U.S. Code</i> | <i>Revised Statutes and Statutes at Large</i> |
|-------------------|-------------------|---|
| | 5 U.S.C. 1009(b). | June 11, 1946, ch. 324, §10(b), 60 Stat. 243. |

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

AMENDMENTS

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

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

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

HISTORICAL AND REVISION NOTES

| <i>Derivation</i> | <i>U.S. Code</i> | <i>Revised Statutes and Statutes at Large</i> |
|-------------------|-------------------|---|
| | 5 U.S.C. 1009(e). | June 11, 1946, ch. 324, §10(e), 60 Stat. 243. |

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

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such

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

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

HISTORICAL AND REVISION NOTES

| <i>Derivation</i> | <i>U.S. Code</i> | <i>Revised Statutes and Statutes at Large</i> |
|-------------------|-------------------|---|
| | 5 U.S.C. 1009(d). | June 11, 1946, ch. 324, §10(d), 60 Stat. 243. |

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

§ 706. Scope of review

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

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

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

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

HISTORICAL AND REVISION NOTES

| <i>Derivation</i> | <i>U.S. Code</i> | <i>Revised Statutes and Statutes at Large</i> |
|-------------------|-------------------|---|
| | 5 U.S.C. 1009(e). | June 11, 1946, ch. 324, §10(e), 60 Stat. 243. |

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

ABBREVIATION OF RECORD

Pub. L. 85-791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof,

conducted over the term of the existing license; and

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

(c) Commission determination

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j,

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),¹ 824i, 824j, 824j-1, 824k, 824o, 824o-1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

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

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

(g) Books and records

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

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

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

(C) any electric utility company, or holding company thereof, which is an associate com-

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

pany or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

Subsec. (e). Pub. L. 109-58, §1295(a)(2), substituted “section 824e(e), 824e(f), 824i, 824j, 824j-1, 824k, 824o, 824p,

824q, 824r, 824s, 824t, 824u, or 824v of this title” for “section 824i, 824j, or 824k of this title”.

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

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

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

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

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

EFFECTIVE DATE OF 2005 AMENDMENT

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

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

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

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

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

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

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

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric en-

§ 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.

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.

CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert M. Kennedy
Robert M. Kennedy
Senior Attorney